



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 2, 2020

Ms. Rebecca S. Hayward
Counsel for the City of South Padre Island
Denton Navarro Rocha Bernal & Zech, P.C.
701 East Harrison, Suite 100
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OR2020-15144

Dear Ms. Hayward:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 832400 (ORR Nos. 2020-C0NXS7 & 2020-54UHMF).

The City of South Padre Island (the "city"), which you represent, received a request for six categories of information, including specified information related to swimming pools and hot tubs; and information, including attorneys' fee bills, related to a specified Emergency Management Order. A second request from the same requestor seeks five categories of information related to the city's legal representation, including fee bills received from outside counsel. The city claims some of the submitted information is excepted from disclosure under section 552.107 of the Government Code and privileged under Rule 503 of the Texas Rules of Evidence.¹ We have considered the submitted arguments and reviewed the submitted representative sample of information.² We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

¹ The requestor contends the city did not comply with section 552.301 of the Government Code in requesting a ruling from this office. *See* Gov't Code § 552.301(b). Nevertheless, because the exception and privilege the city claims can provide compelling reasons to overcome the presumption of openness, we will consider their applicability to the submitted information. *See id.* §§ 552.007, .302, .352.

² We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

Initially, the city states it sought clarification of some of the information requested. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). The city states it has not received clarification of the request. Accordingly, the city has no obligation at this time to release any information that might be responsive to these portions of the request. However, if the city receives clarification and wishes to withhold any of the information encompassed by the clarified request, the city must request another decision from this office at that time. *See id.* §§ 552.301, .302; *see also City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

Next, the city acknowledges some of the submitted information consists of attorney fee bills that are subject to section 552.022(a)(16) of the Government Code. Section 552.022(a)(16) provides for required public disclosure of "information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege" unless the information is expressly confidential under the Act or other law. Gov't Code § 552.022(a)(16). The city seeks to withhold the information at issue under section 552.107(1) of the Government Code. However, section 552.107(1) is discretionary and does not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 10-11 (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, the city may not withhold any portion of the submitted fee bills under section 552.107(1). However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will address the city's claim of the attorney-client privilege under rule 503 of the Texas Rules of Evidence for the submitted attorney fee bills. We will also consider the city's argument under section 552.107(1) of the Government Code for the information not subject to section 552.022.

Texas Rule of Evidence 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

(A) between the client or the client's representative and the client's lawyer or the lawyer's representative;

(B) between the client's lawyer and the lawyer's representative;

(C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;

(D) between the client's representatives or between the client and the client's representative; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if it is not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding).

The city asserts the portions of the submitted fee bills it marked should be withheld under rule 503. The city states the submitted fee bills include privileged attorney-client communications between the city's attorneys and city officials and staff in their capacities as clients. The city explains the communications at issue were made for the purpose of the rendition of legal services to the city. The city states the communications at issue have not been, and were not intended to be, disclosed to third parties. Based on these representations and our review of the information at issue, we find the city has established most of the information it marked constitutes privileged attorney-client communications under rule 503. However, we find the city has failed to demonstrate some of information it marked consists of privileged attorney client communications. We note an entry stating a memorandum or an e-mail was prepared or drafted does not demonstrate the document was communicated to the client. Thus, we find the city has not demonstrated the information at issue was communicated and it does not reveal a client confidence, and this information, which we marked for release, may not be withheld under rule 503. Thus, with the exception of the information we marked for release, the city may withhold the information it marked within the submitted attorney fee bills pursuant to rule 503 of the Texas Rules of Evidence.

The city claims section 552.107 of the Government Code for the information not subject to section 552.022. Section 552.107(1) protects information that comes within the attorney-client privilege. The elements of the privilege under section 552.107 are the same as those discussed for rule 503. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See Open Records Decision No. 676 at 6-7*

(2002). Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

The city informs us the information at issue, which the city submitted as Exhibit B5, consists of communications between the city's attorneys and city officials and staff in their capacities as clients, made for the purpose of the rendition of legal services to the city. The city states the communications were intended to be confidential. Based on these representations and our review, we find the city has demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the city may withhold Exhibit B5 under section 552.107 of the Government Code.

In summary, with the exception of the information we marked for release, the city may withhold the information it marked within the submitted attorney fee bills pursuant to rule 503 of the Texas Rules of Evidence. The city may withhold Exhibit B5 under section 552.107 of the Government Code. The city must release the remaining information.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/be

Ref: ID# 832400

c: Requestor