



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 26, 2012

Mr. Jeff T. Ullman  
Counsel for the City of Bartlett  
Knight & Partners  
223 West Anderson Lane, Suite A-105  
Austin, Texas 78752

OR2012-09846

Dear Mr. Ullman:

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# 457241.

The City of Bartlett (the "city"), which you represent, received a request for several categories of information pertaining to a named individual, including personnel documents, e-mails sent and received by the named individual, and e-mails and city council minutes referencing the named individual, as well as information pertaining to city finances. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.104, 552.106, 552.107, 552.133, and 552.143 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information, a portion of which consists of a representative sample.<sup>1</sup> We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note you have submitted e-mails not pertaining to the named individual. In addition, some of the submitted information is not responsive to the instant request for

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<sup>1</sup>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 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.

information because it was created after the date the city received the request. Thus, this information is not responsive to the present request. This decision does not address the public availability of this non-responsive information, and this information need not be released in response to this request.

Next, we note the city has only submitted e-mails and attachments for our review. To the extent any additional information responsive to the remainder of the request existed on the date the city received the request, we assume you have released it. If you have not released such information, you must do so at this time. *Id.* §§ 552.301, .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

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. This section encompasses information protected by other statutes, such as section 551.104 of the Open Meetings Act, chapter 551 of the Government Code. Section 551.104 provides in part that “[t]he certified agenda or tape of a closed meeting is available for public inspection and copying only under a court order issued under Subsection (b)(3).” *Id.* § 551.104(c). We note the city is not required to submit a certified agenda or tape recording of a closed meeting to this office for review. *See* Open Records Decision No. 495 at 4 (1988) (attorney general lacks authority to review certified agendas or tapes of executive sessions to determine whether a governmental body may withhold such information from disclosure under statutory predecessor to Gov’t Code § 552.101). Such information cannot be released to a member of the public in response to an open records request. *See* Attorney General Opinion JM-995 at 5-6 (1988) (public disclosure of certified agenda of closed meeting may be accomplished only under procedures provided in Open Meetings Act). Section 551.146 of the Open Meetings Act makes it a criminal offense to disclose a certified agenda or tape recording of a lawfully closed meeting to a member of the public. *See* Gov’t Code § 551.146(a)-(b); *see also* ORD 495 at 4. You inform us the responsive information includes an audio recording of a closed meeting of the city council. Based on your representation, we conclude the city must withhold the audio recording of the closed meeting under section 552.101 of the Government Code in conjunction with section 551.104(c) of the Government Code.

You raise section 552.103 of the Government Code for the information in Exhibit B. Section 552.103 provides, in pertinent part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). See Open Records Decision No. 551 at 4 (1990).

You state a lawsuit styled *City of Bartlett, Texas v. Deck*, Cause No. 09-505-C26, was filed in the 26th District Court of Williamson County, prior to the city's receipt of this request for the information at issue. You explain the lawsuit was pending at the time the city received the request for information. You state the information at issue relates to the lawsuit. Based on your representations and our review, we find you have established the information at issue is related to litigation that was pending on the date the city received this request for information. Accordingly, we conclude that the city may generally withhold Exhibit B under section 552.103 of the Government Code.

We note the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. See ORD 551 at 4-5. Thus, when the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, there is no interest in withholding that information from public disclosure under section 552.103. See Open Records Decision Nos. 349 (1982), 320 (1982). Accordingly with the exception of the information an opposing party has already seen or had access to, which we have marked for release, you may withhold Exhibit B under section 552.103 of the Government Code. We note the applicability of section 552.103 ends once the related litigation concludes. See Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Section 552.106 excepts from disclosure “[a] draft or working paper involved in the preparation of proposed legislation” and “[a]n internal bill analysis or working paper prepared by the governor's office for the purpose of evaluating proposed legislation.” Gov't Code § 552.106(a)-(b). We note section 552.106(b) applies to information created or used

by employees of the governor's office for the purpose of evaluating proposed legislation. The purpose of section 552.106 is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body. *See* Open Records Decision No. 615 at 2 (1993). Therefore, section 552.106 is applicable only to the policy judgments, recommendations, and proposals of persons who are involved in the preparation of proposed legislation and who have an official responsibility to provide such information to members of the legislative body. *See id.* at 1; *see also* Open Records Decision No. 429 at 5 (1985) (statutory predecessor to section 552.106 not applicable to information relating to governmental entity's efforts to persuade other governmental entities to enact particular ordinances).

In this instance, you generally assert the information in Exhibit D is excepted from disclosure under section 552.106. However, you have not demonstrated how the information at issue constitutes a draft or working paper involved in the preparation of proposed legislation. Further, you have failed to demonstrate that this information constitutes of an internal bill analysis or working paper prepared by the governor's office for the purpose of evaluating proposed legislation. Therefore, we conclude the city may not withhold any of Exhibit D under section 552.106.

You also claim the information in Exhibit D is excepted from disclosure under section 552.143 of the Government Code. Section 552.143 provides in relevant part:

(a) All information prepared or provided by a private investment fund and held by a governmental body that is not listed in Section 552.0225(b) is confidential and excepted from the requirements of Section 552.021.

(b) Unless the information has been publicly released, pre- and post-investment diligence information, including reviews and analyses, prepared or maintained by a governmental body or a private investment fund is confidential and excepted from the requirements of Section 552.021, except to the extent it is subject to disclosure under Subsection (c).

(c) All information regarding a governmental body's direct purchase, holding, or disposal of restricted securities that is not listed in Section 552.0225(b)(2)-(9), (11), (13)-(16) is confidential and excepted from the requirements of Section 552.021. This Subsection does not apply to a governmental body's purchase, holding, or disposal of, restricted securities for the purpose of reinvestment nor does it apply to a private investment fund's investment in restricted securities. This Subsection applies to information regarding a direct purchase, holding, or disposal of restricted securities by the Texas growth fund, created under Section 70, Article XVI, Texas Constitution, that is not listed in Section 552.0225(b).

Gov't Code § 552.143 (a)-(c). Section 552.143 makes confidential certain investment fund information pertaining to governmental bodies. You have not explained, nor can we discern, however, how section 552.143 is applicable to any information at issue. Consequently, you have failed to demonstrate Exhibit D may be withheld under section 552.143 of the Government Code.

Section 552.107 of the Government Code 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 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 a capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). 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, orig. proceeding). 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 inform us the information in Exhibit E consists of communications between city attorneys and employees that were made for the purpose of providing legal advice to the city. You have identified the parties to these communications. You inform us the communications were intended to be, and have remained, confidential. Based on your representations and our review, we conclude you have established the information at issue is protected by the attorney-client privilege. Therefore, the city may withhold Exhibit E under section 552.107(1) of the Government Code.

Section 552.133 of the Government Code excepts from disclosure a public power utility's information that is "reasonably related to a competitive matter." Gov't Code § 552.133(b). Section 552.133 of the Government Code provides in relevant part:

(a) In this section, "public power utility" means an entity providing electric or gas utility services that is subject to the provisions of this chapter.

(a-1) For purposes of this section, "competitive matter" means a utility-related matter that is related to the public power utility's competitive activity, including commercial information, and would, if disclosed, give advantage to competitors or prospective competitors. The term:

(1) means a matter that is reasonably related to the following categories of information:

...

(B) bidding and pricing information for purchased power, generation and fuel, and Electric Reliability Council of Texas bids, prices, offers, and related services and strategies[.]

...

(F) customer billing, contract, and usage information, electric power pricing information, system load characteristics, and electric power marketing analyses and strategies[.]

*Id.* § 552.133(a)-(a-1). Section 552.133(a-1)(2) provides fifteen categories of information that are not competitive matters. *Id.* § 552.133(a-1)(2).

You state the city is an electric utility provider, Bartlett Electric Cooperative ("BEC"). We understand BEC is a municipally owned utility for purposes of section 552.133. You state the information in Exhibit C relates to BEC's competitive activity and commercial information and if released, would give competitors an advantage. The information at issue is not among the fifteen categories of information expressly excluded from the definition of "competitive matter" by section 552.133(a-1)(2). Based on your representations and our review, we find Exhibit C relates to competitive matters as defined by section 552.133(a-1). Thus, we conclude the city must withhold Exhibit C under section 552.133 of the Government Code.<sup>2</sup>

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<sup>2</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

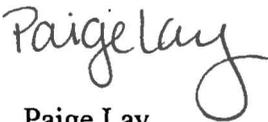
We note some of the remaining responsive information is subject to section 552.137 of the Government Code.<sup>3</sup> Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *Id.* § 552.137(a)-(c). The remaining information contains e-mail addresses of members of the public. The city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code unless the owners consent to their release.

In summary, the city must withhold the audio recording of the closed meeting under section 552.101 of the Government Code in conjunction with section 551.104(c) of the Government Code. Except where we have marked for release, the city may withhold Exhibit B under section 552.103 of the Government Code. The city may withhold Exhibit E under section 552.107 of the Government Code. The city must withhold Exhibit C under section 552.133 of the Government Code and the e-mail addresses we have marked under section 552.137 of the Government Code unless the owners consent to their release. The remaining responsive information must be released.

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 [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Paige Lay  
Assistant Attorney General  
Open Records Division

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<sup>3</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Ref: ID# 457241

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)