



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 24, 2013

Ms. Marivi Gambini
Paralegal
City of Irving
825 West Irving Boulevard
Irving, Texas 75060

OR2013-10660

Dear Ms. Gambini:

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# 491167.

The City of Irving (the "city") received a request for all documents and communications related to a specified water pipeline along the Santa Fe Railroad right-of-way during a specified period of time. You state the city has released some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.105, 552.107, and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹Although you raise rule 503 of the Texas Rules of Evidence, we note section 552.107 of the Government Code is the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code. *See* Open Records Decision No. 676 at 1-2 (2002). Further, although you raise rule 192.3 of the Texas Rules of Civil Procedure, you have provided no arguments explaining how this rule is applicable. Therefore, we assume you have withdrawn your claim this rule applies to the submitted information. *See* Gov't Code §§ 552.301, .302.

²We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

Initially, you assert portions of the submitted information are not responsive to the instant request for information. We note the instant request is for all documents relating to certain topics. We note the information at issue is contained in the documents related to the requested topics. Thus, we find the information at issue is responsive to the request. However, we note some of the submitted information, which we have marked, is not responsive to the instant request for information because it was created after the city received the request for information. This ruling does not address the public availability of any information that is not responsive to the request and the city is not required to release such information in response to this request. Therefore, with the exception of the information we have marked as non-responsive, we will address your claimed exceptions for the submitted information.

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 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* 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. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain 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 some of the information submitted as Exhibit C consists of communications involving city attorneys, city employees, and city representatives in their capacities as clients. You state these communications were made to facilitate the rendition of professional legal services. You state these communications were confidential, and you do not indicate the city has waived the confidentiality of the information at issue. 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 in Exhibit C. Accordingly, the city may withhold the information we have marked in Exhibit C under section 552.107(1) of the Government Code. However, the remaining e-mail in Exhibit C was provided to an individual you have not demonstrated is a privileged party. Therefore, we conclude you have failed to establish how the remaining e-mail constitutes a privileged communication for the purposes of section 552.107(1). Thus, the city may not withhold the remaining e-mail under section 552.107.

You claim section 552.105 of the Government Code for the remaining information. Section 552.105 of the Government Code excepts from disclosure information relating to:

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) 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. Section 552.105 is designed to protect a governmental body's planning and negotiating position with regard to particular transactions. *See Open Records Decision Nos. 564 (1990), 357 (1982), 310 (1982)*. Information 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*.

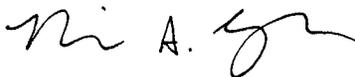
You state the city council passed and approved multiple option agreements between the city and Chaparral Rails to Trails, Inc. for right-of-way acquisition for water lines for the city. You explain, most recently, on June 7, 2012 the city council approved the third option agreement. You state the negotiating is ongoing with respect to possible right-of-way acquisition, and no final decision has been made or announced. You inform us some of the remaining responsive information relates to the location of the city's contemplated future right-of-way acquisition. Further, you explain some of the remaining responsive information pertains to the price of the real property. You argue release of the remaining responsive information would reveal the planning, negotiations, and potential acquisition of the right-of-way for the acquisition of water lines for the city, and the city has in good faith determined its release would impair the city's planning and negotiations with respect to the project. Based upon your representations, we conclude the city may withhold the remaining responsive information under section 552.105 of the Government Code.³

In summary, the city may withhold the information we have marked under section 552.107(1) of the Government Code. The city may withhold the remaining responsive information under section 552.105 of the Government Code.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Nicholas A. Ybarra
Assistant Attorney General
Open Records Division

NAY/ac

³As our ruling is dispositive, we need not address your remaining arguments against disclosure of the responsive information.

Ref: ID# 491167

Enc. Submitted documents

c: Requestor
(w/o enclosures)