



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 20, 2020

Mr. Jose E. de la Fuente
Counsel for the Texas Municipal Power Agency
Lloyd Gosselink Rochelle & Townsend, P.C.
816 Congress Avenue, Suite 1900
Austin, Texas 78701

OR2020-20996

Dear Mr. de la Fuente:

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# 840035 (TMPA PIC ID 202006041).

The Texas Municipal Power Agency (the "agency"), which you represent, received a request for three categories of information pertaining to a specified agency board meeting. You state the agency has released some information to the requestor. You claim some of the submitted information is excepted from disclosure under sections 552.103, 552.104, 552.105, 552.107, and 552.133 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

[T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Id. § 552.022(a)(1). The submitted information includes a completed report that is subject to section 552.022(a)(1). The agency must release the completed report pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the

Government Code or is made confidential under the Act or other law. *See id.* You seek to withhold the information subject to section 552.022 under section 552.105 of the Government Code. However, section 552.105 is discretionary in nature and does not make information confidential under the Act. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 564 (1990) (statutory predecessor to section 552.105 subject to waiver). Therefore, the agency may not withhold the information subject to section 552.022 of the Government Code, which we indicated, under section 552.105 of the Government Code. However, information encompassed by section 552.022 may be withheld under section 552.104 of the Government Code. *See* Gov't Code § 552.104(b) (information protected by section 552.104 not subject to required public disclosure under section 552.022(a)). Additionally, we will address your argument under section 552.105 for the information not subject to section 552.022(a)(1).

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 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 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. *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 portions of the submitted information consist of communications involving attorneys for the agency and agency employees and officials that were made in furtherance of the rendition of professional legal services to the agency. You state these communications were intended to be, and have remained, confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to some of the information at issue. Accordingly, the agency may withhold the information we indicated under section 552.107(1) of the Government Code.¹ However, upon review, we find a portion of the information you seek to withhold under section 552.107 has been shared with individuals you have not demonstrated are privileged parties. Therefore, we conclude you have failed to establish this information constitutes a communication between or among privileged parties for the purposes of section 552.107(1), and the agency may not withhold it on that basis.

Section 552.104(a) of the Government Code excepts from disclosure information that a governmental body demonstrates, if released, would “harm its interests by providing an advantage to a competitor or bidder in a particular ongoing competitive situation or in a particular competitive situation where the governmental body establishes the situation at issue is set to reoccur or there is a specific and demonstrable intent to enter into the competitive situation again in the future.” 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). After review of the information at issue and consideration of the arguments, we find you have established the release some of the information at issue would harm the agency’s interests by providing an advantage to a competitor or bidder in a particular ongoing competitive situation. Thus, we conclude the agency may withhold the information we indicated under section 552.104(a) of the Government Code.² However, we find you have failed to demonstrate the applicability of section 552.104 to the remaining information at issue. Thus, we conclude the agency may not withhold the remaining information at issue under section 552.104(a).

Section 552.105 of the Government Code excepts from disclosure information relating to “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(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. 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

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

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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 assert some of the remaining information relates to the appraisal or purchase price of real property the agency intends to sell. You state release of the information at issue prior to completion of the transaction would impair the agency's planning and negotiating position with respect to sale of the property at issue. We understand the agency has made a good-faith determination release would harm its negotiating position. Based on your representations and our review, we conclude the agency may withhold the information we indicated under section 552.105 of the Government Code.

In summary, the agency may withhold the information we indicated under section 552.107(1) of the Government Code. The agency may withhold the information we indicated under section 552.104(a) of the Government Code. The agency may withhold the information we indicated under section 552.105 of the Government Code. The agency 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Gerald A. Arismendez
Assistant Attorney General
Open Records Division

GAA/jm

Ref: ID# 840035

Enc. Submitted documents

c: Requestor
(w/o enclosures)