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ATTORNEY GENERAL OF TEXAS

April 28, 2022

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OR2022-12071

Dear Mr. McCullough:

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# 941565 (City Reference Nos. C000507, C000505, and C000515).

The City of Harlingen (the "city"), which you represent, received three requests from the same requestor for information pertaining to modifications and amendments of a specified lease; contracts between the city or the city's airport and a specified law firm; billing records for a specified law firm; and communications between the specified law firm and specified city employees pertaining to Sun Valley Aviation.<sup>1</sup> You indicate you released some 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 information.

Initially, we note section 552.301(e)(1)(D) of the Government Code states a governmental body asking for an attorney general decision must, within fifteen business days of receiving a request, provide the attorney general with "a copy of the specific information requested, *or submit representative samples of information if a voluminous amount of information was requested.*" Gov't Code § 552.301(e)(1)(D) (emphasis added). We note the city submitted a voluminous amount of information, rather than a representative sample. We have reviewed a representative sample of the voluminous information submitted.<sup>2</sup>

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<sup>1</sup> As the city has failed to submit a copy of the written requests for information, we take our description of the requests from your brief.

<sup>2</sup> To the extent the city identifies confidential information subject to a provision not addressed in this ruling, the city should contact the Open Government Hotline.

We note you have not submitted the requested contracts between the city or the city's airport and a specified law firm. Thus, to the extent any information responsive to this portion of the requests existed when the present requests were received, we assume it has been released. If such information has not been released, then it must be released at this time. *See id.* §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

We also note portions of the submitted information, which we have marked, are not responsive to the instant requests because they do not pertain to the requested information. The city need not release non-responsive information in response to these requests, and this ruling will not address that information.<sup>3</sup>

Next, we must address the city's procedural obligations under section 552.301 of the Government Code, which prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. *See* Gov't Code § 552.301. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). We understand the city sent the requestor a cost estimate of charges pursuant to section 552.2615 of the Government Code and the requestor accepted the cost estimate. *See id.* § 552.2615. The estimate of charges required the requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. *See id.* § 552.263(a). You inform us the city received payment for the charges on March 3, 2022. *See id.* §§ 552.2615, .263(a), (e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date governmental body receives bond or deposit). Thus, the city's fifteen-business-day deadline was March 17, 2022. As of the date of this letter, the city has failed to submit a copy of the written requests for information. Consequently, we conclude the city has failed to comply with the procedural requirements mandated by section 552.301(e) of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). The city claims section 552.107 of the Government Code for the submitted information. Because section 552.107 can provide a compelling reason to overcome the presumption of openness, we will address your argument under this section for the submitted information.

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<sup>3</sup> As we are able to make this determination, we need not address your arguments against its disclosure.

Next, we note the responsive information contains agendas and minutes of public meetings conducted by the city. The agendas of a governmental body's public meetings are specifically made public under provisions of the Open Meetings Act (the "OMA"), chapter 551 of the Government Code. *See* Gov't Code §§ 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). We note the agenda of a public meeting of a governmental body is a public record when entered, is public in whatever form it exists, and public access may not be delayed until formal approval is obtained. Open Records Decision No. 225 (1979). Although you seek to withhold this information under section 552.107 of the Government Code, 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 city must release the submitted public meeting agendas and minutes pursuant to section 551.041 of the Government Code.

We note some of the remaining responsive information is 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:

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege; [and]

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

Gov't Code § 552.022(a)(16), (17). The remaining responsive information includes attorney fee bills that are subject to section 552.022(a)(16) and court-filed documents that are subject to section 552.022(a)(17). This information must be released unless it is made confidential under the Act or other law. *See id.* Although you assert the information subject to section 552.022 is excepted from disclosure under section 552.107, this section is a discretionary exception 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(1) 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 552.022 of the Government Code 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). We will therefore consider your assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence for the information subject to section 552.022 of the Government Code. We will also consider your argument under section 552.107 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 responsive attorney fee bills must be withheld in their entirety under rule 503. However, section 552.022(a)(16) of the Government Code provides information "that is *in* a bill for attorney's fees" is not excepted from required disclosure unless it is confidential under other law or privileged under the attorney-client privilege. *See* Gov't Code § 552.022(a)(16) (emphasis added). This provision, by its express language, does not permit the entirety of an attorney fee bill to be withheld. *See also* Open Records Decision Nos. 676 (attorney fee bill cannot be withheld in entirety on basis it contains or is attorney-client communication pursuant to language in section 552.022(a)(16)), 589 (1991) (information in attorney fee bill excepted only to extent information reveals client confidences or attorney's legal advice). Accordingly, the city may not withhold the entirety of the responsive fee bills under Texas Rule of Evidence 503.

The city states the responsive attorney fee bills consist of communications involving attorneys for the city, city employees, and city officials. The city states the communications were made for the purpose of facilitating the rendition of professional legal services to the city. We understand these communications were intended to be, and have remained, confidential. Upon review, we find the city has established some of the information at issue constitutes privileged attorney-client communications under rule 503. Thus, the city may withhold the information we have marked in the responsive attorney fee bills under Texas Rule of Evidence 503. However, we find the city has failed to demonstrate the remaining information within the responsive attorney fee bills 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. Therefore, the city may not withhold any of the remaining information within the responsive attorney fee bills under rule 503.

You state the information subject to section 552.022(a)(17) consists of attachments to privileged attorney-client communications between attorneys for the city and city employees and officials that were made for the purpose of providing legal services to the city. You indicate the communications were intended to be, and have remained, confidential. Based on these representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to most of the information at issue. Accordingly, with the exception of the information we have marked for release, the city may generally withhold the information subject to section 552.022(a)(17) of the Government Code under Texas Rule of Evidence 503. We note, however, the attachments at issue have been shared with non-privileged parties. Further, if the attachments at issue are removed from the e-mails to which they are attached and stand alone, they are responsive to the request for information. Therefore, if the attachments are maintained by the city separate and apart from the otherwise privileged communications to which they are attached, then the city may not withhold this information under rule 503 of the Texas Rules of Evidence. In addition, we find the information we have marked for release was shared with parties you have not shown to be privileged. Thus, we conclude you have failed to establish the information we have marked constitutes privileged communications for the purposes of rule 503, and the city may not withhold it on that basis.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* Gov't Code § 552.107(1). The elements of the privilege under section 552.107(1) are the same as those discussed above 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. 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 assert the remaining responsive information constitutes communications between city employees, city officials, and city attorneys that were made for the purpose of providing legal advice to the city. You indicate these communications were made in confidence and have maintained their confidentiality. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to some of the

information at issue. Thus, with the exception of the information we have marked for release, the city may generally withhold the remaining responsive information under section 552.107(1) of the Government Code. We note, however, that some of the remaining responsive information consists of e-mail strings including e-mails received from or sent to non-privileged parties. Furthermore, if the e-mails received from or sent to non-privileged parties are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, if these non-privileged e-mails, which we have marked, are maintained by the city 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 under section 552.107(1) of the Government Code. In addition, we find the remaining responsive information at issue, which we have marked for release, was shared with parties you have not shown to be privileged. Thus, we conclude you have failed to establish the remaining responsive information, which we have marked for release, constitutes privileged communications for the purposes of section 552.107(1), and the city may not withhold it on that basis.

Section 552.136 of the Government Code states “[n]otwithstanding any other provision of this chapter, 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.”<sup>4</sup> *Id.* § 552.136; *see also id.* § 552.136(a) (defining “access device”). Accordingly, we find the city must withhold the information we marked under section 552.136 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, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address maintained by a governmental entity for one of its officials or employees, or a personal e-mail address belonging to a city employee or official used to conduct official government business. *See id.* § 552.137(c); *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 Gov’t Code § 552.137(a)). Accordingly, to the extent the e-mail addresses within the remaining responsive information belong to members of the public and are not excluded by subsection 552.137(c) of the Government Code, the city must withhold such e-mail addresses under section 552.137 of the Government Code, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release. *See id.* § 552.137(b). However, to the extent an e-mail address within the remaining responsive information at issue is excluded by subsection 552.137(c) or belongs to a city employee or official, the city may not withhold that e-mail address under section 552.137 of the Government Code.

In summary, the city must release the submitted public meeting agendas and minutes pursuant to section 551.041 of the Government Code. The city may withhold the information we have marked in the responsive attorney fee bills under Texas Rule of

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<sup>4</sup> The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Evidence 503. With the exception of the information we have marked for release, the city may generally withhold the information subject to section 552.022(a)(17) of the Government Code under Texas Rule of Evidence 503; however, if the attachments at issue are maintained by the city separate and apart from the otherwise privileged communications to which they are attached, then the city may not withhold this information under rule 503 of the Texas Rules of Evidence. With the exception of the information we have marked for release, the city may withhold the remaining information under section 552.107(1) of the Government Code; however, to the extent the non-privileged e-mails, which we have marked, are maintained by the city 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 under section 552.107(1) of the Government Code. The city must withhold the information we marked under section 552.136 of the Government Code. To the extent the e-mail addresses within the remaining responsive information belong to members of the public and are not excluded by subsection 552.137(c) of the Government Code, the city must withhold such e-mail addresses under section 552.137 of the Government Code, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release. The city must release the remaining responsive 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,

Jennifer Copeland  
Assistant Attorney General  
Open Records Division

JC/jm

Ref: ID# 941565

c: Requestor  
(w/o enclosures)