



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 24, 2013

Ms. Rachel L. Lindsay  
Counsel for the Town of Flower Mound  
Brown & Hofmeister, L.L.P.  
740 East Campbell Road, Suite 800  
Richardson, Texas 75081

OR2013-01395

Dear Ms. Lindsay:

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# 476863.

The Town of Flower Mound (the "town"), which you represent, received a request for ten categories of information pertaining to the Pink Evening Primrose Trail Project; documents regarding the purchase of real property by the town in the last twelve months, including communications with property owners regarding potential acquisition; and documents regarding the condemnation of real property by the town in the last twelve months. You claim that the submitted information is excepted from disclosure under sections 552.103, 552.105, 552.107, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the submitted information contains a resolution of the town's council. Because laws and ordinances are binding on members of the public, they are matters of public record and may not be withheld from disclosure under the Act. *See* Open Records Decision No. 221 at 1 (1979) ("official records of the public proceedings of a governmental body are among the most open of records"); *see also* Open Records Decision No. 551 at 2-3 (1990) (laws or ordinances are open records). A resolution is analogous to an ordinance. Accordingly, the resolution must be released.

Next, we note the submitted information contains an agenda and minutes of a public meeting of the town. The agendas and minutes of a governmental body's public meetings are

specifically made public under provisions of the Open Meetings Act, chapter 551 of the Government Code. *See* Gov't Code §§ 551.022 (minutes and tape recordings of open meeting are public records and shall be available for public inspection and copying on request to governmental body's chief administrative officer or officer's designee), .041 (governmental body shall give written notice of date, hour, place, and subject of each meeting), .043 (notice of meeting of governmental body must be posted in place readily accessible to general public for at least 72 hours before scheduled time of meeting). Although you seek to withhold this information under sections 552.103, 552.105, and 552.107, as a general rule, the exceptions to disclosure found in the Act do not apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Accordingly, the submitted agenda and minutes of the public meeting must be released pursuant to section 551.022 of the Government Code.

Section 552.022 provides in part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(1), (17). The submitted information contains completed appraisal reports that are subject to section 552.022(a)(1) and court-filed documents that are subject to section 552.022(a)(17). Although you seek to withhold this information under sections 552.103, 552.105, and 552.107 of the Government Code, those sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 676 at 6 (2002) (attorney-client privilege under section 552.107 may be waived), 564 (1990) (statutory predecessor to section 552.105 subject to waiver), 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, the town may not withhold the information subject to section 552.022 under sections 552.103, 552.105, and 552.107 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503.

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

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).

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* ORD 676 at 6-7. 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. *Id.* Upon a demonstration of all three factors, the entire communication is 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). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state the information at issue includes communications made between private parties, including the town's legal counsel and the town's staff, for the purpose of facilitating the

rendition of professional legal services to the town. You further state that these communications have remained confidential. Based on your representations and our review, we find the appraisal reports we have marked may be withheld under Texas Rule of Evidence 503. However, the remaining information subject to section 552.022 involves communications or documents communicated with individuals you have not identified as privileged. Therefore, we find you have failed to demonstrate the applicability of the attorney-client privilege to the remaining information subject to section 552.022. Accordingly, none of the remaining information subject to section 552.022 may be withheld under Texas Rule of Evidence 503.

Section 552.107(1) protects information that comes within the attorney-client privilege. The elements of the privilege under section 552.107(1) are the same as those discussed for rule 503 above. 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* ORD 676 at 6-7. 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 portions of the submitted information consist of communications between the town's legal counsel and the town in its capacity as a client. You state these communications were made in furtherance of the rendition of professional legal services to the town. You also state these communications were not intended to be, and have not been, disclosed to parties other than those encompassed by the attorney-client privilege. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information we have marked. Accordingly, the town may withhold the information we have marked under section 552.107(1) of the Government Code. However, we find you have failed to demonstrate how the remaining information consists of communications between privileged parties made for the purpose of facilitating the rendition of professional legal services to the town. Accordingly, the remaining information may not be withheld under section 552.107 of the Government Code.

Section 552.105(2) of the Government Code excepts from disclosure information relating to "appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property." Gov't Code § 552.105(2). Section 552.105 is designed to protect a governmental body's planning and negotiating position with respect to particular transactions. Open Records Decision Nos. 564 at 2 (1990), 357 (1982), 310 (1982). Information that is excepted from disclosure under section 552.105 that pertains to such negotiations may be excepted from disclosure so long as the transaction relating to that information is not complete. *See* ORD 310. But the protection offered by section 552.105 is not limited solely to transactions not yet finalized. This office has concluded that information about specific parcels of land obtained in advance of other parcels to be acquired for the same project could be withheld where release of the information would harm the governmental body's negotiating position with respect to the remaining parcels. *See*

ORD 564 at 2. A governmental body may withhold information “which, if released, would impair or tend to impair [its] ‘planning and negotiating position in regard to particular transactions.’” ORD 357 at 3 (quoting Open Records Decision No. 222 (1979)). The question of whether specific information, if publicly released, would impair a governmental body’s planning and negotiating position with regard to particular transactions is a question of fact. Accordingly, this office will accept a governmental body’s good-faith determination in this regard, unless the contrary is clearly shown as a matter of law. *See* ORD 564.

You state the submitted documents include information regarding purchasing, valuation, and pricing information of real property. You further state the town has preliminary plans to include these properties in its public works project for the creation of the Pink Evening Primrose Trail Project. You assert release of this information would harm the town’s negotiating position with respect to the acquisition of these properties. Based on your representations and our review, we conclude the town may withhold the information we have marked under section 552.105 of the Government Code.<sup>1</sup> However, we find you have failed to demonstrate how release of the remaining information would impair the town’s planning and negotiating position with regard to the Pink Evening Primrose Trail Project. Therefore, none of the remaining information may be withheld under section 552.105 of the Government Code.

Section 552.103 of the Government Code provides, in part, as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov’t Code § 552.103(a), (c). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information

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<sup>1</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See* Open Records Decision No. 551 at 4 (1990).

You argue portions of the submitted information relate to an ongoing litigation. You state, and provide documentation showing, prior to the date of the current request the town sued Minassian Properties, LC in a lawsuit styled *Town of Flower Mound, Texas v. Minassian Properties, LC, Owner, Wells Fargo Bank, N.A., Note Holder, B. Lamar Ball, Trustee, and Richard C. Erwin, Trustee*, Cause No. PR-201200318, petitioning the probate court to condemn certain land and the special commissioner made a ruling in your favor. You assert Minassian Properties, LC has appealed this decision. *See* Prop. Code § 21.018(b) (stating that if party files objection to findings of special commissioners, court shall try case in same manner as other civil causes.) Based on your representations and our review, we agree the town was involved in litigation prior to the date the town received the request for information. *See* Gov't Code § 552.103(c) (litigation must be pending or reasonably anticipated at time governmental body receives request for information). Further, we agree a portion of the remaining information is related to this litigation. Thus, this information is generally subject to section 552.103 of the Government Code.

However, the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Thus, if the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We note the opposing parties to the pending litigation have seen or had access to a portion of the information at issue. Therefore, this information is not protected by section 552.103 and may not be withheld on that basis. We also note the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). Accordingly, the town may only withhold the information we have marked under section 552.103 of the Government Code. Further, we find you have failed to demonstrate how any of the remaining information pertains to the pending litigation. Therefore, none of the remaining information may be withheld under section 552.103 of the Government Code.

We note some of the submitted information may be 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. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). 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.

In summary, the town must release the town council's resolution. The town must release the agenda and meeting minutes of the public meeting pursuant to section 551.022 of the Government Code. The town may withhold the appraisal reports we have marked under Texas Rule of Evidence 503. The town may withhold the information we have marked under section 552.107 of the Government Code. The town may withhold the information we have marked under section 552.105 of the Government Code. The town may withhold the information we have marked under section 552.103 of the Government Code. The remaining information must be released, but any information protected by copyright may only be released in accordance with copyright law.

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](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,



Thana Hussaini  
Assistant Attorney General  
Open Records Division

TH/som

Ref: ID# 476863

Enc. Submitted documents

c: Requestor  
(w/o enclosures)