



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 26, 2022

Mr. Kieran Hillis
Assistant General Counsel
Office of Governor Greg Abbott
P.O. Box 12428
Austin, Texas 78711

OR2022-21966

Dear Mr. Hillis:

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# 962197 (OOG ID# 231-22).

The Office of the Governor (the "governor's office") received a request for a specified payment made from the Major Events Reimbursement Fund and information pertaining to tax increment adjustments to disbursements made from the Major Events Reimbursement Fund.¹ You state the governor's office has released some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹ We note the governor's office asked for and received clarification regarding this request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad 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).

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 that those records contain substantially different types of information than that submitted to this office.

Initially, we note some of the submitted 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:

...

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

Gov't Code § 552.022(a)(3). A portion of the submitted information contains information in an account, contract, or voucher relating to the receipt or expenditure of funds by the commission that is subject to section 552.022(a)(3). This information 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 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(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the information subject to section 552.022(a)(3), which we have marked, may not be withheld 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). Therefore, we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503 for the information subject to 552.022. We will also consider your arguments for the submitted information not subject to 552.022.

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

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). Accordingly, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must 1) show that 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 that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. *See* ORD 676 at 6-7. 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); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

The governor's office asserts the information subject to section 552.022(a)(3) is protected by the attorney-client privilege. However, upon review, we find you have failed to demonstrate the information at issue constitutes communications between privileged parties made in furtherance of the rendition of professional legal service to the governor's office for the purposes of rule 503 of the Texas Rules of Evidence. Thus, the governor's office may not withhold the information subject to section 552.022(a)(3) on that basis. As you raise no further exceptions to disclosure, the governor's office must release the information we have marked pursuant to section 552.022(a)(3) of the Government Code.

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 assert section 552.107 for the remaining information. You state the remaining information consists of communications between attorneys for the governor's office and employees of the governor's office that were made for the purpose of facilitating the rendition of professional legal services to the governor's office. You state the communications were intended to be, and have remained, confidential. Based on your representations and our review, we find that, with the exception of the information we have

marked, the governor's office may generally withhold the remaining information under section 552.107(1) of the Government Code.³ We note, however, the attachment to an otherwise privileged e-mail string was received from a non-privileged party. Furthermore, if the attachment received from the non-privileged party is removed from the e-mail string and stands alone, it is responsive to the request for information. Therefore, if the non-privileged attachment, which we have marked, is maintained by the governor's office separate and apart from the otherwise privileged e-mail string in which it appears, then the governor's office may not withhold the non-privileged attachment under section 552.107(1) of the Government Code.

However, we find the remaining information at issue, which we have marked, was shared with a party 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 section 552.107(1), and the governor's office may not withhold it on that basis.

In summary, the governor's office must release the information we have marked pursuant to section 552.022(a)(3) of the Government Code. With the exception of the information we have marked for release, the governor's office may generally withhold the remaining information under section 552.107(1) of the Government Code; however, if the marked non-privileged attachment is maintained separate and apart from the otherwise privileged e-mail string in which it appears, the governor's office may not withhold the information at issue. The governor's office must release the information we have marked for release.

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/jxd

³ As our ruling on this information is dispositive, we need not address your remaining argument against its disclosure.

Mr. Kieran Hillis - Page 5

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Enc. Submitted documents

c: Requestor
(w/o enclosures)