



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 14, 2015

Mr. Leonard H. Dougal
Counsel for Goforth Special Utility District
Jackson Walker, L.L.P.
100 Congress Avenue, Suite 1100
Austin, Texas 78701

OR2015-07224

Dear Mr. Dougal:

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# 559984.

The Goforth Special Utility District (the "district"), which you represent, received a request for all communications between specified individuals with the district and specified individuals from any of the five named entities. You state you have released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.105 and 552.107 of the Government Code.¹ We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released). We have considered the submitted arguments and reviewed the submitted representative sample of information.

Initially, we address the requestor's assertion the information the district submitted as a representative sample of information is not representative of the whole of the information requested. We note, in requesting a decision from this office, a governmental body may

¹Although you also raise section 552.101 of the Government Code in conjunction with sections 551.104 and 551.146 of the Government Code, you make no arguments to support these exceptions. Therefore, we assume you have withdrawn your claim that these sections apply to the submitted information. *See* Gov't Code §§ 552.301, .302. Further, we note the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107 of the Government Code. *See* ORD 676 at 1-2.

submit to this office a representative sample of information rather than submitting all the requested records. *See id.* § 552.301(e)(1)(D). In doing so, it is the governmental body's burden to assure that the 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)*. Whether the district has additional information it seeks to withhold that it has not provided is a question of fact. This office is unable to resolve disputes of fact in the open records ruling process. *See Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986)*. Where fact issues are not resolvable as a matter of law, we must rely upon the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernable from the documents submitted for our inspection. *See Open Records Decision No. 522 at 4 (1990)*. Accordingly, we must accept the district's representation the information submitted to this office is truly representative of the information for which the department seeks a ruling as a whole. *See ORDs 499, 497*. 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 that submitted to our office. *See Gov't Code §§ 552.301(e)(1)(D), .302; ORDs 499 at 6, 497 at 4*.

Section 552.105 of the Government Code 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. 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*. Under 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.'" *ORD 357 at 3 (quoting Open Records Decision No. 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*.

You state the district has made a good-faith determination the information you have indicated relates to locations of property the district intends to purchase and release of that information would affect the prices of property that have yet to be purchased. You explain release of the information at issue would harm the district's negotiating position with respect to the

acquisition of these properties. Based on your representations and our review, we conclude the district may withhold the information you have indicated under section 552.105 of the Government Code.

Section 552.107(1) 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 “to facilitate 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). 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: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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 state the information you have marked consists of communications between district attorneys and district employees that were made for the purpose of providing legal services to the district. You state these communications are confidential. Based on your representations and our review, we find the information you have marked consists of privileged attorney-client communications. Therefore, the district may withhold the information you have marked under section 552.107(1) of the Government Code.

In summary, the district may withhold the information you have marked under section 552.105 of the Government Code. The district may withhold the information you have marked under 552.107(1) of the Government Code. The district 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 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,

A handwritten signature in black ink, appearing to read 'Meredith L. Coffman', followed by a long horizontal line extending to the right.

Meredith L. Coffman
Assistant Attorney General
Open Records Division

MLC/dls

Ref: ID# 559984

Enc. Submitted documents

c: Requestor
(w/o enclosures)