



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 3, 2013

Ms. Rachel L. Lindsay  
Counsel for the City of Keene  
Brown & Hofmeister, LLP  
740 East Campbell Road, Suite 800  
Richardson, Texas 75081

OR2013-15281

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# 498094.

The City of Keene (the "city"), which you represent, received a request for the following: (1) copies of invoices or credit card receipts for all purchases connected with the former city mayors meeting at city hall; (2) copies of contracts or extensions of contracts pertaining to the purchase of a specified property and copies of any related checks; (3) correspondence, memoranda, or e-mails relating to B.E. Energy, including communications involving three named city employees; (4) copies of contracts or proposed contracts for the purchase of land by the city or any of its boards during a specified time period; and (5) agreements between Zacharias Real Estate and the city or any of its boards. You state the city has released information responsive to categories (1) and (4) above and will release more of the responsive information upon payment of costs. You state the city does not have any information responsive to category (5) above.<sup>1</sup> You claim the remaining requested information is excepted from disclosure under sections 552.107, 552.131,

---

<sup>1</sup>We note the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975); *see also* Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 416 at 5 (1984).

and 552.137 of the Government Code. You also state release of the submitted information may implicate the proprietary interests of third parties. Accordingly, pursuant to section 552.305 of the Government Code, you were required to notify these third parties of the request for information and of their 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 considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup> We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note portions of the submitted information, which we have marked, are not responsive to the instant request because they were created after the date the request was received. The city need not release nonresponsive information in response to this request, and this ruling will not address that information.

We note 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 information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from any third party explaining why its information should not be released. Therefore, we have no basis to conclude any third party has a protected proprietary interest in the responsive information. *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, the city may not withhold any of the responsive information on the basis of any proprietary interest any third party may have in it.

Section 552.107(1) of the Government Code 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

---

<sup>2</sup>We 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 that those records contain substantially different types of information than that submitted to this office.

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 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 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 to only 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 to only 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, orig. proceeding). 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 assert Exhibit C-1 consists of communications between city employees, consultants for the city, and city attorneys that were made for the purpose of providing legal advice to the city. You also assert these communications were made in confidence and have maintained their confidentiality. Based on your representations and our review, we find the city has demonstrated the applicability of the attorney-client privilege to Exhibit C-1, and it may generally be withheld under section 552.107(1). We note two of the e-mails consist of communications with representatives of B.E. Energy. You state the “individuals representing B.E. Energy have partnered with the [c]ity on an industrial project.” However, the submitted information reveals the city and B.E. Energy were engaged in financing negotiations regarding the industrial project at issue. Because these parties were negotiating the terms of an agreement, their interests were adverse at the time the communication was made. Accordingly, at the time the communications were made, the parties did not share a common interest that would allow the attorney-client privilege to apply to the communications. *See* TEX. R. EVID. 503(b)(1)(C); *In re Monsanto*, 998 S.W.2d 917, 922 (Tex. App.—Waco 1999, orig. proceeding.) (discussing the “joint-defense” privilege incorporated by rule 503(b)(1)(C)). Further, if the e-mails with B.E. Energy are removed from the e-mail string to which they are attached and stand alone, they are responsive to the request for

information. Therefore, if the e-mails with B.E. Energy, which we have marked, are maintained by the city separate and apart from the otherwise privileged e-mail string to which they are attached, then the city may not withhold this information under section 552.107(1).

Section 552.131 of the Government Code 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) protects the proprietary interests of third parties that have provided information to governmental bodies, not the interests of governmental bodies themselves. 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 661 at 5-6, 552 at 5 (attorney general will accept private person's claim under section 552.110(a) of Government Code if person establishes *prima facie* case for trade secret exception, and no one submits argument that rebuts claim as matter of law). Thus, the city may not withhold any of the information at issue under section 552.131(a) of the Government Code.

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. Gov't Code § 552.131(b). You assert Exhibits B and B-1 relate to economic development negotiations between the city, the Keene Community Development Corporation, the estate of E. K. Birdwell, and a named individual. You state Exhibits B and B-1 relate to financial incentives offered to the estate of E. K. Birdwell and the named individual by the city. You also explain no agreements had been reached at the time of the

request. However, upon review of your representations and the information at issue, we find you have not demonstrated how any of the information contained in Exhibit B or Exhibit B-1 consists of information about a financial or other incentive being offered to a business prospect by the city. Consequently, the city may not withhold any of the information in Exhibit B or Exhibit B-1 under section 552.131(b).

We note some of the remaining information is subject to section 552.136 of the Government Code.<sup>3</sup> Section 552.136 states “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” *Id.* § 552.136. Accordingly, we find the city must withhold the bank account and routing numbers we have marked under section 552.136 of the Government Code.

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). *Id.* § 552.137(a)-(c). The e-mail addresses at issue are not a type specifically excluded by section 552.137(c) of the Government Code. In addition, you state the city has not received consent for the release of the e-mail addresses at issue. Therefore, the city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code.

In summary, the city may generally withhold Exhibit C-1 under section 552.107(1) of the Government Code. However, if the e-mails we have marked exist separate and apart from the privileged e-mail string to which they are attached, the city may not withhold the marked e-mails under section 552.107(1) of the Government Code. The city must withhold the information we have marked under sections 552.136 and 552.137 of the Government Code. The remaining responsive information 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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](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

---

<sup>3</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

  
Jennifer Luttrall  
Assistant Attorney General  
Open Records Division

JL/som

Ref: ID# 498094

Enc. Submitted documents

c: Requestor  
(w/o enclosures)