



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 13, 2008

Mr. Charles Wallace
City of New Braunfels
P.O. Box 311747
New Braunfels, Texas 78130

OR2008-13998

Dear Mr. Wallace:

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# 323038.

The City of New Braunfels (the "city") received a request for six categories of communication and correspondence, including information pertaining to the 2005 Traffic Thoroughfare Plan and the Town Creek development and related tax increment reinvestment zone. You state that you will provide the requestor with a portion of the requested information. You claim, however, that the submitted information is excepted from disclosure under sections 552.107, 552.131, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that some of the submitted information is subject to section 552.022 of the Government Code. This section provides in part that:

(a) the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code. § 552.022(a)(16). In this instance, the submitted information includes attorney fee bills. Thus, the city must release this information pursuant to section 552.022(a)(16) unless it is expressly confidential under other law. You argue that this information is excepted from disclosure under section 552.107 of the Government Code. Section 552.107 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Open Records Decision No. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). As such, section 552.107 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the city may not withhold the information subject to section 552.022 under section 552.107 of the Government Code. However, the Texas Supreme Court has held that the Texas Rules of Evidence are "other law" within the meaning of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The attorney-client privilege is also found under rule 503 of the Texas Rules of Evidence. Accordingly, we will consider your assertion of this privilege under rule 503 of the Texas Rules of Evidence for the information subject to section 552.022.

Rule 503 of the Texas Rules of Evidence encompasses the attorney-client privilege and provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; 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 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). Thus, 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. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state that the information at issue consists of communications between city employees and attorneys for the city made for the purpose of facilitating the rendition of professional legal services and were not intended to be disclosed to third parties. Based upon your representations and our review of the fee bills at issue, we find that the city may withhold the information we have marked in the submitted fee bills pursuant to rule 503 of the Texas Rules of Evidence. However, we conclude you have not established that the remaining information at issue consists of privileged attorney-client communications; therefore, none of this information may be withheld under rule 503.

We next address your arguments under section 552.107 of the Government Code for the information not subject to section 552.022. Section 552.107 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.*, 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 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 explain that some of the remaining submitted information consists of confidential communications between city employees and city attorneys that were made in furtherance of the rendition of professional legal services. You also state that the communications were intended to be confidential and that their confidentiality has been maintained. Based on these representations and our review of the information at issue, we agree that the city may withhold the information we have marked under section 552.107.

You also raise section 552.131 of the Government Code for a portion of the submitted information. Section 552.131 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.

(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) 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.* Thus, the scope of section 552.131(a) is co-extensive with that of section 552.110 of the Government Code. *See id.* § 552.110(a)-(b).

You state that the information at issue is related to negotiations involving a governmental body and a business prospect. You contend that the information involves commercial or financial information whose disclosure would cause substantial competitive harm to the business prospects from whom the information was obtained. You have not demonstrated, however, that any of the information at issue constitutes a trade secret under section 552.110(a). *See id.* § 552.110(a); Open Records Decision No. 552 at 5 (1990) (attorney general will accept private person’s claim under section 552.110(a) if person establishes *prima facie* case for trade secret exception and no one submits argument that rebuts claim-as-matter-of-law). Likewise, you have not shown that any of the information at issue consists of commercial or financial information whose disclosure would cause substantial competitive harm. *See Gov’t Code* § 552.110(b); Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm). We therefore conclude that the city may not withhold any of the submitted information under section 552.131(a).

Section 552.131(b) protects information relating to a financial or other incentive that is being offered to a business prospect by a governmental body or another person. *See Gov’t Code* § 552.131(b). This aspect of section 552.131 protects the interests of governmental bodies, not those of third parties. Although you indicate the information at issue is related to economic development negotiations, including the offer of financial incentives, you have not demonstrated that any of the information at issue reveals any financial incentive that is being offered to a business prospect. We therefore conclude that the city may not withhold any of the information at issue under section 552.131(b).

You contend that certain e-mail addresses and personal information belonging to members of the public are excepted from disclosure pursuant to section 552.137 of the Government Code. 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). § 552.137(a)-(c). You argue that the request “relates to persons with whom [c]ity employees have communicated and who are not [c]ity employees[.]” You state that the city has not received consent for the release of the information at issue. Upon review, we agree that the e-mail addresses we have marked must be withheld under section 552.137 of the Government Code. However, section 552.137 applies specifically to e-mail addresses and does not encompass any additional information. Accordingly, the city may not withhold any of the remaining information at issue pursuant to section 552.137 of the Government Code.

In summary, the city may withhold the information we have marked within the submitted attorney fee bills under Texas Rule of Evidence 503. The city may also withhold the information we have marked under section 552.107 of the Government Code. The city must withhold the marked e-mail addresses under section 552.137 of the Government Code. The remaining information must be released.

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,



Lauren E. Kleine
Assistant Attorney General
Open Records Division

LEK/jb

Ref: ID# 323038

Enc. Submitted documents

c: Ms. Cary Roberts
c/o Carter Casteel
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(w/o enclosures)