



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 5, 2008

Ms. Marie A. Taylor  
Assistant City Attorney  
City of El Paso  
2 Civic Center Plaza, 9<sup>th</sup> Floor  
El Paso, Texas 79901

OR2008-10561

Dear Ms. Taylor:

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# 317833.

The City of El Paso (the "city") received three requests for information related to a specified project. You state that the city has released some of the requested information to the requestors. However, you claim that portions of the submitted information are excepted from disclosure under sections 552.107 and 552.131 of the Government Code.<sup>1</sup> You also believe that the submitted information may implicate the proprietary interests of third parties. Accordingly, you have provided documentation showing that the city notified Regency Centers ("Regency") and Industrial Realty Group/Plexxar ("Industrial") of this request for information and each company's right to submit arguments to this office as to why the submitted information should not be released. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that some of the submitted information was the subject of a prior ruling of this office, issued as Open Records Letter No. 2008-09675 (2008). We presume that the pertinent facts and circumstances have not changed since the issuance of Open Records Letter No. 2008-09675. Thus, the city may continue to rely on Open Records Letter No. 2008-09675 for the information we have marked.<sup>2</sup> See Open Records Decision No. 673

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<sup>1</sup>Although you also raise Texas Rule of Evidence 503, the Texas Supreme Court has held that the Texas Rules of Evidence are other laws that make information confidential for the purposes of section 552.022 of the Government Code. See *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The information for which you claim the attorney-client privilege is not encompassed by section 552.022, and thus, we do not address rule 503.

<sup>2</sup>As we are able to make this determination, we need not address your arguments under sections 552.107 and 552.131 of the Government Code for this information.

(2001) (governmental body may rely on prior ruling as previous determination when 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D); 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and 4) the law, facts, and circumstances on which the prior ruling was based have not changed since the issuance of the ruling). For the submitted information not previously ruled upon, we will address your submitted arguments.

We next note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. See Gov't Code § 552.305(d)(2)(B). As of the date of this letter, this office has not received comments from Regency or Industrial explaining how the release of the submitted information will affect their proprietary interests. Thus, we have no basis to conclude that the release of any portion of the submitted information would implicate the proprietary interests of Regency or Industrial. See, e.g., Open Records Decision Nos. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence 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). Accordingly, the city may not withhold any portion of the submitted information on the basis of any proprietary interest that Regency or Industrial may have in the information.

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 "for the purpose of facilitating 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 Texas 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). 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 to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of 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, no writ). 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 that the information at issue consists of confidential e-mail communications between city attorneys and city administrators that were made for the purpose of rendering professional legal advice. You also state that the confidentiality of the communications has been maintained. Based on these representations and our review of the information at issue, we agree that the information we have marked consists of privileged attorney-client communications that may be withheld under section 552.107 of the Government Code.

You assert that the remaining information is excepted from disclosure under section 552.131 of the Government Code. Section 552.131(b) provides that “[u]nless and until an agreement is made with [a] 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(b). You inform us that the information you have marked relates to pending economic development negotiations involving the city and “business prospect 2008.02.01A,” otherwise known as Hawkins Regency, L.P. You also indicate the information at issue concerns possible financial or other incentives being offered to Hawkins Regency. Upon review of your arguments and the information at issue, we conclude that the city may withhold some of this information, which we have marked, under section 552.131(b). We note that the applicability of section 552.131 ends once the city finalizes an agreement with the business prospect. *See id.* § 552.131(c). However, we find you have not sufficiently demonstrated how the remaining information at issue consists of a financial or other incentive being offered to the business prospect for purposes of section 552.131(b). Therefore, we conclude that this information is not excepted from disclosure under section 552.131(b).

We note that some of the submitted information is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See Open Records Decision No. 550 (1990).*

In summary, the city may continue to rely on Open Records Letter No. 2008-09675 for the information we have marked. The city may withhold the information we have marked under section 552.107 and section 552.131 of the Government Code. The remaining information in Exhibits C-3 and C-4 must be released to all three requestors. The remaining information in Exhibits C-5 and C-6 must be released to the first and second requestors. Any information protected by copyright must be released in accordance with copyright law.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

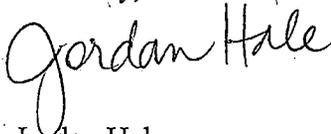
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for

contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Jordan Hale  
Assistant Attorney General  
Open Records Division

JH/jb

Ref: ID# 317833

Enc. Submitted documents

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