



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 24, 2022

Mr. Caleb Garcia
Deputy City Attorney
City of Denton
215 East McKinney Street
Denton, Texas 76201

OR2022-25601

Dear Mr. Garcia:

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# 967818.

The City of Denton (the "city") received two requests from the same requestor for information pertaining to the requestor and a specified address during a defined period of time, including a specified incident. You state the city does not maintain information responsive to a portion of the requests.¹ You also state you will release some information to the requestor. You claim some of the submitted information was not properly requested under chapter 1701 of the Occupations Code. You also claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.108 of the Government Code.² We have considered the submitted arguments and reviewed the submitted representative sample of information.³

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 Although you failed to timely raise section 552.107 of the Government Code, this provision constitutes a compelling reason to withhold information, and we will consider your argument under this exception. *See Gov't Code* § 552.301, .302.

³ 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

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:

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

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

Gov't Code § 552.022(a)(17). The submitted information contains information 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.* The city seeks to withhold the information subject to section 552.022(a)(17) 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 No. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived); *see also* Open Records Decision Nos. 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, which we have marked, 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 the city's assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence for the submitted court-filed documents. Further, we will 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;

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.

(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).

We understand the city to assert the submitted court-filed documents are attached to a communication 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. We understand the communication was 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 the submitted court-filed documents under rule 503.

Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that did not result in conviction or deferred adjudication. *See* Gov't Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). The city states Exhibits B and C relate to a closed criminal investigation that did not result in conviction or deferred adjudication. Based on this representation and our review, we agree section 552.108(a)(2) is applicable to Exhibits B and C.

However, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. *Id.* § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). *See also* Open Records Decision No. 127 (1976) (summarizing

types of information considered to be basic information). Thus, with the exception of basic information, which must be released, the city may withhold Exhibits B and C under section 552.108(a)(2) of the Government Code.⁴

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses information made confidential by chapter 772 of the Health and Safety Code, which authorizes the development of local emergency communication districts. Section 772.318 of the Health and Safety Code applies to an emergency communication district for a county with a population of more than 20,000 and makes confidential the originating telephone numbers and addresses of 9-1-1 callers that are furnished by a 9-1-1 service supplier. *See* Open Records Decision No. 649 (1996). The city indicates it is part of an emergency communication district that is subject to section 772.318 of the Health and Safety Code. Accordingly, we conclude the city must withhold the marked telephone number and address under section 552.101 of the Government Code in conjunction with section 772.318 of the Health and Safety Code if they consist of the originating telephone number and address furnished by a 9-1-1 service supplier. If the marked information does not consist of the originating telephone number provided by a 9-1-1 service supplier, it may not be withheld under section 552.101 in conjunction with section 772.318.

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* 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).

The city asserts Exhibit E 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. We understand 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 some of the information at issue, which we have marked. Accordingly, the city may generally withhold the information we have marked under section 552.107 of the Government Code. We note, however, some of these e-mail strings include 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

⁴ As we are able to make this determination, we do not address the applicability of section 1701.661(a) of the Occupations Code to the submitted video recordings. *See generally* Occ. Code § 1701.661(a), (e). Further, as our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code. Further, we find the remaining information at issue has been shared with individuals you have not demonstrated are privileged parties. Therefore, we conclude you have failed to establish the remaining information at issue constitutes communications between or among city employees and attorneys for the purposes of section 552.107(1). Thus, the city may not withhold the remaining information at issue on that basis.

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 exclude by subsection (c).⁵ *See* Gov’t Code § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, the general e-mail address of a business, an Internet website address, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address of a vendor who seeks to contract with a governmental body, an e-mail address a governmental entity maintains for one of its officials or employees, or an e-mail address provided to a governmental body on a letterhead. *See id.* § 552.137(c). We are unable to determine if the e-mail addresses within the remaining information fall within the scope of section 552.137(c). Accordingly, we must rule conditionally. To the extent the e-mail addresses within the remaining information are not excluded by section 552.137(c), the city must withhold them under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. *See id.* § 552.137(b). However, to the extent the e-mail addresses at issue are excluded by section 552.137(c), the city may not withhold them under section 552.137 of the Government Code.

In summary, the city may withhold the submitted court-filed documents under rule 503 of the Texas Rules of Evidence. With the exception of basic information, which must be released, the city may withhold Exhibits B and C under section 552.108(a)(2) of the Government Code. The city must withhold the marked telephone number and address under section 552.101 of the Government Code in conjunction with section 772.318 of the Health and Safety Code if they consist of the originating telephone number and address furnished by a 9-1-1 service supplier. The city may generally withhold the information we have marked under section 552.107 of the Government Code; however, if the marked non-privileged e-mails are maintained by the city separate and apart from the otherwise privileged e-mail strings in which they appear and stand alone, then the city may not withhold them under section 552.107(1) of the Government Code. To the extent the e-mail addresses within the remaining information are not excluded by section 552.137(c), the city must withhold them under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. The remaining information must be released.⁶

⁵ 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).

⁶ We note the non-privileged e-mails contain an e-mail address to which the requestor has a right of access under section 552.137(b) of the Government Code. *See* Gov’t Code § 552.137(b). However, Open Records Decision No. 684 (2009) is a previous determination authorizing all governmental bodies to withhold specific categories of information without the necessity of requesting an attorney general decision, including e-mail

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,

Colin Henry
Attorney
Open Records Division

CEH/jm

Ref: ID# 967818

Enc. Submitted documents

c: Requestor
(w/o enclosures)

addresses of members of the public under section 552.137 of the Government Code. Thus, if the city receives another request for this same information from a person who does not have a right of access to it, Open Records Decision No. 684 authorizes the city to redact the requestor's e-mail address without the necessity of requesting an attorney general decision.