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ATTORNEY GENERAL OF TEXAS

July 8, 2015

Ms. Ellen H. Spalding  
Counsel for the Eanes Independent School District  
Rogers, Morris & Grover  
5718 Westheimer Road, Suite 1200  
Houston, Texas 77057

OR2015-13832

Dear Ms. Spalding:

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# 570741 (EISD Request #7274).

The Eanes Independent School District (the "district"), which you represent, received a request for eleven categories of information related to a specified tract of land. You state you do not have information responsive to a portion of the request.<sup>1</sup> You state you will release some information to the requestor. You state you will withhold information subject to section 552.137 of the Government Code pursuant to Open Records Decision 684 (2009).<sup>2</sup> You claim the submitted information is excepted from disclosure under sections 552.104, 552.105, 552.107, and 552.111 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence.<sup>3</sup> You also state the proprietary interests of

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<sup>1</sup>We note the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

<sup>2</sup>Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including e-mail addresses of members of the public under section 552.137, without the necessity of requesting an attorney general decision. ORD 684.

<sup>3</sup>Although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

certain third parties might be implicated. Accordingly, you notified the third parties of the request and of their right to submit arguments to this office explaining why their information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>4</sup> We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (permitting interested third party to submit to attorney general reasons why requested information should or should not be released).

Initially, you state you have redacted information that is not responsive to the request. This decision does not address the public availability of the non-responsive information, and that information need not be released.

Next, we note an interested third party is allowed ten business days after the date of its receipt of a governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from any third party explaining why its information should not be released. Therefore, we have no basis to conclude any third party has a protected proprietary interest in the submitted information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the district may not withhold any of the submitted information on the basis of any proprietary interest a third party may have in it.

Next, we consider the applicability of section 552.105 of the Government Code to the submitted information. Section 552.105 of the Government Code excepts from disclosure information related 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.

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<sup>4</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 that those records contain substantially different types of information than that submitted to this office.

Gov't Code § 552.105. Section 552.105 is designed to protect a governmental body's planning and negotiating position with regard to particular transactions. *See* Open Records Decision Nos. 564, 357 (1982), 310 (1982). Information that is excepted from disclosure under section 552.105 that pertains to such planning and 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 in 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 at 2.

The district states negotiations between the district and the owner of the specified tract of land are not currently ongoing. However, you indicate the information at issue is related to planning for a possible land acquisition by the district. You inform us the district has made no final plans for the possible land acquisition. You contend public disclosure of the information at issue could adversely affect the district's potential future plans. Based on your representations and our review, we conclude the district may withhold Exhibits C, D, E, and F under section 552.105 of the Government Code.<sup>5</sup>

However, we note the information in Exhibit B consists of attorney fee bills, which are subject to section 552.022(a)(16) of the Government Code. Section 552.022(a)(16) provides for the required public disclosure of "information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege," unless the information is expressly confidential under the Act or other law. Gov't Code § 552.022(a)(16). Although you raise section 552.105 of the Government Code for this information, we note section 552.105 is a discretionary exception that protects a governmental body's interest and may be waived. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 564 (1990) (statutory predecessor to section 552.105 subject to waiver). As such, section 552.105 does not make information confidential under the Act. Accordingly, the district may not withhold any portion of Exhibit B under section 552.105 of the Government Code. However, we note information subject to section 552.022 may be withheld under section 552.104 of the Government Code. *See* Gov't Code § 552.104(b). Additionally, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will address your arguments under rule 503 of the Texas Rules of Evidence and section 552.104 of the Government Code for the information in Exhibit B, which is subject to section 552.022(a)(16).

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<sup>5</sup>As we are able to make this determination, we need not address your remaining arguments for this information.

Rule 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

- (A) between the client or the client's representative and the client's lawyer or the lawyer's representative;
- (B) between the client's lawyer and the lawyer's representative;
- (C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;
- (D) between the client's representatives or between the client and the client's representative; or
- (E) among lawyers and their representatives representing the same client.

Tex. R. Evid. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made to further the rendition of professional legal services to the client or reasonably necessary to transmit the communication. *Id.* 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must 1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; 2) identify the parties involved in the communication; and 3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. *See* Open Records Decision No. 676 (2002). Upon a demonstration of all three factors, the entire communication is confidential under Rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

You state the portions of the attorney fee bills in Exhibit B you have marked are subject to rule 503 of the Texas Rules of Evidence. You assert the information at issue includes privileged attorney-client communications between the district's attorneys and district employees and representatives in their capacities as clients. You state the communications at issue were made for the purpose of the rendition of legal services to the district and were not intended to be disclosed to third parties. Based on your representations and our review, we find the district has established most of the information you marked in Exhibit B constitutes attorney-client communications under rule 503. However, we find some of the information you marked does not consist of privileged attorney-client communications. This information, which we have marked for release, may not be withheld under rule 503. Thus, except for the information we marked for release, the district may withhold the information you marked within the attorney fee bills in Exhibit B pursuant to rule 503 of the Texas Rules of Evidence.

Next, we address the applicability of section 552.104(a) to the remaining information in Exhibit B. Section 552.104(a) of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The "test under section 552.104 is whether knowing another bidder's [or competitor's information] would be an advantage, not whether it would be a decisive advantage." *Boeing Co. v. Paxton*, No. 12-1007, slip op. at 17 (Tex. June 19, 2015).

You seek to withhold the remaining information in Exhibit B under section 552.104. In this instance, you state the release of the information at issue would adversely affect the district's interests and position. Further, you state that, although negotiations between the district and a specified entity are not currently ongoing, "negotiations could potentially become active again at some later date." However, upon review, we find you have not demonstrated how release of the information at issue will give advantage to a competitor. Accordingly, the district may not withhold any of the remaining information in Exhibit B under section 552.104 of the Government Code.

In summary, the district may withhold Exhibits C, D, E, and F under section 552.105 of the Government Code. With the exception of the information we marked for release, the district may withhold the information you have marked in the attorney fee bills in Exhibit B pursuant to rule 503 of the Texas Rules of Evidence. The remaining information in Exhibit B must be released pursuant to section 552.022(a)(16) of the Government Code.

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 'JB', with a long horizontal line extending to the right.

Joseph Behnke  
Assistant Attorney General  
Open Records Division

JB/som

Ref: ID# 570741

Enc. Submitted documents

c: Requestor  
(w/o enclosures)