



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 9, 2020

Mr. Joshua Humphreys
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OR2020-17135

Dear Mr. Humphreys:

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# 833559.

Kinney County (the "county"), which you represent, received four requests from the same requestor for information pertaining to specified communications. You state the county does not maintain information responsive to portions of the requests.¹ You claim the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim 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 Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

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, we note some of the submitted information, which we have indicated, is not responsive to the instant requests for information because it was created after the date the county received the instant requests for information. This ruling does not address the public availability of any information that is not responsive to the requests and the county is not required to release such information in response to these requests.

Next, we must address the requestor's assertion the county failed to comply with section 552.301 of the Government Code. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. *See id.* § 552.301(a). Section 552.301(e)(1)(A) requires the governmental body to submit to this office "written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld[.]" *Id.* § 552.301(e)(1)(A). Section 552.301(e-1) provides as follows:

A governmental body that submits written comments to the attorney general under Subsection (e)(1)(A) shall send a copy of those comments to the person who requested the information from the governmental body not later than the 15th business day after the date of receiving the written request. If the written comments disclose or contain the substance of the information requested, the copy of the comments provided to the person must be a redacted copy.

Id. § 552.301(e-1). The determination of whether a governmental body mailed copies of correspondence at issue to the requestor is a question of fact. This office cannot resolve disputes of fact in its decisional process. *See Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986).* Where a fact issue cannot be resolved as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernible from the documents submitted for our inspection. ORD 552 at 4.

You state, and provide documentation demonstrating, the county received the requests for information after business hours on April 10, 2020. Thus, April 13, 2020 is the date on which the county is deemed to have received the requests. We note this office does not count the date a request was received or holidays for the purpose of calculating a governmental body's deadlines under the Act. Therefore, the county's fifteen-business-day deadline for each request was May 4, 2020. The envelope in which the county mailed its correspondence to this office under section 552.301(e) of the Government Code is postmarked April 30, 2020. *See Gov't Code § 552.308(a)* (describing rules for calculating submission dates of documents sent via first class mail, common or contract carrier, or interagency mail). The brief of the county indicates the county sent a copy of its correspondence to the requestor concurrent with the timely mailing to this office. Consequently, based on the correspondence of the county and our review, we find the county complied with the procedural requirements mandated by section 552.301(e-1) of the Government Code. Therefore, we will address the submitted arguments against disclosure of the responsive information.

Next, we note the responsive information includes notices and agendas from public meetings. The notices and agendas of a governmental body's public meetings are specifically made public under provisions of the Open Meetings Act, chapter 551 of the Government Code. *See id.* §§ 551.041 (governmental body shall give written notice of date, hour, place, and subject of each meeting), .043 (notice of meeting of governmental body must be posted in place readily accessible to general public for at least 72 hours before scheduled time of meeting). Although you raise sections 552.103 and 552.107 of the Government Code for the information at issue, the exceptions to disclosure found in the Act do not apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Accordingly, the county must release the submitted notices and agendas from the public meetings, which we have indicated, pursuant to section 551.022 of the Government Code.

Next, we note some of the remaining responsive information consists of e-mail attachments that are subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

[T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body; [and]

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(3), (17). The information at issue consists of information in an account, contract, or voucher relating to the receipt or expenditure of funds by the county that is subject to section 552.022(a)(3), and court-filed documents that are subject to section 552.022(a)(17). Thus, the information at issue must be released unless it is made confidential under the Act or other law. *See id.* You seek to withhold the information at issue under sections 552.103 and 552.107 of the Government Code. However, sections 552.103 and 552.107 are discretionary in nature and do not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* 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), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the county may not withhold the information subject to section 552.022, which we have indicated, under section 552.103 or 552.107 of the Government Code. 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 consider your assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence for the information at issue. Additionally, as section 552.136 of the Government Code makes information confidential under the Act, we will consider the applicability of this section to the information subject to section 552.022.³ Further, we will consider your arguments for the responsive information not subject to section 552.022.

Section 552.103 of the Government Code provides, in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body claiming section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information, and (2) the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

You state, and provide documentation showing, prior to receipt of the instant requests, the requestor filed several lawsuits against the county and county officials, which are currently pending. Therefore, we agree litigation was pending on the date the county received the present requests for information. You also state the information at issue pertains to the substance of the lawsuit claims. Based on these representations and our review, we find the information at issue is related to the pending litigation.

³ The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).*

We note, however, the opposing party has seen or had access to some of the remaining information at issue. The purpose of section 552.103 of the Government Code is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. *See* ORD 551 at 4-5. Thus, once the opposing party in pending litigation has seen or had access to information that is related to the litigation, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, the county may not withhold the information the opposing party has seen or had access to, which we have indicated for release, under section 552.103 of the Government Code. We note the applicability of section 552.103(a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 at 3 (1982). Accordingly, with the exception of the information subject to section 552.022 and the information we have indicated to release, the county may withhold the remaining responsive information under section 552.103.⁴

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).

⁴ As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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).

You state the information subject to section 552.022 was communicated between attorneys for the county and county officials and employees and was made for the purpose of facilitating the rendition of professional legal services to the county. You state the information at issue was “not intended to be disclosed to non-privileged parties.” However, we note the remaining information at issue has been shared with individuals with whom you have not demonstrated the county shares a privileged relationship. Thus, we find you have failed to demonstrate the information at issue consists of privileged attorney-client communications for the purposes of Texas Rule of Evidence 503, and the county may not withhold any portion of the information at issue on that basis.

Section 552.107(1) of the Government Code 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* ORD 676 at 6-7. 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).

You claim the remaining information not subject to section 552.022 consists of communications between attorneys for the county and county officials and employees that were made for the purpose of facilitating the rendition of professional legal services. You state the information at issue was “not intended to be disclosed to non-privileged parties.” However, we note the information at issue was sent to or received from individuals with whom you have not demonstrated the county shares a privileged relationship. Therefore, we find you have failed to demonstrate the information at issue constitutes privileged attorney-client communications for the purposes of section 552.107(1). Accordingly, the county may not withhold any of the remaining responsive information at issue under section 552.107(1) of the Government Code.

Section 552.136 of the Government Code provides, “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected,

assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). Accordingly, the county must withhold the routing and bank account numbers within the remaining responsive information under section 552.136 of the Government Code.

Some of the remaining responsive information may be subject to section 552.137 of the Government Code. Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, an e-mail address that a governmental entity maintains for one of its officials or employees, or a personal e-mail address belonging to a county employee or official used to conduct official government business. *See Austin Bulldog v. Leffingwell*, 490 S.W.3d 240 (Tex. App.—Austin 2016, no pet.) (holding personal e-mail addresses of government officials used to conduct official government business are not e-mail addresses of “members of the public” for purposes of section 552.137(a)). Because we are unable to discern whether the e-mail addresses at issue belong to county employees or officials or fall within the scope of section 552.137(c), we must rule conditionally. To the extent the e-mail addresses at issue, which we have indicated, belong to members of the public, the county must withhold the e-mail addresses at issue under section 552.137, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release. *See Gov’t Code* § 552.137(b). However, to the extent the e-mail addresses at issue are excluded by subsection 552.137(c) or belong to a county employee or official, the e-mail addresses at issue may not be withheld under section 552.137 of the Government Code.

In summary, the county must release the submitted notices and agendas from the public meetings, which we have indicated, pursuant to section 551.022 of the Government Code. With the exception of the information subject to section 552.022 of the Government Code and the information we have indicated, which must be released, the county may withhold the remaining responsive information under section 552.103 of the Government Code. In releasing the remaining responsive information, the county must withhold: (1) routing and bank account numbers under section 552.136 of the Government Code; and (2) to the extent the e-mail addresses belong to members of the public, the e-mail addresses we indicated under section 552.137 of the Government Code, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release.⁵

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.

⁵ We note the requestor has a right of access to some of the information being released. *See Gov’t Code* § 552.023(a) (governmental body may not deny access to person to whom information relates or person’s agent on ground that information is considered confidential by privacy principles); ORD 481 at 4 (privacy theories not implicated when individuals request information concerning themselves). Thus, if the county receives another request for the same information from a different requestor, the county must again seek a decision from this office.

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,

Alexandra C. Burks
Attorney
Open Records Division

ACB/eb

Ref: ID# 833559

Enc. Submitted documents

c: Requestor
(w/o enclosures)