



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 31, 2022

Mr. Andrew J. Clark
Counsel for the Magnolia Volunteer Fire Department
Andrews Myers
1885 Saint James Place, 15th Floor
Houston, Texas 77056-4110

OR2022-33708

Dear Mr. Clark:

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# 978370.

The Magnolia Volunteer Fire Department (the "department"), which you represent, received two requests from the same requestor for information pertaining to internal investigations and all e-mails sent or received by a named individual from a specified time period.¹ You state you have released some information to the requestor. You claim the department is not a governmental body subject to the Act.² Alternatively, you claim the submitted information is excepted from disclosure under section 552.107 of the Government Code and privileged under Texas Rule of Evidence 503.³ We have considered your arguments and reviewed the submitted information.

The Act defines "governmental body," in pertinent part, as "the part, section, or portion of an organization, corporation, commission, committee, institution, or agency that spends or that is supported in whole or in part by public funds[.]" Gov't Code § 552.003(1)(A)(xii). "Public funds" means "funds of the state or of a governmental subdivision of the state." *Id.*

¹ As the department has not submitted a copy of one of the requests for information, we take our description from the department's brief.

² We note we asked the department to provide additional information pursuant to section 552.303 of the Government Code. *See* Gov't Code § 552.303(c)-(d) (if attorney general determines that information in addition to that required by section 552.301 is necessary to render decision, written notice of that fact shall be given to governmental body and requestor, and governmental body shall submit necessary additional information to attorney general not later than the seventh calendar day after date of receipt of notice). We have received and considered the information submitted by the department pursuant to that request.

³ The department did not comply with section 552.301 of the Government Code in requesting a ruling from this office. *See* Gov't Code § 552.301(e). Nonetheless, because the attorney-client privilege can provide a compelling reason to overcome the presumption of openness, we will consider its applicability to the submitted information. *See id.* §§ 552.007, .302, .352.

§ 552.003(5). The Texas Supreme Court has defined “‘supported in whole or in part by public funds’ to include only those private entities or their sub-parts sustained, at least in part, by public funds, meaning they could not perform the same or similar services without the public funds.” *Greater Houston P’ship v. Paxton*, 468 S.W.3d 51, 63 (Tex. 2015). Thus, section 552.003(1)(A)(xii) encompasses only those private entities that are dependent on public funds to operate as a going concern, *see id.* at 61, and only those entities acting as the functional equivalent of the government, *see id.* at 62. Upon review, we find the department has failed to demonstrate it does not fall within the definition of a “governmental body” under section 552.003 of the Government Code. Therefore, we find the department is a governmental body for purposes of the Act, and the submitted information is public information subject to the Act which may only be withheld if it is excepted from disclosure under the Act. Accordingly, we will consider your arguments against disclosure of the submitted information.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a)(16) provides for required public disclosure of “information that is in a bill for attorney’s fees and that is not privileged under the attorney-client privilege,” unless the information is confidential under the Act or other law. *See Gov’t Code* § 552.022(a)(16). The submitted information includes attorney fee bills subject to section 552.022(a)(16). The department must release this information unless it is made confidential under the Act or other law. *See id.* Although the department raises section 552.107 of the Government Code for this information, 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 department may not withhold any of the information subject to section 552.022(a)(16) under section 552.107. The Texas Supreme Court has held, however, 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 address the department’s attorney-client privilege claim under rule 503 of the Texas Rules of Evidence for the information at issue. Further, we will address the department’s argument under section 552.107 against disclosure of the information not subject to section 552.022(a)(16).

Texas Rule of Evidence 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 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).

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. 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. *Id.* Upon a demonstration of all three factors, the entire communication 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 department states the information at issue consists of communications between outside counsel for the department and department employees that were made for the purpose of facilitating the rendition of professional legal services to the department. The department states these communications were intended to be, and have remained, confidential. Upon review, we find the department has established some of the information constitutes privileged attorney-client communications under rule 503. Thus, the department may withhold the information we have marked under Texas Rule of Evidence 503. However, we find the department has failed to demonstrate the remaining information at issue within the attorney fee bills documents communications with a privileged party. 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 department may not withhold any of the remaining information within the attorney fee bills under rule 503. Accordingly, the department must release the remaining information in the attorney fee bills pursuant to section 552.022(a)(16) of the Government Code.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. 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).

The department states the remaining information not subject to section 552.022 consists of communications between outside counsel for the department and a department employee that were made for the purpose of providing legal services to the department. The department states the communications were intended to be confidential and have remained confidential. Based on these representations and our review, we find the information at issue consists of privileged attorney client communications. Therefore, the department may withhold the remaining information not subject to section 552.022(a)(16) under section 552.107(1) of the Government Code.

In summary, the department may withhold the information we marked in the attorney fee bills under Texas Rule of Evidence 503. The department must release the remaining information in the attorney fee bills pursuant to section 552.022(a)(16) of the Government Code. The department may withhold the remaining information not subject to section 552.022(a)(16) under section 552.107(1) of the Government Code.

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,

Amy Shipp
Assistant Attorney General
Open Records Division

ALS/jxd

Ref: ID# 978370

Enc. Submitted documents

c: Requestor
(w/o enclosures)