



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

July 16, 2015

Ms. Leah Simon Hayes  
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OR2015-14501

Dear Ms. Hayes:

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# 571843.

The Village of Salado (the "village"), which you represent, received a request for information pertaining to the village's discussions with Sanctuary Development Company, L.L.C. ("Sanctuary"). You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.131 of the Government Code. You also state you notified Sanctuary of the request for information and of its right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

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 exception encompasses information made confidential by

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<sup>1</sup>We assume that 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.

section 551.104 of the Open Meetings Act. Section 551.104 provides, in part, “The certified agenda or recording 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 village 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 governmental body may withhold such information from disclosure under statutory predecessor to section 552.101). Thus, 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 recording of a lawfully closed meeting to a member of the public. *See* Gov’t Code § 551.146(a)-(b). The village states the requested information includes certified agendas of a closed meeting. Based on this representation, we agree the village must withhold the certified agendas of a closed meeting under section 552.101 of the Government Code in conjunction with section 551.104 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 claim the information in Exhibit B consists of communications between village attorneys, outside counsel for the village, and village employees, officials, and consultants that were made for the purpose of facilitating the rendition of professional legal services to the village. You state the communications have remained confidential and have not been disclosed to non-privileged parties. Upon review, we find you have failed to demonstrate some of the e-mail strings you seek to withhold under section 552.107(1) of the Government Code were communicated between privileged parties; accordingly, the village may not withhold this information on this basis. However, we find you have demonstrated the applicability of the attorney-client privilege to the remaining information in Exhibit B. Thus, with the exception of the non-privileged e-mail strings, which we have marked for release in their entireties, the village may generally withhold the remaining information in Exhibit B under section 552.107(1) of the Government Code.<sup>2</sup> We note, however, some of the privileged e-mail strings we have marked include e-mails received from or sent to non-privileged parties. If these e-mails are removed from the privileged e-mail strings and stand alone, they are responsive to the request for information. Therefore, if the non-privileged e-mails we have marked are maintained by the village separate and apart from the otherwise privileged e-mail strings in which they appear, then the village may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code.

To the extent the non-privileged e-mails we have marked are maintained by the village separate and apart from the otherwise privileged e-mail strings in which they appear, we will address your arguments under section 552.131 of the Government Code for the non-privileged e-mails and the remaining information. 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 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

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

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 village may not withhold any of the information at issue 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). You state the information at issue relates to ongoing negotiations between the village and Sanctuary regarding economic development incentives. You further state the village has not reached an agreement with Sanctuary. However, upon review, we find you have not demonstrated how any of the information at issue 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) of the Government Code.

To the extent the non-privileged e-mails we have marked are maintained by the village separate and apart from the otherwise privileged e-mail strings in which they appear, portions of the non-privileged e-mails and the remaining information are subject to section 552.137 of the Government Code.<sup>3</sup> Section 552.137 of the Government Code provides, "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to an institutional e-mail address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address of a vendor who seeks to contract

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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. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

with a governmental body, an e-mail address maintained by a governmental body for one of its officials or employees, or an e-mail address provided to a governmental body on a letterhead. *See id.* § 552.137(c). Thus, to the extent the information at issue contains e-mail addresses that belong to members of the public who have not affirmatively consented to their release, the village must withhold those e-mail addresses under section 552.137 of the Government Code. However, the village may not withhold any e-mail addresses that are of the type listed in subsection 552.137(c) under section 552.137 of the Government Code.

In summary, the village must withhold the certified agendas of a closed meeting under section 552.101 of the Government Code in conjunction with section 551.104 of the Government Code. With the exception of the e-mail strings we have marked for release, the village may withhold the information in Exhibit B under section 552.107(1) of the Government Code; however, if the non-privileged e-mails we have marked are maintained by the village separate and apart from the otherwise privileged e-mail strings in which they appear, then the village may not withhold these non-privileged e-mails under section 552.107. To the extent the non-privileged e-mails we have marked and the remaining information contain e-mail addresses that are not subject to subsection 552.137(c) of the Government Code and belong to members of the public who have not affirmatively consented to their release, the village must withhold those e-mail addresses under section 552.137 of the Government Code. The village 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](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,



Cristian Rosas-Grillet  
Assistant Attorney General  
Open Records Division

CRG/cbz

Ref: ID# 571843

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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