



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 5, 2015

Ms. Sarah Parker
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2015-23327

Dear Ms. Parker:

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# 587422.

The Texas Department of Transportation ("TxDOT") received four requests from the same requestor for information pertaining to specified construction projects. TxDOT claims 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 Texas Rule of Civil Procedure 192.5. We have considered the submitted arguments and reviewed the submitted representative sample of information.¹ We have also considered comments submitted by 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 Exhibit D contains court-filed documents that are subject to section 552.022(a)(17) of the Government Code, which provides the following:

Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public

¹We 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 and not excepted from required disclosure unless made confidential under this chapter or other law:

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(17). Although TxDOT asserts the information subject to section 552.022 is excepted from release under section 552.107 of the Government Code, this section is discretionary and does not make information confidential under the Act. *See* Open Records Decision No. 676 at 6 (2002) (section 552.107 is not other law for purposes of section 552.022); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, TxDOT may not withhold the information subject to section 552.022 under section 552.107. However, the Texas Supreme Court has held the Texas Rules of Evidence are “other law” that make information expressly confidential for purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider the assertion of the attorney-client privilege under rule 503 for this information.

Rule 503(b)(1) provides the following:

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 [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

TxDOT asserts the information subject to section 552.022 in Exhibit D consists of confidential communications between attorneys for and employees of TxDOT that were made for the purpose of rendering professional legal advice. It also asserts the communications were intended to be confidential and their confidentiality have been maintained. Upon review, we find TxDOT has established this information constitutes privileged attorney-client communications that TxDOT may withhold under rule 503.

TxDOT asserts the remaining information in Exhibit D is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) also protects information that comes within the attorney-client privilege. The elements of the privilege under section 552.107(1) are the same as those discussed for rule 503. 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* ORD 676 at 6-7. 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*, 922 S.W.2d at 923.

TxDOT explains the remaining information in Exhibit D consists of confidential communications between attorneys and employees of TxDOT that were made in furtherance of the rendition of professional legal services. TxDOT also asserts the communications were intended to be confidential and their confidentiality has been maintained. We note some of the information at issue consists of communications sent to and from an individual whom TxDOT has not identified or otherwise established is a privileged party. Thus, we conclude TxDOT has failed to establish this information, which we have marked for release, is excepted from disclosure under section 552.107. Nevertheless, we find TxDOT has established the remaining information in Exhibit D constitutes privileged attorney-client

communications. Thus, TxDOT may generally withhold this information under section 552.107(1) of the Government Code. However, we note some of these e-mail strings include e-mails and attachments received from or sent to non-privileged parties. Furthermore, if the e-mails received from or sent to non-privileged parties are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, if TxDOT maintains these non-privileged e-mails and attachments, which we have marked, separate and apart from the otherwise privileged e-mail strings in which they appear, then it may not withhold these non-privileged e-mails and attachments under section 552.107(1) of the Government Code but, instead, must release them.

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*, 466 S.W.3d 831, 841 (Tex. 2015). TxDOT informs us Exhibit B pertains to utility relocations of the projects at issue. TxDOT explains, although some utility relocation agreements has been finalized, it is still in the process of negotiating agreements with other utilities. TxDOT argues release of Exhibit B would allow the utilities that it is currently negotiating with to tailor their negotiation strategy, which would place TxDOT at a disadvantage in its negotiations. After review of the information at issue and consideration of the arguments, we find TxDOT has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude TxDOT may withhold Exhibit B under section 552.104(a) of the Government Code.

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.

Gov’t Code § 552.105. 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.

TxDOT states it has made a good-faith determination Exhibit C pertains to the appraisal or purchase price of real property that it intends to purchase. Further, it asserts the release of this information would harm its negotiations for purchase of the property in question. Based on these representations, we conclude TxDOT may withhold Exhibit C under section 552.105 of the Government Code.²

To conclude, TxDOT may withhold the information subject to section 552.022 of the Government Code in Exhibit D under Texas Rule of Evidence 503. With the exception of the information we have marked for release, TxDOT may withhold the remaining information in Exhibit D under section 552.107 of the Government Code; however, TxDOT must release the non-privileged e-mails and attachments we have marked in Exhibit D if it maintains this marked information separate and apart from the otherwise privileged e-mail strings in which they appear. TxDOT may withhold Exhibit B under section 552.104(a) of the Government Code and Exhibit C under section 552.105 of the Government Code. TxDOT 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,


James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/sb

²As our ruling is dispositive, we do not address TxDOT's other arguments to withhold this information.

Ref: ID# 587422

Enc. Submitted documents

c: Requestor
(w/o enclosures)