



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 25, 2016

Ms. Patricia A. Rigney
City Attorney
City of Pharr
P.O. Box 1729
Pharr, Texas 78577

OR2016-19260

Dear Ms. Rigney:

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# 623876 (PIR-2016-219).

The City of Pharr (the "city") received a request for three categories of information pertaining to the financing and development of a specified project. You state you have released some information. You claim the submitted information is excepted from disclosure under sections 552.104, 552.105, 552.107, 552.110, and 552.131 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information was the subject of previous requests for information, as a result of which this office issued Open Records Letter No. 2016-16246 (2016). We note the city now seeks to withhold information under sections 552.104, 552.105, 552.107, and 552.131(b) of the Government Code that was previously ordered released in Open Records Letter No. 2016-16246. Section 552.007 of the Government Code provides that, if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the

city may not now withhold the information previously released in Open Records Letter No. 2016-16246 unless its release is expressly prohibited by law or the information is confidential under law. Although the city raises sections 552.104, 552.105, 552.107, and 552.131(b) of the Government Code for this information, these sections do not prohibit the release of information or make information confidential. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 592 (1991) (stating that governmental body may waive section 552.104), 564 (1990) (statutory predecessor to section 552.105 subject to waiver). Thus, the city may not now withhold the information previously ordered released in Open Records Letter No. 2016-16246 under section 552.104, section 552.105, section 552.107, or section 552.131(b) of the Government Code. However, as sections 552.110(b) and 552.131(a)(2) can make information confidential, we will address the applicability of these exceptions to the information previously ordered released in Open Records Letter No. 2016-16246.

Section 552.104 of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov't Code § 552.104. The “test under section 552.104 is whether knowing another bidder’s [or competitor’s information] would be an advantage, not whether it would be a decisive advantage.” *Boeing Co. v. Paxton*, 466 S.W.3d 831, 841 (Tex. 2015). The city states it competes with other entities to attract and encourage long-term business growth and long-term residency. The city indicates it has specific marketplace interests in the submitted information. Further, the city states it will be negotiating similar contracts in the near future and release of the submitted information would place the city at a competitive disadvantage in procuring such contracts. After review of the submitted information and consideration of the arguments, we find the city has established the release of some of the submitted information not previously released in Open Records Letter No. 2016-16246 would give advantage to a competitor or bidder. Thus, we conclude the city may withhold this information, which we have marked, under section 552.104(a) of the Government Code.¹ However, we find the city has failed to demonstrate release of the remaining information would give an advantage to a competitor or bidder. Accordingly, the city may not withhold the remaining information under section 552.104 of the Government Code.

Section 552.105(1) of the Government Code excepts from disclosure information relating to “the location of real or personal property for a public purpose prior to public announcement of the project[.]” Gov't Code § 552.105(1). 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

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

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. 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 will reveal the location of property the city purchased for a public purpose. However, you do not explain how release of this information will harm the city's negotiating position with respect to the purchase of other parcels or a particular pending transaction. Thus, we find you have failed to demonstrate the information at issue is excepted from disclosure under section 552.105(1) of the Government Code. We therefore conclude the city may not withhold the remaining information under section 552.105(1) of the Government Code.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* 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 "to facilitate the rendition of 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 only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). 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.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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).

Upon review, we find you have failed to demonstrate any of the remaining information constitutes privileged communications made for the rendition of professional legal services. Accordingly, the city may not withhold any of the remaining information under section 552.107(1) of the Government Code.

Although the city argues some of the remaining information is excepted under section 552.110(b) of the Government Code, that exception is designed to protect the interests of third parties, not the interests of a governmental body. *See Gov't Code* § 552.110 (excepts from disclosure trade secret or commercial or financial information obtained from third party). Thus, we do not address the city's argument under section 552.110.

The city asserts the remaining information is excepted under section 552.131(a)(2) of the Government Code, which reads as follows:

(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:

...

(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.

Id. § 552.131(a)(2). 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 release of any of the information at issue would cause a third party substantial competitive harm. *See Open Records Decision Nos.* 661 at 5-6 (1999), 552 at 5 (1990) (attorney general will accept private person's claim under section 552.110(a) of the 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)(2) of the Government Code.

In summary, the city may withhold the information we have marked under section 552.104(a) of the Government Code. The city must release the remaining 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,



Paige Lay
Assistant Attorney General
Open Records Division

PL/som

Ref: ID# 623876

Enc. Submitted documents

c: Requestor
(w/o enclosures)