



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 28, 2006

Mr. J. Andrew Bench
Attorney at Law
P.O. Box 1353
Greenville, Texas 75403-1353

OR2006-11340

Dear Mr. Bench:

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# 260475.

The City of Greenville (the "city") received a request for all e-mails sent, received, or deleted from the account of a named individual during a specified time period. You state that you have released some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.105, 552.107, and 552.131 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

You characterize the e-mail communications in Exhibits D and E as being purely personal in nature. The Act is only applicable to "public information." See Gov't Code § 552.021. Section 552.002(a) defines public information as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental

¹ We assume that 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 ruling 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.

body owns the information or has a right of access to it.” Gov’t Code § 552.002(a). Information that is collected, assembled, or maintained by a third party may be subject to disclosure under the Act if it is maintained for a governmental body, the governmental body owns or has a right of access to the information, and the information pertains to the transaction of official business. *See* Open Records Decision No. 462 (1987).

We understand you to contend that the submitted e-mails in Exhibits D and E were not collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business by or of the city. Based on your representations and our review of the e-mails at issue, we agree that these communications are not related to the transaction of official city business and therefore do not constitute “public information” of the city. Consequently, the city is not required to disclose the submitted e-mail communications in Exhibits D and E under the Act.² *Cf.* Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources).

You claim that Exhibit B is excepted from disclosure pursuant to section 552.107 of the Government Code. Section 552.107 of the Government Code, which protects information coming within the attorney-client privilege. 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. Open Records Decision No. 676 at 6-7 (2002).

First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was “not

² As our ruling for Exhibits D and E is dispositive, we need not address your other claimed exceptions for this information.

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).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. 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 state that the information in Exhibit B constitutes communications between an attorney for the city and the city’s Board of Development. You also state that these communications were made for the purpose of facilitating the rendition of professional legal services, and that these communications were intended to be, and have remained, confidential. Having considered your representations and reviewed the communications at issue, we conclude that the attorney-client privilege is applicable to the information in Exhibit B. Accordingly, the city may withhold Exhibit B under section 552.107.

The city claims that the information in Exhibit C is excepted from disclosure under section 552.131(a) of the Government Code. Section 552.131 excepts from public disclosure a business prospect’s trade secret or commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the governmental body’s territory. Gov’t Code § 552.131(a). Section 552.131(a) is inapplicable to information about a financial or other incentive offered the business prospect after a governmental body reaches an agreement with the business prospect. Gov’t Code § 552.131(b),(c).

After reviewing the city’s arguments and the information at issue, we conclude that, while the city generally alleges that release of the information in Exhibit C would cause substantial competitive harm to third parties, the city has not demonstrated that this information is either protected trade secret information or commercial or financial information of a business prospect. Therefore, we find that you have not demonstrated the applicability of section 552.131(a) to the information in Exhibit C, and it may not be withheld on that basis.

Section 552.131(b) of the Government Code provides that “[u]nless and until an agreement is made with [a] business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].” Gov’t Code § 552.131(b). You inform us that the

information in Exhibit C relates to pending economic development negotiations involving the city and various business prospects. You also indicate that Exhibit C includes information concerning possible financial or other incentives being offered to these business prospects. Upon review of your arguments and the information in Exhibit C, we conclude that the city may withhold some of the information at issue, which we have marked, under section 552.131(b). We note that the applicability of section 552.131 ends once the city finalizes an agreement with the business prospect. *See id.* § 552.131(c). However, we find you have not sufficiently demonstrated how the remaining information at issue consists of a financial or other incentive for purposes of section 552.131(b). Therefore, we conclude that this information is not excepted from disclosure under section 552.131(b).

You claim that some of the remaining information in Exhibit C is excepted from disclosure under section 552.105 of the Government Code. This section excepts from disclosure information relating to:

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Gov't Code § 552.105. This provision is designed to protect a governmental body's planning and negotiating position with regard to particular transactions. *See* Open Records Decision Nos. 564 (1990), 357 (1982), 310 (1982). Information that is excepted from disclosure under section 552.105 that pertains to such negotiations may be excepted from disclosure so long as the transaction relating to the negotiations is not complete. *See* Open Records Decision No. 310 (1982). Pursuant to section 552.105, a governmental body may withhold information "which, if released, would impair or tend to impair [its] 'planning and negotiating position in regard to particular transactions.'" Open Records Decision No. 357 at 3 (1982) (*quoting* Open Records Decision No. 222 (1979)). The question of whether specific information, if publicly released, would impair a governmental body's planning and negotiation position in regard to particular transactions is a question of fact. Thus, this office will accept a governmental body's good faith determination in this regard, unless the contrary is clearly shown as a matter of law. *See* Open Records Decision No. 564 (1990).

In this instance, you state that the city believes that the remaining information in Exhibit C includes information regarding the location of real property that the city intends to purchase for a public purpose. However, you have not identified any particular transaction that is at issue, and you have not sufficiently demonstrated the applicability of section 552.105. Therefore, we conclude none of the remaining submitted information in Exhibit C is excepted from disclosure under section 552.105.

In summary, Exhibits D and E are not subject to the Act and need not be released. The city may withhold the information in Exhibit B under section 552.107 of the Government Code. The city may withhold the information we have marked in Exhibit C under 552.131 of the Government Code. The remaining responsive information must be released to the requestor.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

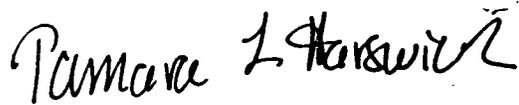
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for

contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink that reads "Tamara L. Harswick". The signature is written in a cursive style with a large initial 'T' and a stylized 'L'.

Tamara L. Harswick
Assistant Attorney General
Open Records Division

TLH/sdk

Ref: ID# 260475

Enc. Submitted documents

c: Mr. J.P.
c/o J. Andrew Bench
Counsel to the City of Greenville
P.O. Box 1353
Greenville, Texas 75403-1353
(w/o enclosures)