



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 28, 2011

Ms. Lois A. Rockefeller
Attorney for the City of Clyde
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290 Cedar
Abilene, Texas 79601-5720

OR2011-17458

Dear Ms. Rockefeller:

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# 436991.

The City of Clyde (the "city"), which you represent, received a request for (1) all documents relating to the understanding between the city and Backporch Productions, L.L.C. ("Backporch") for development of a permanent outdoor stage facility at Clyde Lake Park and (2) all documents evidencing any transactions between the city, the Upper Pecan Bayou, the Central Colorado Soil Conservation District, the Soil Conservation Service, and the United States Department of Agriculture concerning the ownership of certain property.¹ You state the city has released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.107, 552.110, and 552.131 of the Government Code. In addition, you state release of some of the submitted information may implicate the proprietary interests of Backporch. Accordingly, you inform us the city notified Backporch of the request and of its right to submit comments to this office as to why the submitted information should not be released to the requestor. *See Gov't Code* § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and

¹We note the city received clarification of the request. *See Gov't Code* § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

explain applicability of exception to disclosure under the Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note you have marked some of the information as non-responsive because it does not pertain to either of the requested items of information. The city need not release this non-responsive information in response to this request, and this ruling will not address that information.

You raise section 552.110 of the Government Code, arguing that release of the information “could be harmful to Backporch.” However, because section 552.110 is designed to protect the interests of third parties, not those of governmental bodies, a governmental body may not raise section 552.110 on behalf of a third party. Therefore, if we do not receive comments from a third party explaining why the information at issue should not be released, we will conclude section 552.110 is not applicable. 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 it 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 Backporch explaining why the submitted information should not be released to the requestor. Thus, we have no basis to conclude that the release of any portion of the requested information would implicate Backporch’s interests. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, 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), 542 at 3. Accordingly, we conclude that the city may not withhold any of the requested information on the basis of any interest Backporch may have in the information.

You raise section 552.107 of the Government Code for some of the submitted e-mails in Exhibit B. Section 552.107 protects information coming within the attorney-client privilege. Gov’t Code § 552.107(1). 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 pet.). 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 e-mails at issue consists of communications between and among individuals identified as the city’s legal counsel and city administrator. You indicate these e-mails were made for the purpose of facilitating the rendition of legal services, and were intended to be, and have remained, confidential. Based on your representations and our review, we conclude some of the e-mails at issue, which we have marked, are protected by the attorney-client privilege and may be withheld under section under section 552.107 of the Government Code.² However, the remaining e-mails reflect they were sent from or received by non-privileged parties. Accordingly, you failed to show how these remaining e-mails fall within the attorney-client privilege. Thus, the remaining e-mails at issue may not be withheld under section 552.107.

You raise section 552.131(a) of the Government Code for the remaining responsive information. Section 552.131 of the Government Code provides, in part, as follows:

(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

²As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

(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). We note that 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); ORDs 552 at 5, 661 at 5-6. Thus, section 552.131(a) protects the proprietary interests of third parties that have provided information to governmental bodies, not the interests of governmental bodies themselves. Therefore, we do not address the city's arguments under section 552.131(a). In this instance, there has been no demonstration by a third party that any of the information at issue constitutes a trade secret or that release of any of the information at issue would cause a third party substantial competitive harm. *See* ORDs 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), 661 at 5-6 (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 remaining responsive information under section 552.131(a) of the Government Code.

Section 552.137 of the Government Code provides 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 e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c).³ Gov't Code § 552.137(a)-(c). Upon review, we find the e-mail addresses we have marked in the remaining responsive information are not of the type specifically excluded by section 552.137(c) of the Government Code. Accordingly, the city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners consent to disclosure.⁴

In summary, the city may withhold the information we have marked under section 552.107 of the Government Code. The city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners consent to disclosure. The city must release the remaining responsive information.

³The 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).

⁴We note Open Records Decision No. 684 (2009) is a previous determination authorizing all governmental bodies to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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, toll free at (888) 672-6787.

Sincerely,



Sean Nottingham
Assistant Attorney General
Open Records Division

SN/agn

Ref: ID# 436991

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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