



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 17, 2015

Mr. Ryan D. Pittman
Counsel for City of Wylie
Abernathy, Roeder, Boyd & Hullett, P.C.
P.O. Box 1210
McKinney, Texas 75070-1210

OR2015-26568

Dear Mr. Pittman:

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# 591141.

The City of Wylie (the "city"), which you represent, received a request for information pertaining to a specified property. You claim the submitted information is excepted from disclosure under sections 552.105, 552.107, and 552.131 of the Government Code and privileged under Texas Rule of Evidence 503.¹ We have considered your arguments and reviewed the submitted information. 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, we note the submitted information includes information subject to section 552.022(a)(17) of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

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

...

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

Id. § 552.022(a)(17). The city must release the information subject to section 552.022(a)(17) unless it is made confidential under the Act or other law. *See id.* Although the city seeks to withhold the court-filed document, which we have marked, under sections 552.105, 552.107, and 552.131(b) of the Government Code, these sections are discretionary exceptions to disclosure and do not make information confidential under the Act. *See Open Records Decision Nos. 676 at 6 (2002) (Gov't Code § 552.107(1) is not other law for purposes of Gov't Code § 552.022), 665 at 2 n.5 (2000) (discretionary exceptions generally).* Therefore, the city may not withhold the marked court-filed document under section 552.105, section 552.107, or section 552.131(b) of the Government Code. However, as section 552.131(a) of the Government Code makes information confidential under the Act, we will consider the applicability of this exception to the information subject to section 552.022(a)(17). Further, the Texas Supreme Court has held, however, the Texas Rules of Evidence are “other law” that make information expressly confidential for purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will consider the city’s assertion of the attorney-client privilege under Texas Rule of Evidence 503 for the information subject to section 552.022. We will also consider your arguments against disclosure of the remaining information not subject to section 552.022.

Texas Rule of Evidence 503 enacts the attorney-client privilege. 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* ORD 676. 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).

You assert the information subject to section 552.022 of the Government Code was communicated between attorneys for the city and city employees. You state the communication at issue was made for the purpose of the rendition of legal services to the city. You state the city has not waived the attorney-client privilege with regard to the communication. Upon review, we find you have failed to demonstrate the information at issue constitutes a privileged communication for purposes of rule 503. Therefore, the city may not withhold the information subject to section 552.022(a)(17) under Texas Rule of Evidence 503.

Section 552.105 of the Government Code excepts from disclosure information relating to “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(2). Section 552.105 is designed to protect a governmental body’s planning and negotiating position with respect to particular transactions. Open Records Decision Nos. 564 at 2 (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 “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 argue release of the remaining information, which is not subject to section 552.022 of the Government Code, would hinder the city's current and/or future acquisition efforts with respect to the specified property and damage its negotiation position in connection with the specified property. You state there has not been a public announcement regarding the project that is the subject of the remaining information. We understand the city has made a good-faith determination release of the information at issue would impair the city's negotiation position in regard to the property at issue. Upon review of your argument and the information at issue, we find the city may withhold the information not subject to section 552.022 under section 552.105 of the Government Code.²

Next, we address your argument under section 552.131(a) of the Government Code for the information subject to section 552.022 of the Government Code. Section 552.131 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 substantial competitive harm to the person from whom the information was obtained.

Gov't Code § 552.131(a). Section 552.131(a) excepts from disclosure only "trade secret[s] of [a] business prospect" and "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." *Id.* This aspect of section 552.131 is co-extensive with section 552.110 of the Government Code. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 661 at 5-6 (1999), 552 at 5 (1990). We note section 552.131(a) does not protect the interests of a governmental body regarding the release of information pertaining to economic development negotiations. Thus, we do not address your arguments under section 552.131(a) for the information subject to section 552.022(a)(17). Further, we have not received arguments from any third party explaining how the information at issue contains the third party's trade secrets or its commercial or financial information. *See* Gov't Code § 552.305(d)(2)(B). Because no third party has demonstrated the information at issue qualifies as a trade secret or release of the information at issue would result in substantial competitive harm, we conclude none of the

²As our ruling is dispositive, we need not address your remaining argument against disclosure of the submitted information.

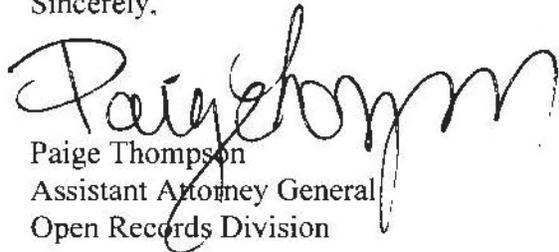
information subject to section 552.022(a)(17) may be withheld pursuant to section 552.131(a).

In summary, the city must release the marked court-filed document pursuant to section 552.022(a)(17) of the Government Code. The city may withhold the remaining information under section 552.105 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,



Paige Thompson
Assistant Attorney General
Open Records Division

PT/som

Ref: ID# 591141

Enc. Submitted documents

c: Requestor
(w/o enclosures)