



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 28, 2022

Ms. Tessa K. Meredith
Counsel for the City of Marble Falls
Messer, Fort & McDonald
6371 Preston Road, Suite 200
Frisco, Texas 75034

OR2022-36545

Dear Ms. Meredith:

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# 982344 (COMF ORR ID: MF090222SH).

The City of Marble Falls (the "city"), which you represent, received a request for information pertaining to a specified entity during a defined time period. You state the city has released some information to the requestor. You claim some of the submitted information is excepted from disclosure under section 552.107 of the Government Code and privileged under Texas Rules of Evidence 503.¹ We have considered your arguments and reviewed the submitted information.

Initially, we note portions of the submitted information consist of city ordinances and resolutions. Because laws and ordinances are binding on members of the public, they are matters of public record and may not be withheld from disclosure under the Act. *See* Open Records Decision No. 221 at 1 (1979) ("official records of the public proceedings of a governmental body are among the most open of records"); *see also* Open Records Decision No. 551 at 2-3 (1990) (laws or ordinances are open records). A resolution is analogous to an ordinance. Accordingly, the city must release the submitted ordinances and resolutions.

¹ Although you also raise section 552.101 of the Government Code in conjunction with section 552.107 of the Government Code, this office has concluded section 552.101 does not encompass other exceptions found in the Act. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Accordingly, we do not address your argument under section 552.101.

We note some of the remaining 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:

...

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

...

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

Gov't Code § 552.022(a)(3), (16). The remaining information includes a contract that is subject to subsection 552.022(a)(3). The remaining information also includes attorney fee bills subject to section 552.022(a)(16). The city must release the information subject to subsections 552.022(a)(3) and 552.022(a)(16) unless they are made confidential under the Act or other law. *See id.* You seek to withhold the information subject to section 552.022 under section 552.107 of the Government Code. However, this 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).* Thus, the information subject to section 552.022 may not be withheld under section 552.107 of the Government Code. However, we note 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 Texas Rule of Evidence 503 for the information subject to subsection 552.022. We will also consider your argument under section 552.107 for the remaining information not subject to section 552.022.

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 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 it is 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. 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).

You claim some of the information subject to section 552.022 of the Government Code is protected by the attorney-client privilege. You assert the information at issue consists of communications between attorneys for the city, city staff and officials, and a privileged consultant. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the city. You also state these 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 the information at issue. Accordingly, the city may withhold the information you marked under Texas Rules of Evidence 503.

We now address your arguments for the remaining information not subject to section 552.022. 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 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*, 922 S.W.2d at 923.

You assert portions of the remaining information consist of communications between attorneys for the city, city staff and officials, and a privileged consultant that were made for the purpose of providing legal services to the city. You state these communications were intended to be, and have remained, 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 remaining information you marked under section 552.107 of the Government Code.

In summary, the city must release the submitted resolutions and ordinances. The city may withhold the information you marked under Texas Rules of Evidence 503. The city may withhold the remaining information you marked under section 552.107 of the Government Code. 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,

Gerald A. Arismendez
Assistant Attorney General
Open Records Division

GAA/jxd

Ref: ID# 982344

Enc. Submitted documents

c: Requestor
(w/o enclosures)