



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 11, 2013

Mr. Gary Henrichson
Assistant City Attorney
City of McAllen
P.O. Box 220
McAllen, Texas 78505-0220

OR2013-05830

Dear Mr. Henrichson:

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# 483752 (PIR No. W010495-012113).

The City of McAllen (the "city") received a request for The Embassy Suites hotel developer's request to extend a specified agreement with the city, to include the "proforma" submitted by the developer on a specified date and any current development agreement between the developer and the city. You claim the submitted information is excepted from disclosure under sections 552.107, 552.110, 552.131, and 552.153 of the Government Code. Additionally, you state release of this information may implicate the proprietary interests of Boulevard Development Company, L.C. ("Boulevard"). Accordingly, you notified Boulevard of the request for information and of its right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from Boulevard. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the submitted completed agreement, which we have marked, is subject to section 552.022(a)(3) of the Government Code, which provides for the required public disclosure of "information in an account, voucher, or contract relating to the receipt or

expenditure of public or other funds by a governmental body,” unless it is “made confidential under [the Act] or other law[.]” Gov’t Code § 552.022(a)(3). Although you raise sections 552.107(1), 552.131(b), and 552.153(b)(1) of the Government Code, these sections are discretionary exceptions that protect a governmental body’s interests and do not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 6 (2002) (attorney-client privilege under section 552.107 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally); *see also* Gov’t Code § 552.153(b)(1) (providing for the withholding of certain information relating to a proposal for a qualifying project under chapter 2267 of the Government Code if release would harm the governmental body’s financial interests or bargaining position), (2)(C) (providing for the withholding of certain information provided by a contracting party under chapter 2267 if release before the execution of an interim or comprehensive agreement would harm the governmental body’s financial interests or bargaining position). Therefore, the city may not withhold the information subject to section 552.022 under sections 552.107, 552.131(b), or 552.153(b)(1). However, you also assert the agreement subject to section 552.022(a)(3) is excepted from disclosure under sections 552.110, 552.131(a), and 552.153(b)(2) of the Government Code, which make information confidential under the Act. Furthermore, the Texas Supreme Court has held 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). Accordingly, we will consider your claims under sections 552.110, 552.131(a), and 552.153(b)(2) and Texas Rule of Evidence 503 for the information subject to section 552.022(a)(3). We will also consider all submitted arguments against disclosure of the remaining information, which is not subject to section 552.022(a)(3).

We first address your assertion of the attorney-client privilege for the agreement subject to section 552.022(a)(3) of the Government Code. Texas Rule of Evidence 503 encompasses 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 it is 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 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 the communication is confidential by explaining it was not intended to be disclosed to third persons and 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). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding).

You argue the information at issue pertains to ongoing discussions between the city and Boulevard and involves attorneys for the city. You explain the city and Boulevard are currently negotiating extensions to the agreement at issue. Because the city and Boulevard were negotiating the terms of the agreement, their interests were adverse at the time the communication was made. Accordingly, at the time of the agreement, the city and Boulevard did not share a common interest that would allow the attorney-client privilege to apply to the agreement. *See* TEX. R. EVID. 503(b)(1)(C); *In re Monsanto*, 998 S.W.2d 917, 922 (Tex. App.—Waco 1999, no pet.) (discussing the “joint-defense” privilege incorporated by rule 503(b)(1)(C)). Therefore, you have failed to demonstrate how the agreement consists of a communication between privileged parties. *See* TEX. R. EVID. 503(b)(1)(C). Therefore, the agreement may not be withheld under Texas Rule of Evidence 503.

Next, we consider your argument under section 552.107(1) of the Government Code for the remaining information, which is not subject to section 552.022(a)(3) of the Government Code. Section 552.107(1) also protects information coming within the attorney-client privilege. *See* Gov’t Code § 552.107(1). The elements of the privilege under section 552.107 are the same as those discussed for rule 503. 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 inform us the remaining information consists of communications pertaining to ongoing discussions between the city and Boulevard and involves attorneys for the city. We understand the communications were made for the purpose of facilitating the rendition of professional legal services to the city. We also understand these communications were intended to be confidential and have remained confidential. Upon review, we find you have demonstrated the applicability of the attorney-client privilege to most of the information not subject to section 552.022(a)(3) of the Government Code. Thus, the city may generally withhold the remaining information under section 552.107(1) of the Government Code.¹ We note, however, these e-mail strings include e-mails and attachments received from or sent to Boulevard. As noted above, you state the city and Boulevard were engaged in contractual negotiations during the time the communications at issue were made. Because the city was involved in negotiations with Boulevard at the time the communications were made, we find their interests were adverse at that time. Accordingly, as noted above, at the time the communications were made, the city and Boulevard did not share a common interest that would allow the attorney-client privilege to apply. See TEX. R. EVID. 503(b)(1)(c); *In re Monsanto*, 998 S.W.2d at 922. We additionally note that, if the e-mails received from or sent to Boulevard are removed from the e-mail strings and stand alone, they are responsive to the request for information. Thus, if these e-mails and attachments, which we have marked, are maintained by the city separate and apart from the otherwise privileged e-mail strings in which they appear, then the city may not withhold them under section 552.107(1) of the Government Code. In that event, we consider your claims under sections 552.110, 552.131(a), 552.131(b), 552.131(b)(1), and 552.153(b)(2) of the Government Code for these non-privileged e-mails. We will also address Boulevard's claim under section 552.110 of the Government Code for an attachment to these non-privileged e-mails. Finally, we will consider your claims under sections 552.110, 552.131(a), and 552.153(b)(2) of the Government Code for the agreement subject to section 552.022(a)(3) of the Government Code.

You raise section 552.110 of the Government Code. We note, however, section 552.110 is designed to protect the interests of third parties, such as Boulevard, not the interests of a governmental body. Thus, we do not address your arguments under section 552.110 of the Government Code, and the information at issue may be withheld under section 552.110 based only on arguments from Boulevard. Boulevard seeks to withhold the proforma attached to one of the non-privileged e-mails under section 552.110.

Section 552.110(b) protects “[c]ommercial 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 § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely

¹As our ruling for this information is dispositive, we need not address the remaining arguments against its release.

result from release of the information at issue. *Id.*; *see also* Open Records Decision No. 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).

Boulevard explains the proforma consists of a compilation of the projected economic performance of the hotel at issue. Boulevard asserts the proforma operating statement was produced based on its experience operating other Embassy Suites hotels and release of this information would cause it competitive harm because it would provide Boulevard's competitors with a detailed analysis of the costs and percentages that could be expected in the operation of other Embassy Suites hotels. Boulevard further asserts this could result in the loss of a competitive advantage Boulevard has developed in operating Embassy Suites hotels. Upon review of Boulevard's arguments and the information at issue, we find Boulevard has established the proforma, which we have marked, constitutes commercial or financial information, the release of which would cause Boulevard substantial competitive injury. Therefore, the city must withhold this marked information under section 552.110(b) of the Government Code.²

Section 552.131 relates to economic development information and 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) only protects the proprietary interests of third parties that have provided information to governmental bodies, not the interests of

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

governmental bodies themselves. In this instance, we have already disposed of Boulevard's arguments under section 552.110(b) of the Government Code. We therefore conclude the city may not withhold any of the information at issue under section 552.131(a).

Section 552.131(b) of the Government Code protects information about a financial or other incentive that is being offered to a business prospect by a governmental body or another person. You state the non-privileged information not subject to section 552.022(a)(3) of the Government Code contains economic incentives requested and offered by the city and Boulevard during the ongoing contractual negotiations between the parties. You also explain no agreement had been reached at the time of the request. Upon review, we find the information we have marked consists of information about financial or other incentives being offered by the city to a business prospect. Accordingly, the city may withhold the information we have marked under section 552.131(b) of the Government Code.³ However, you have not demonstrated how any of the remaining information at issue consists of information about a financial or other incentive being offered to a business prospect by the city. Consequently, none of the remaining information may be withheld under section 552.131(b).

Section 552.153 of the Government Code protects proprietary records and trade secrets involved in certain partnerships under chapter 2267 of the Government Code and provides in part:

(a) In this section, "affected jurisdiction," "comprehensive agreement," "contracting person," "interim agreement," "qualifying project," and "responsible governmental entity" have the meanings assigned those terms by [s]ection 2267.001.

(b) Information in the custody of a responsible government entity that relates to a proposal for a qualifying project authorized under [c]hapter 2267 is exempted from the requirements of [the Act] if:

(1) the information consists of memoranda, staff evaluations, or other records prepared by the responsible governmental entity, its staff, outside advisors, or consultants exclusively for the evaluation and negotiation of proposals filed under [c]hapter 2267 for which:

(A) disclosure to the public before or after the execution of an interim or comprehensive agreement would adversely affect the financial interest or bargaining position of the responsible governmental entity; and

³As our ruling for this information is dispositive, we need not address your remaining argument against its release.

(B) the basis for the determination under Paragraph (A) is documented in writing by the responsible governmental entity;
or

(2) the records are provided by a contracting person to a responsible governmental entity or affected jurisdiction under [c]hapter 2267 and contain:

(A) trade secrets of the contracting person;

(B) financial records of the contracting person, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or other means; or

(C) other information submitted by the contracting person that, if made public before the execution of an interim or comprehensive agreement, would adversely affect the financial interest or bargaining position of the responsible governmental entity or the person.

Id. § 552.153(a)-(b). Section 2267.001(10) of the Government Code provides that “qualifying project” means:

(A) any ferry, mass transit facility, vehicle parking facility, port facility, power generation facility, fuel supply facility, oil or gas pipeline, water supply facility, public work, waste treatment facility, hospital, school, medical or nursing care facility, recreational facility, public building, or other similar facility currently available or to be made available to a governmental entity for public use, including any structure, parking area, appurtenance, and other property required to operate the structure or facility and any technology infrastructure installed in the structure or facility that is essential to the project’s purpose; or

(B) any improvements necessary or desirable to unimproved real estate owned by a governmental entity.

Id. § 2267.001(10).⁴ Further, section 2267.001(11) provides that “responsible governmental entity” means “a governmental entity that has the power to develop or operate an applicable

⁴We note the 82nd Legislature created two versions of chapter 2267 of the Government Code. Section 552.153(a) refers to the version of chapter 2267 entitled “Public and Private Facilities and Infrastructure,” which was added by Senate Bill 1048.

qualifying project.” *Id.* § 2267.001(11). You also raise section 552.153(b)(1) for the remaining non-privileged e-mails and section 552.153(b)(2) for these e-mails and the agreement. You state “[i]t is within the realm of possibilities . . . that the ever changing negotiation [between the city and Boulevard] could evolve into a public private partnership.” However, you have not explained, nor can we discern, how the city constitutes a responsive governmental entity and the information relates to a proposal for a qualifying project authorized under chapter 2267 of the Government Code. Furthermore, Boulevard does not seek to withhold any of its remaining information under section 552.153(b)(2) of the Government Code. Accordingly, we find the city may not withhold any portion of the remaining information at issue under section 552.153 of the Government Code.

We note the remaining non-privileged e-mails between the city and Boulevard contain e-mail addresses that are subject to section 552.137 of the Government Code.⁵ This section 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). *Id.* § 552.137(a)-(c). The e-mail addresses we have marked in these non-privileged e-mails are not specifically excluded by section 552.137(c). As such, these e-mail addresses must be withheld under section 552.137 of the Government Code unless the owners of the addresses affirmatively consent to their release. *See id.* § 552.137(b).

In summary, the city may generally withhold the information we have marked under section 552.107(1) of the Government Code. However, if the non-privileged e-mails we have marked exist separate and apart from the otherwise privileged e-mail strings in which they appear, then the city may not withhold the non-privileged e-mails under section 552.107(1) of the Government Code. In that event, the city must withhold the information we have marked under sections 552.110(b), 552.131(b), and 552.137 of the Government Code, unless the owners of the e-mail addresses we marked subject to section 552.137 affirmatively consent to their release. The remaining information in the non-privileged e-mails must be released. In either event, the agreement we have marked subject to section 552.022(a)(3) of the Government Code 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,

⁵The 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).

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,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/ag

Ref: ID# 483752

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Michael A. Fallek
Boulevard Development Co., LC
4316 North Tenth Street
McAllen, Texas 78504
(w/o enclosures)