



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

October 14, 2020

Ms. Danielle Folsom  
Assistant City Attorney  
Legal Department  
City of Houston  
PO Box 368  
Houston, Texas 77001

OR2020-25863

Dear Mr. Folsom:

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# 849542 (Ref. No. 26832).

The City of Houston (the "city") received a request for seven categories of information pertaining to the acquisition of property, condemnation proceedings, and settlement agreements. You state the city will release some responsive information. You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, we note some of the submitted information is subject to section 552.022(a)(18) of the Government Code. Section 552.022(a)(18) provides for the required public disclosure of "a settlement agreement to which a governmental body is a party[,]" unless it is "made confidential under [the Act] or other law[.]" Gov't Code § 552.022(a)(18). You seek to withhold the information subject to section 552.022 under section 552.107 of the Government Code. However, section 552.107 is discretionary in nature and does not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the city may not withhold the information subject to section

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<sup>1</sup> 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 that those records contain substantially different types of information than that submitted to this office.

552.022 under section 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). Thus, we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503 for the information subject to section 552.022(a)(18). We will also consider your argument under section 552.107 for the information not subject to section 552.022.

Next, we address Texas Rule of Evidence 503, which encompasses the attorney-client privilege, for the information subject to section 552.022(a)(18) of the Government Code. Rule 503(b)(1) provides the following:

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 not intended to be disclosed to third persons other than those to whom disclosure is made to further the rendition of professional legal services to the client or reasonably necessary to transmit 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. *See* ORD 676. Upon a demonstration of all three factors, the entire communication is confidential under rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state the information subject to section 552.022 of the Government Code is attached to a communication between city attorneys, city attorney representatives, and city employees that was made for the purpose of facilitating the rendition of professional legal services to the city. You state the communication was intended to be confidential and has remained confidential. Upon review, we find you have established the information at issue constitutes privileged attorney-client communications under rule 503. Accordingly, the city may generally withhold the information subject to section 552.022 of the Government Code under rule 503. However, we note the settlement agreement is separately responsive to the request and was disclosed to a non-privileged party. Therefore, if the settlement agreement is maintained by the city separate and apart from the otherwise privileged e-mail communication to which it is attached, then the city may not withhold the agreement under rule 503. If the agreement is not maintained separate and apart from the otherwise privileged e-mail communication, then the city may withhold this information under rule 503 of the Texas Rules of Evidence.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. The elements of the privilege under section 552.107 are the same as those discussed for Texas Rule of Evidence 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*, 922 S.W.2d at 923.

You state the remaining information consists of communications between city attorneys, city attorney representatives, and city employees that were made for the purpose of facilitating the rendition of professional legal services to the city. You also state the communications were intended to be confidential and have remained confidential. Based upon your representations and our review, we find you demonstrated the applicability of the attorney-client privilege to some of the information at issue, which we marked. Accordingly, the city may generally withhold the information we marked under section 552.107(1) of the Government Code. We note some of the otherwise privileged e-mail strings include e-mails and attachments received from or sent to non-privileged parties. Furthermore, if these e-mails and attachments are removed from the otherwise privileged e-mail strings and stand alone, they are responsive to the instant request. Therefore, if the city maintains these non-privileged e-mails and attachments, which we marked, separate and apart from the otherwise privileged e-mail strings in which they appear, then these non-privileged e-mails and attachments are not excepted under section 552.107(1), and the city may not withhold them on that basis. In addition, the remaining information at issue consists of communications between the city and third parties regarding contract negotiations and, therefore, the parties' interests were adverse at the time of the communications. Accordingly, the remaining information at issue has been shared with individuals you have not demonstrated are privileged parties and we find you have failed to demonstrate the information at issue constitutes privileged attorney-client communications for the purposes of section 552.107(1). Therefore, the city may not withhold any of the remaining information at issue under section 552.107(1) 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).<sup>2</sup> See Gov’t Code § 552.137(a)-(c). The e-mail addresses at issue are not excluded by subsection (c). Accordingly, the city must withhold the personal e-mail addresses we marked in the remaining information under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

In summary, the city may generally withhold the marked settlement agreement subject to section 552.022(a)(18) of the Government Code under Texas Rule of Evidence 503; however, if the settlement agreement is maintained by the city separate and apart from the privileged e-mail to which it is attached, then the city may not withhold this information under Texas Rule of Evidence 503. The city may generally withhold the information we marked under section 552.107(1) of the Government Code; however, if the city maintains the non-privileged e-mails and attachments we marked separate and apart from the otherwise privileged e-mail strings in which they appear, then the city may not withhold these non-privileged e-mails and attachments under section 552.107(1) of the Government Code. The city must withhold the personal e-mail addresses we marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. 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,

Michelle Garza  
Assistant Attorney General  
Open Records Division

MRG/eb

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<sup>2</sup> The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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Enc. Submitted documents

c: Requestor  
(w/o enclosures)