



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 25, 2016

Ms. Elaine Nicholson
Assistant City Attorney
Law Department
City of Austin
P.O. Box 1088
Austin, Texas 78767-1088

OR2016-01777

Dear Ms. Nicholson:

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# 595455.

The City of Austin (the "city") received a request for information related to the Fixed Base Operator Lease and Development Agreement between the city and Advanced Services, Inc., d/b/a Jet Black Flight Services ("Jet Black") during a specified time period. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note the submitted information contains minutes of a public meeting of the city council. Section 551.022 of the Government Code expressly provides that the "minutes and tape recordings of an open meeting are public records and shall be available for public inspection and copying on request to the governmental body's chief administrative officer

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 that those records contain substantially different types of information than that submitted to this office.

or the officer's designee." Gov't Code § 551.022. Therefore, the submitted minutes of a public meeting of the city council, which we have marked, are generally public.

However, the city asserts some of the submitted information consists of information made confidential by section 154.073 of the Civil Practice and Remedies Code. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses information protected by other statutes. *Id.* § 552.101. Section 154.073 of the Civil Practice and Remedies Code provides in relevant part that:

(a) Except as provided by Subsections (c), (d), (e), and (f), a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.

(b) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings related to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.

Civ. Prac. & Rem. Code § 154.073(a), (b). You state the information you have marked pertains to a pre-mediation statement, which is a communication made to an impartial third party pursuant to a formal dispute resolution process under chapter 154 of the Civil Practice and Remedies Code. Upon review, we agree most of this information, which we have marked, consists of communications relating to the subject matter of the dispute made by a participant in an alternative dispute resolution procedure. Accordingly, we find the information we have marked, including the minutes of a public meeting of the city council, is confidential under section 154.073 of the Civil Practice and Remedies Code and must generally be withheld under section 552.101 of the Government Code. However, we find the city has failed to establish the remaining information you have marked consists of communications made during an alternative dispute resolution procedure. Therefore, the remaining information is not confidential under section 154.073, and the city may not withhold the remaining information at issue under section 552.101 of the Government Code in conjunction with section 154.073 of the Civil Practice and Remedies Code.

A conflict of laws exists between section 551.022 of the Government Code and section 154.073 of the Civil Practice and Remedies Code regarding the minutes of a public meeting of the city council. Where information falls within both a general and a specific statutory provision, the specific statutory provision prevails as an exception to the general

provision, unless the general provision is the later enactment and the manifest intent is that the general provision prevail. *See* Gov't Code § 311.026; *Cuellar v. State*, 521 S.W.2d 277 (Tex. Crim. App. 1975) (under well-established rule of statutory construction, specific statutory provisions prevail over general ones). In this instance, although section 154.073 generally pertains to communications made by a participant in an alternative dispute resolution procedure, section 551.022 specifically applies to the minutes of an open meeting. Therefore, we find section 551.022 is more specific than, and prevails over, section 154.073. *Cf.* Civ. Prac. & Rem. Code § 154.073(c) (oral communication or written material used in or made part of alternative dispute resolution procedure is admissible or discoverable if admissible or discoverable independent of procedure); *Knapp v. Wilson N. Jones Mem'l Hosp.*, 281 S.W.3d 163 (Tex. App.—Dallas 2009, no pet.) (provision's confidentiality does not create blanket of confidentiality nor is it so broad as to bar all evidence regarding everything that occurs at arbitration from being presented in trial court). Accordingly, the minutes of a public meeting of the city council, which we have marked, must be released pursuant to section 551.022 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 is excepted from disclosure under section 552.107(1) of the Government Code because it consists of communications between attorneys and employees of the city. Additionally, you state these communications were made for the purpose of facilitating the rendition of professional legal services, the confidentiality of the communications has been maintained, and the communications were not intended to be shared with any third parties. Based on these representations and our review, we find the city has demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the city may withhold the information you have marked under section 552.107(1) of the Government Code.

We note some of the remaining information may be subject to section 552.137 of the Government Code.² Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See Gov’t Code* § 552.137(a)-(c). Accordingly, the city must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure or subsection (c) applies.

In summary, the city must release the city council meeting minutes we have marked pursuant to chapter 551 of the Government Code. The city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 154.073 of the Civil Practice and Remedies Code. The city may withhold the information you have marked under section 552.107(1) of the Government Code. The city must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure or subsection (c) applies. The remaining information must be released.

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.

²The 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).*

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 that reads "Britni Ramirez". The signature is written in a cursive, flowing style.

Britni Ramirez
Assistant Attorney General
Open Records Division

BR/bhf

Ref: ID# 595455

Enc. Submitted documents

c: Requestor
(w/o enclosures)