



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 16, 2019

Ms. Lynn Trumbul
Senior Assistant City Secretary
City of Hutto
500 West Live Oak Street
Hutto, Texas 78634

OR2019-19331

Dear Ms. Trumbul:

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# 775565.

The City of Hutto (the "city") received two requests from different requestors for information pertaining to specified city developments. You claim the submitted information is excepted from disclosure under sections 552.107, 552.110, and 552.131 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹ We have also received and considered the comments submitted by the requestors. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information).

¹We 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.

Initially, we must address the procedural obligations of the city under section 552.301 of the Government Code, which 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), 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. *Id.* § 552.301(b). The city states it received the first request for information on April 22, 2019 and received the second request for information on May 8, 2019. The city does not inform us it was closed on any date after these requests. Thus, the city's ten-business-day deadlines to request a ruling were May 6, 2019 and May 22, 2019. The envelopes containing the requests for rulings from this office were postmarked May 6, 2019 and May 22, 2019. *See* Gov't Code § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail). The requests for ruling indicates the requestors were copied on the correspondence. *See id.* However, we note you failed to raise sections 552.110 and 552.131 of the Government Code within the required ten-day deadline for the first request, and failed to raise sections 552.107, 552.110, and 552.131 within the required ten-day deadline for the second request. *See id.* § 552.301(b). Accordingly, we conclude the city failed to comply with the requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ). You assert sections 552.107, 552.110, and 552.131 of the Government Code for the submitted information. Because sections 552.107 and 552.131 of the Government Code can provide compelling reasons to overcome the presumption of openness, we will address your arguments under these sections for the submitted information. However, although you assert some of the submitted information is excepted under section 552.110 of the Government Code, that exception is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address your argument under section 552.110 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. *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). 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.*, 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. *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 state the information you marked consists of communications between city officials, city employees, and outside counsel for the city that were made for the purpose of providing legal services to the city. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the information you marked consists of privileged attorney-client communications. Therefore, the city may generally withhold the information you indicated under section 552.107(1) of the Government Code. We note, however, the otherwise privileged e-mail string includes e-mails received from or sent to non-privileged parties. Furthermore, if the e-mails received from or sent to non-privileged parties are removed from the otherwise privileged e-mail string in which they appear and stand alone, they are responsive to the requests for information. Therefore, if these non-privileged e-mails, which we marked, are maintained by the city separate and apart from the otherwise privileged e-mail string in which they appear, then the city may not withhold these non-privileged e-mails 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* Open Record Decision Nos. 661 at 5-6 (1999), 552 at 5 (1990). 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). Section 552.131(b) protects the interests of governmental bodies, not third parties. You state the remaining information pertains to economic development negotiations. However, upon review we find the remaining information does not reveal an incentive being offered by the city. Accordingly, the city may not withhold any of the remaining information under section 552.131(b).

In summary, the city may generally withhold the information you indicated under section 552.107(1) of the Government Code. However, if the city maintains the non-privileged e-mails, which we marked, separate and apart from the otherwise privileged e-mail string in which they appear, then the city must release the non-privileged emails. 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,

A handwritten signature in cursive script that reads "D. Michelle Case". The signature is written in black ink and includes a long, horizontal flourish at the end.

D. Michelle Case
Assistant Attorney General
Open Records Division

DMC/gw

Ref: ID# 775565

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)