ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 1, 2013

Mr. Matthew C. G. Boyle
Boyle & Lowry, L.L.P.
4201 Wingren Drive, Suite 108
Irving, Texas 75062-2763

OR2013-11182

Dear Mr. Boyle:

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# 491843.

The City of Grapevine (the "city"), which you represent, received a request for (1) any correspondence between a specified law firm and the city manager's office sent or received during a specified time period and (2) a copy of the current contract between the specified law firm and the city. You state the city is releasing some information. You claim the submitted information is excepted from disclosure under sections 552.105 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted correspondence, which we have marked, is not responsive because it falls outside of the specified time period. This ruling does not address the public availability of non-responsive information, and the city is not required to release non-responsive information in response to these requests.

Next, we note some of the responsive information falls within the scope of section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless the information is excepted from disclosure under section 552.108 of the Government Code or made confidential under the Act or other law. Gov't Code § 552.022(a)(1). The responsive information contains completed appraisal reports that are

subject to section 552.022(a)(1). Although you seek to withhold the information subject to section 552.022 under sections 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* Open Records Decision Nos. 676 at 6 (2002) (attorney-client privilege under section 552.107 may be waived), 564 (1990) (statutory predecessor to Gov't Code § 552.105 subject to waiver); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.105 and 552.107 do not make information confidential for purposes of section 552.022. Therefore, the information subject to section 552.022 may not be withheld under section 552.105 or section 552.107. 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. *See 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 for the information subject to section 552.022.

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:
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> > (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, no writ).

You claim the appraisal reports are privileged communications. We note, however, the responsive information indicates the appraisal reports were sent to parties who you have not established are privileged parties for purposes of Texas Rule of Evidence 503. As a result, we find you have failed to demonstrate that the appraisal reports document confidential communications that were made between privileged parties. Therefore, we conclude rule 503 is not applicable to the appraisal reports and they may not be withheld on this basis.

We now address your arguments for the responsive information not subject to section 552.022 of the Government Code. Section 552.107(1) of the Government Code 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 Exhibits B, C, D, and E, as well as the remaining information in Exhibit F, consist of communications among city employees and attorneys. You state these communications were made in furtherance of the rendition of professional legal services to the city. 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 at issue. Accordingly, the city may generally withhold the information at issue under section 552.107(1) of the Government Code. We note, however, some of the e-mail strings at issue include e-mails received from or sent to non-privileged parties. Furthermore, if the e-mails received from or sent to the non-privileged parties are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, if these non-privileged e-mails, 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 these non-privileged e-mails under section 552.107(1) of the Government Code.

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. We note this provision is designed to protect a governmental body's planning and negotiating position with regard to particular transactions. *See* Open Records Decision Nos. 564, 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. 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.'" Open Records Decision Nos. 357 at 3, 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 remaining information at issue in Exhibit F relates to the city's efforts to acquire real estate for a public project. You state the location of the project has not been announced or finalized. You state the city has not yet closed on its intended purchase, and the city is currently pursuing negotiations among various property options. You indicate the city has made a good-faith determination that the release of the information at issue would impair the city's planning and negotiating position with regard to this particular transaction. Therefore, if the information at issue is maintained by the city separate and apart from the otherwise privileged e-mail strings, then we conclude the city may withhold the information at issue under section 552.105 of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code.[1] Gov't Code § 552.117(a)(1). Section 552.117(a)(1) also applies to the personal

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[1]The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

cellular telephone number of a current or former official or employee of a governmental body, provided the cellular telephone service is not paid by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Therefore, if the non-privileged e-mails are maintained by the city separate and apart from the otherwise privileged e-mail strings, then to the extent the individual whose information we have marked timely requested confidentiality under section 552.024, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code, including the cellular telephone number if the cellular telephone service is not paid for by a governmental body.

Section 552.137 of the Government Code 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). *See* Gov't Code § 552.137(a)-(c). The e-mail addresses we have marked are not excluded by subsection (c). Therefore, to the extent the non-privileged e-mails are maintained by the city separate and apart from the otherwise privileged e-mail strings, the city must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. Regardless, the city must withhold the e-mail addresses we have marked in Exhibit A under section 552.137, unless the owners affirmatively consent to their public disclosure.

In summary, the city may generally withhold the responsive information not subject to section 552.022 of the Government Code under section 552.107(1) of the Government Code. If the non-privileged e-mails, 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 these non-privileged e-mails under section 552.107(1) of the Government Code. In this instance, (1) the city must withhold the information we have marked in the non-privileged e-mails under section 552.105 of the Government Code, (2) to the extent the individual whose information we have marked timely requested confidentiality under section 552.024 of the Government Code, the city must withhold the information we have marked in the non-privileged e-mails under section 552.117(a)(1) of the Government Code, including the cellular telephone number if the cellular telephone service is not paid for by a governmental body, and (3) the city must withhold the e-mail addresses we have marked in the non-privileged e-mails under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their public disclosure. The city must withhold the e-mail addresses we have marked in Exhibit A under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their public disclosure. The city must release the remaining responsive information.

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,

Sean Nottingham
Assistant Attorney General
Open Records Division

SN/tch

Ref: ID# 491843

Enc. Submitted documents

c: Requestor
(w/o enclosures)