



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 3, 2017

Mr. Zachariah T. Evans
Counsel for the City of Bee Cave
Akers & Akers, LLP
13625 Pond Springs Road, Suite 204
Austin, Texas 78729

OR2017-25210

Dear Mr. Evans:

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# 682903.

The City of Bee Cave (the "city"), which you represent, received a request for correspondence during a specified time period involving city officials and related to a list of key terms. You state you will release 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 the requestor seeks "responsive information between April 15, 2017 and September 1, 2017." It is implicit in several provisions of the Act that the Act applies only to information already in existence. *See* Gov't Code §§ 552.002, .021, .227, .351. We note the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismiss'd); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983). Consequently, a governmental body is not required to comply with a standing request to supply information prepared in the future. *See* Attorney General Opinion JM-48 at 2 (1983); *see also* Open Records Decision Nos. 476 at 1 (1987), 465 at 1 (1987). Thus, the only

information encompassed by the present request consists of information the city maintained or had a right of access to as of the date it received the request.

Next, the city argues Exhibit C is not responsive to the request because it is only tangentially related to the key words or phrases listed by the requestor. However, we note a governmental body must make a good faith effort to relate a request to information held by the governmental body. *See* Open Records Decision No. 561 at 8 (1990). Upon review, we find Exhibit C to be responsive to the request. We will therefore address your claimed exceptions for Exhibit C.

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(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. 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 state Exhibit C pertains to prospective negotiations the city has had with certain real property owners. You state the city has not publicly announced this information. We understand the city has made a good faith determination that release of this information would harm the city's negotiating position with respect to the acquisition of the property at issue. Based on your representations and our review, we find section 552.105 is applicable to the information at issue. Therefore, the city may withhold Exhibit C under section 552.105 of the Government Code.

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).

You claim Exhibit B is protected by section 552.107(1) of the Government Code. You state Exhibit B consists of communications between the city attorney and city employees and officials. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the city. You further state these communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the responsive information at issue. Thus, the city may generally withhold the information at issue under section 552.107(1) of the Government Code. We note, however, some of these e-mail strings includes e-mails received from and sent to parties with whom you have not demonstrated the city shares a privileged relationship. Furthermore, if the e-mails received from and sent to non-privileged parties are removed from the e-mail string and stand alone, they are responsive to the request for information. Therefore, 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 that instance, some of the remaining information may be subject to section 552.137 of the Government Code.¹ Section 552.137 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). Gov’t Code § 552.137(a)-(c). Section 552.137 does not apply to an institutional e-mail address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address of a vendor who seeks to contract with a governmental body, an e-mail address maintained by a governmental entity for one of its officials or employees, or an e-mail address provided to a governmental body on a letterhead. *See id.* § 552.137(c). We are unable to determine whether the personal e-mail addresses we marked within the remaining information at issue, which are located within e-mails communicating official business of the city, belong to one of the categories described in section 552.137(c). Further, we are unable to determine whether the personal e-mail addresses we have marked belong to government employees or officials. Thus, we rule conditionally. To the extent the personal e-mail addresses we have marked in the remaining information belong to government officials or employees, or to the extent subsection (c) applies, this information is not subject to section 552.137 and may not be withheld on that basis. *See Austin Bulldog v. Leffingwell*, 490 S.W.3d 240 (Tex. App.—Austin 2016, no pet.) (holding personal e-mail addresses of government officials used to conduct official government business are not e-mail addresses of “members of the public” for purposes of Gov’t Code § 552.137(a)). However, to the extent the personal e-mail addresses we have marked are not the personal e-mail addresses of government officials or employees and subsection (c) does not apply, this information is subject to section 552.137 of the Government Code and must be withheld under section 552.137, unless the owners of the e-mail addresses affirmatively consent to their release.

In summary, the city may withhold Exhibit C under section 552.105 of the Government Code. The city may generally withhold the responsive information in Exhibit B under section 552.107(1) of the Government Code. However, if the city maintains the non-privileged e-mails, which we have marked, separate and apart from the otherwise privileged e-mail strings to which they are attached, then the city must release the marked e-mails. To the extent the city releases the marked e-mails, and to the extent the personal e-mail addresses we have marked are not the personal e-mail addresses of government officials or employees and subsection (c) does not apply, the city must withhold the

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

information we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release.

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,



Kelly McWethy
Assistant Attorney General
Open Records Division

KSM/som

Ref: ID# 682903

Enc. Submitted documents

c: Requestor
(w/o enclosures)