



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

March 20, 2015

Mr. Frank Battle  
General Counsel  
Office of the Speaker  
P.O. Box 2910  
Austin, Texas 78768-2910

OR2015-05380

Dear Mr. Battle:

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# 557070.

The Office of the Speaker (the "speaker's office") received a request for any correspondence to or from named individuals regarding a named senator. You state you have released some information to the requestor. The speaker's office does not take a position as to whether a portion of the submitted information is excepted from disclosure under the Act. However, the speaker's office states it notified the Frisco Economic Development Corporation (the "FEDC") of the speaker's office's receipt of the request for information and of the right of the FEDC to submit arguments to this office as to why the requested information should not be released. *See Gov't Code § 552.304* (interested party may submit written comments stating why information should or should not be released). We have received arguments from the FEDC. You state the speaker's office has withheld some of the responsive information pursuant to sections 306.003 and 306.004 of the Government Code.<sup>1</sup> *See Gov't Code §§ 306.003(a), .004(a); see also Open Records Decision No. 648 at 3-7 (1996)*. You

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<sup>1</sup>Release of information subject to section 306.003(a) or 306.004(a) of the Government Code is governed by chapter 306, not the Act, and it is within the discretion of a legislator to either withhold or release such information.

claim the remaining submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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 section 323.017 of the Government Code, which provides:

Communications, including conversations, correspondence, and electronic communications, between a member of the legislature or the lieutenant governor and an assistant or employee of the council that relate to a request by the official for information, advice, or opinions from an assistant or employee of the council are confidential. Information, advice, and opinions given privately by an assistant or employee of the council to a member of the legislature, or the lieutenant governor, acting in the person's official capacity, are confidential. However, the member or lieutenant governor may choose to disclose all or a part of the communications, information, advice, or opinions to which this section applies, and such a disclosure does not violate the law of this state.

*Id.* § 323.017. You state Exhibit G contains a communication between a member of the speaker’s office and employees of the council that relates to a request for research. Upon review, we agree the information at issue consists of a communication between a member of the legislature and employees of the council that relate to a request for information, advice, or opinion from council employees. Accordingly, the speaker’s office must withhold the information in Exhibit G under section 552.101 of the Government Code in conjunction with section 323.017 of the Government Code.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. *Id.* § 552.107(1). 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* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate 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. *See* 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. *See 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* 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. Finally, the attorney-client privilege applies only to a confidential communication, 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. *See 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 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. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state the information in Exhibit E consists of communications between an attorney for the speaker’s office, the speaker of the house, and members of the speaker’s office. You state the information in Exhibit F consists of a communication between the Executive Director of the House Business Office and the attorney for the speaker’s office, in his role as legal counsel to the House Business Office. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the clients and these communications have remained confidential. Upon review, we find the speaker’s office has demonstrated the applicability of the attorney-client privilege to the information in Exhibits E and F. Thus, the speaker’s office may withhold the information in Exhibits E and F under section 552.107(1) of the Government Code.<sup>2</sup>

The FEDC claims Exhibit C is excepted from disclosure under section 552.131 of the Government Code. Section 552.131 of the Government Code relates to economic development information and provides in part:

- (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

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

to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

- (1) a trade secret of the business prospect; or
- (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.

(b) Unless and until an agreement is made with the 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(a)-(b). Section 552.131(a) protects the proprietary interests of third parties that have provided information to governmental bodies, not the interests of governmental bodies themselves. There has been no demonstration by a third party that any of the information at issue constitutes a trade secret or that release of any of the information at issue would cause a third party substantial competitive harm. *See* Open Records Decision Nos. 661 at 5-6 (1999), 552 at 5 (1990) (attorney general will accept private person's claim under section 552.110(a) of the Government Code if person establishes *prima facie* case for trade secret exception, and no one submits argument that rebuts claim as matter of law). Thus, the speaker's office may not withhold any of the information in Exhibit C under section 552.131(a) of the Government Code.

Section 552.131(b) of the Government Code protects information about a financial or other incentive that is being offered to a business prospect by a governmental body or another person. Gov't Code § 552.131(b). The FEDC states the information at issue relates to financial and economic incentives being offered to a business prospect the FEDC is seeking to have locate to the city of Frisco. The FEDC states the negotiations are still pending. Upon review, we find the information we have marked consists of information about financial or other incentives being offered to a business prospect by the FEDC. Accordingly, the speaker's office may withhold the information we have marked under section 552.131(b) of the Government Code on behalf of the FEDC. However, upon review, we find the FEDC has not demonstrated how any of the remaining information consists of information about a financial or other incentive being offered to a business prospect. Consequently, none of the remaining information may be withheld under section 552.131(b).

Section 552.105 excepts from disclosure information relating to the following:

- (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.

*Id.* § 552.105. We note 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 that information is not complete. *See* ORD 310. A governmental body may withhold information that "if released, would impair or tend to impair [its] 'planning and negotiating position in regard to particular transactions.'" Open Records Decision Nos. 357 at 3, 222 (1979). The question of whether specific information, if publicly released, would impair a governmental body's planning and negotiating position with regard to particular transactions is a question of fact. Accordingly, 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* ORD 564.

The FEDC states release of the remaining information in Exhibit C "could hinder FEDC's current and or future acquisition efforts with respect to real or personal property and damage its negotiating position in connection with the same." Upon review, however, we find the FEDC has not demonstrated how any of the information at issue pertains to the location, appraisal, or purchase price of real or personal property for a public purpose. *See* ORD 310 (statutory predecessor to section 552.105 protects information relating to the location, appraisals, purchase price of property to be purchased by governmental body for public purpose). Accordingly, the speaker's office may not withhold the remaining information in Exhibit C under section 552.105 of the Government Code.

In summary, the speaker's office must withhold the information in Exhibit G under section 552.101 of the Government Code in conjunction with section 323.017 of the Government Code. The speaker's office may withhold the information in Exhibits E and F under section 552.107(1) of the Government Code. The information we have marked in Exhibit C may be withheld under section 552.131(b) on behalf of the FEDC. The remaining information in Exhibit C 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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Debbie Lee  
Assistant Attorney General  
Open Records Division

DKL/akg

Ref: ID# 557070

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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