



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 16, 2007

Ms. Kathleen Wells
Taylor Olson Adkins Sralla Elam
I-30 at Bryant-Irvin Road
6000 Western Place, Suite 200
Fort Worth, Texas 76107-4654

OR2007-08956

Dear Ms. Wells:

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# 283779.

The City of Richland Hills (the "city"), which you represent, received a request for information relating to negotiations and discussions between the city and the City of Hurst regarding a proposed hotel/LA Fitness complex on the Hurst-city line. You state that you have released some information to the requestor. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.107,¹ 552.110, and 552.131 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. Section 321.3022 of the Tax Code provides in part:

¹Although you raise section 552.117 referring to "Certain Legal Matters," the correct exception to raise is section 552.107.

²Although you also raise section 552.101 in conjunction with the attorney-client privilege under Texas Rule of Evidence 503, this office has concluded that section 552.101 does not encompass discovery privileges. See Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

(b) The comptroller on request shall provide to a municipality that has adopted a tax under this chapter information relating to the amount of tax paid to the municipality under this chapter during the preceding or current calendar year by each person doing business in an area, as defined by the municipality, that is part of:

- (1) an interlocal agreement;
- (2) a tax abatement agreement;
- (3) a reinvestment zone;
- (4) a tax increment financing district;
- (5) a revenue sharing agreement;
- (6) an enterprise zone;
- (7) a neighborhood empowerment zone;
- (8) any other agreement, zone, or district similar to those listed in Subdivisions (1)-(7); or
- (9) any area defined by the municipality for the purpose of economic forecasting.

...

(f) Information received by a municipality under this section is confidential, is not open to public inspection, and may be used only for the purpose of economic forecasting, for internal auditing of a tax paid to the municipality under this chapter, or for the purpose described in Subsection (g).

(g) Information received by a municipality under Subsection (b) may be used by the municipality to assist in determining revenue sharing under a revenue sharing agreement or other similar agreement.

Tax Code § 321.3022(b), (f)-(g). You inform this office that the city received the sales tax information at issue from the comptroller. We understand that the sales tax information at issue was obtained in order to research the economic development of a strip of land relating to negotiations in which the city is taking part. You also inform us that the negotiations “include the potential sharing of tax revenue in this interdependent economic development venture.” Upon review, we determine that the information we have marked is confidential under section 321.3022 and must be withheld under section 552.101.

Section 552.107 of the Government Code protects information within the attorney-client privilege. Gov’t Code § 552.107. 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 Tex. 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 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).

In this instance, you inform us that some of the submitted information constitutes confidential attorney-client communications between the city attorney and the city manager. You explain the nature of the professional legal services being rendered. You represent that the confidentiality of these communications has been maintained. Based on these representations and our review, we determine that the city may withhold pages 13-15 as confidential attorney-client communications.

The city asserts that one of the submitted e-mails is excepted from disclosure under section 552.110(b) because it contains detailed negotiation strategy and options and risks associated with the economic development negotiations between the city and the City of Hurst. Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would

likely result from release of the information at issue. *Id.* § 552.110(b); Open Records Decision No. 661 (1999). By its terms, section 552.110(b) only protects the interests of the person from whom the information was obtained. This section does not protect the interests of the governmental body that receives proprietary information nor does it allow a governmental body to assert section 552.110 for information it creates. We note that the information at issue was not obtained from a third party, but rather is a communication to the city by individuals acting on its behalf in negotiations. Upon review, we find that the city has failed to establish the applicability of section 552.110(b). Therefore, no part of the information at issue may be withheld pursuant to section 552.110(b).

The city raises section 552.131(a)(2) of the Government Code for the same information which it asserts section 552.110(b). Section 552.131 relates to economic development information and provides in part the following:

(a) Information is excepted from [required public disclosure] 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 territory of the governmental body and the information relates to:

...

(2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

Gov't Code § 552.131(a)(2). Section 552.131(a), in part, excepts from disclosure "commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." *Id.* This aspect of section 552.131 is co-extensive with section 552.110(b) of the Government Code. *See id.* § 552.110(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999). As previously mentioned, the information at issue was not obtained from a third party. We further note that section 552.131(a) does not protect the interests of a governmental body regarding the release of information pertaining to economic development negotiations. Because you have not established the applicability of section 552.110(b), we conclude that none of the information at issue may be withheld pursuant to section 552.131(a)(2).

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 excluded by subsection(c).³ See Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. This section does not protect the work e-mail address of an employee of an entity with which a governmental body has a contractual relationship. *Id.* § 552.137(c)(1). You do not inform us that the individual at issue has affirmatively consented to the release of his e-mail address. Thus, to the extent that the e-mail address we have marked is not specifically excluded by subsection (c)(1), you must withhold the marked e-mail address pursuant to section 552.137 of the Government Code.

In summary, the city must withhold the sales tax information we have marked under section 552.101 of the Government Code in conjunction with section 321.3022 of the Tax Code. The city may withhold pages 13-15 as confidential attorney-client communications under section 552.107. The city must withhold the marked e-mail address pursuant to section 552.137, to the extent that it is not specifically excluded by subsection (c)(1). The remaining information must be released.

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

³The Office of the Attorney General will raise mandatory exceptions like sections 552.137 of the Government Code on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 170 (1987).

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,



Kara A. Batey
Assistant Attorney General
Open Records Division

KAB/mcf

Ref: ID# 283779

Enc. Submitted documents

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(w/o enclosures)