



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 1, 2016

Ms. Josette Flores
Assistant City Attorney
Office of the City Attorney
City of El Paso
P.O. Box 1890
El Paso, Texas 79950-1890

OR2016-24273

Dear Ms. Flores:

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# 632670 (Case No. 16-1021-1116.005).

The City of El Paso (the "city") received a request for e-mails sent by a named individual during a specified time period. You state you have released some information. You claim the submitted information is excepted from disclosure under sections 552.104, 552.105, and 552.107 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we address the requestor's claim the city failed to comply with section 552.301 of the Government Code in requesting a ruling from this office. Section 552.301 prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b),

¹Although you raise section 552.101 of the Government Code in conjunction with sections 552.104, 552.105, and 552.107 of the Government Code, this office has concluded section 552.101 does not encompass other exceptions found in the Act. *See* Open Records Decision Nos. 676 at 1 -2 (2002), 575 at 2 (1990).

a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See id.* § 552.301(b). Further, pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). The city received the request for information on July 6, 2016. We note the city sought clarification of the request on July 18, 2016, and received clarification of the request on August 2, 2016. *See id.* § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). You state the city provided the requestor with a cost estimate pursuant to section 552.2615 of the Government Code and required a deposit. *See Gov't Code* §§ 552.2615(a), .263(a). You state the city received payment of the deposit on August 8, 2016. Thus, August 8, 2016, is the date on which the city is deemed to have received the request. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date that the governmental body receives deposit or bond). You inform us the city is closed on Fridays. This office does not count the date the request was received or days a governmental body is closed for the purpose of calculating a governmental body's deadlines under the Act. Accordingly, the city's ten and fifteen-business-day deadlines were August 24, 2016 and September 1, 2016, respectively. The envelope containing the information required by section 552.301(b) was meter-marked August 24, 2016, and the envelope containing the information required by section 552.301(e) was meter-marked September 1, 2016. *See id.* § 552.308(a)(1) (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Therefore, we find the city complied with the procedural requirements of section 552.301 of the Government Code in requesting this decision.

Section 552.104(a) excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." *Id.* § 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). You represent Exhibits B-1 through B-3 pertain to the naming rights of a city project, which is a competitive process. You argue release of the information at issue would undermine the contract negotiation process because "[t]he city will be negotiating similar contracts and related documents with other private entities and contractors in the foreseeable

future.” Further, you state release of this information “would place the city at a severe disadvantage by allowing other venues and local jurisdictions [...] to approach private entities who can provide naming rights funds for the public amenities of those governmental entities.” After review of the information at issue and consideration of the arguments, we find the city has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the city may withhold Exhibits B-1 through B-3 under section 552.104(a) of the Government Code.²

Section 552.105 excepts from disclosure information relating to the following:

- (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(1)-(2). 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 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 may 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 argue release of Exhibits C-1 through C-3 would harm the city’s ongoing negotiations for property it intends to purchase. We understand the city has made a good faith determination release of the information would impair the city’s planning and negotiating

²As our ruling is dispositive to the information at issue, we need not address the city’s section 552.107 argument against disclosure of this information.

position. Based on your representations and our review, we conclude the city may withhold Exhibits C-1 through C-3 under section 552.105 of the Government Code.³

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. 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).

The city explains the remaining information consists of communications made by attorneys for the city with authorized representatives of the city for the purpose of facilitating the rendition of professional legal services. The city states this information was intended to be and has remained confidential. Upon review, we find the city has demonstrated the applicability of the attorney-client privilege to the information at issue. Therefore, we

³As our ruling is dispositive to the information at issue, we need not address the remaining argument against disclosure of this information.

conclude the city may withhold the remaining information under section 552.107(1) of the Government Code.

In summary, the city may withhold Exhibits B-1 through B-3 under section 552.104(a) of the Government Code. The city may withhold Exhibits C-1 through C-3 under section 552.105 of the Government Code. The city may withhold the remaining information under section 552.107(1) 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,



Erin Groff
Assistant Attorney General
Open Records Division

EMG/som

Ref: ID# 632670

Enc. Submitted documents

c: Requestor
(w/o enclosures)