



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 7, 2016

Mr. R. Gaines Griffin
Counsel for the Kerrville Public Utility Board
Davidson, Troilo, Ream & Garcia
601 NW Loop 410, Suite 100
San Antonio, Texas 78216-5511

OR2016-22674

Dear Mr. Griffin:

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# 629538.

The Kerrville Public Utility Board (the "board"), which you represent, received two requests for information pertaining to a specified settlement agreement and additional information regarding the use of board funds. You state the board has released some information. You claim portions of the submitted information are excepted from disclosure under sections 552.107 and 552.133 of the Government Code. You also state you notified the Lower Colorado River Authority (the "authority") 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* § 552.304 (interested party may submit comments stating why information should or should not be released). We have received comments from the authority. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the submitted information contains notices and agendas of public meetings. The notices and agendas of a governmental body's public meetings are specifically made public under provisions of the Open Meetings Act, chapter 551 of the Government Code. *See id.* §§ 551.041 (governmental body shall give written notice of date, hour, place, and subject of each meeting), .043 (notice of meeting of governmental body must be posted in place readily accessible to general public for at least 72 hours before scheduled time of meeting). Although we understand you seek to withhold portions of this information under sections 552.107 and 552.133, as a general rule, the exceptions to disclosure found in the Act

do not apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Accordingly, the board must release the submitted notices and agendas of the public meetings pursuant to sections 551.041 and 551.043 of the Government Code.

Section 552.104(a) of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). 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 authority states it has specific marketplace interests in the information at issue because it supplies electricity to more than one million people in all fifty-three counties in Texas and the information at issue relates to its competition in the wholesale power electric utility marketplace. In addition, the authority states disclosure of its information would “place it at a competitive disadvantage in the public power market by providing competitors with information that is related to [its] revenues, costs and share capacity with its customers.” After review of the information at issue and consideration of the arguments, we find the authority has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the board may withhold the information we marked under section 552.104(a).¹

Section 552.107(1) of the Government Code protects information coming 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 “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 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

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

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. *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 raise section 552.107(1) of the Government Code for Exhibit M and the remaining information in Exhibit N. You state the information at issue consists of communications between the board’s attorneys, attorneys for the City of Kerrville (the “city”), and city and board representatives that were made for the purpose of providing legal services to the board and the city. You explain the city is a privileged party for the purposes of the communications at issue. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find Exhibit M and the remaining information in Exhibit N consist of privileged attorney-client communications. Therefore, the board may withhold Exhibit M and the remaining information in Exhibit N under section 552.107(1) of the Government Code.

Section 552.133 of the Government Code excepts from disclosure a public power utility’s information that is “reasonably related to a competitive matter.” Gov’t Code § 552.133(b). Section 552.133 provides, in relevant part, the following:

(a) In this section, “public power utility” means an entity providing electric or gas utility services that is subject to the provisions of this chapter.

(a-1) For purposes of this section, “competitive matter” means a utility-related matter that is related to the public power utility’s competitive activity, including commercial information, and would, if disclosed, give advantage to competitors or prospective competitors. The term:

(1) means a matter that is reasonably related to the following categories of information:

(A) generation unit specific and portfolio fixed and variable costs, including forecasts of those costs, capital improvement plans for generation units, and generation unit operating characteristics and outage scheduling; [and]

(E) plans, studies, proposals, and analyses for system improvements, additions, or sales, other than transmission and distribution system improvements inside the service area for which the public power utility is the sole certified retail provider[.]

Id. § 552.133(a), (a-1)(1)(A), (E). Section 552.133(a-1)(2) provides fifteen categories of information that are not competitive matters. *Id.* § 552.133(a-1)(2). You indicate the board is a public power utility for the purposes of section 552.133. We understand you to assert Exhibits H, I, K, and L pertain to competitive matters of the board, specifically identified by subsections 552.133(a-1)(1)(A), (E). Further, the information at issue is not among the fifteen categories of information expressly excluded from the definition of “competitive matter” by section 552.133(a-1)(2). Based on your representations and our review, we find Exhibits H, I, K, and L relate to competitive matters as defined by section 552.133(a-1). Thus, we conclude the board must withhold Exhibits H, I, K, and L under section 552.133 of the Government Code.

In summary, the board must release the submitted notices and agendas of the public meetings pursuant to sections 551.041 and 551.043 of the Government Code. The board may withhold the information we marked under section 552.104(a) of the Government Code. The board may withhold Exhibit M and the remaining information in Exhibit N under section 552.107(1) of the Government Code. The board must withhold Exhibits H, I, K, and L under section 552.133 of the Government Code. The board 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,



Matthew Taylor
Assistant Attorney General
Open Records Division

MHT/bhf

Ref: ID# 629538

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)