



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 21, 2009

Ms. Cathy Cunningham
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4201 Wingren Suite 108
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OR2009-00846

Dear Ms. Cunningham:

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# 332825.

The Town of St. Paul (the "town"), which you represent, received a request for agenda packets, meeting minutes, and information relating to twelve specified business and governmental entities, law firms, and individuals. You state that most of the requested information is being released. You claim that other responsive information is excepted from disclosure under sections 552.107 and 552.131 of the Government Code. You also believe that this request for information may implicate the interests of third parties. You notified the interested parties of this request for information and of their right to submit arguments to this office as to why the requested information should not be released.¹ We have considered the exceptions you claim and reviewed the information you submitted.

We first note that some of the submitted information was created after the date of the town's receipt of this request for information. The Act does not require a governmental body to release information that did not exist when it received a request or create responsive information.² Thus, the information that did not exist when the town received this request

¹See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

²See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

is not responsive to the request. This decision does not address the public availability of the non-responsive information, which we have marked, and that information need not be released in response to this request.

We also note that an interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 of the Government Code to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from any of the third parties that were notified. Thus, because none of the third parties has demonstrated that any of the responsive information is proprietary for the purposes of the Act, the town may not withhold any of the information on the basis of any interest that any of those parties may have in the information. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

Next, we address the town's exceptions to disclosure. Section 552.107(1) of the Government Code protects information that comes 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. *See* 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. *See* 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. *See 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 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. *See* TEX. R. EVID. 503(b)(1)(A)-(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 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. *See 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).

The town seeks to withhold some of the responsive information under section 552.107(1). We understand you to claim that the information in question either consists of or documents privileged attorney-client communications. You have identified some of the parties involved. Based on your representations and our review of the information in question, we have marked information that the town may withhold under section 552.107(1). We conclude that you have not demonstrated that any of the remaining information in question falls within the scope of the attorney-client privilege. Therefore, the town may not withhold any of the remaining responsive information under section 552.107(1).

The town also raises section 552.131 of the Government Code, which 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). 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 id.* § 552.131(b). This aspect of section 552.131 protects the interests of governmental bodies, not those of third parties.

You seek to withhold some of the responsive information under section 552.131. You inform us that the town "is involved in working out the details for a development[.]" You state that "[w]hile this development may not be a business prospect that the [town] initially sought out in or near the [town] . . . it has become like a business prospect that the [town] is negotiating with to have locate in or near the [town]." Having considered your representations, we find that you have not demonstrated that any of the information at issue constitutes a trade secret under section 552.110(a). *See id.* § 552.110(a); ORD 552 at 5 (attorney general will accept private person's claim under Gov't Code § 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); ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm). Moreover, you have not shown that any of the information at issue reveals a financial incentive that the town is offering to a business prospect. We therefore conclude that the town may not withhold any of the responsive information under section 552.131 of the Government Code.

We note that section 552.117 of the Government Code may be applicable to some of the remaining responsive information.³ Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request under section 552.024 that the information be kept confidential. The town must withhold the information that we have marked under section 552.117(a)(1) if it is related to a current or former official or employee of the town who timely requested confidentiality for the marked information under section 552.024.

We also note that the remaining responsive information includes personal e-mail addresses. Section 552.137 of the Government Code states that "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the

³Unlike other exceptions to disclosure under the Act, this office will raise section 552.117 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

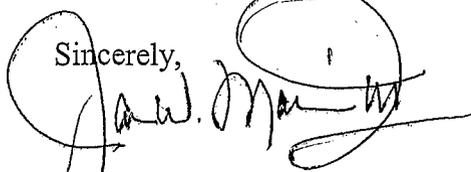
e-mail address has affirmatively consented to its public disclosure.⁴ Gov't Code § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. We have marked e-mail addresses that the town must withhold under section 552.137 unless the owner of an e-mail address has affirmatively consented to its public disclosure.

In summary: (1) the town may withhold the information that we have marked under section 552.107(1) of the Government Code; (2) the town must withhold the information that we have marked under section 552.117(a)(1) of the Government Code if it is related to a current or former official or employee of the town who timely requested confidentiality for the marked information under section 552.024 of the Government Code; and (3) the marked e-mail addresses must be withheld under section 552.137 of the Government Code unless the owner of an e-mail address has consented to its disclosure. The rest of the responsive 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.

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.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/cc

⁴Section 552.137 also is mandatory and may not be waived. Gov't Code §§ 552.007, .352; ORD 674 at 3 n.4.

Ref: ID# 332825

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