



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 9, 2020

Mr. David T. Ritter
Counsel for the City of McKinney
Brown & Hofmeister, L.L.P.
740 East Campbell Road, Suite 800
Richardson, Texas 75081

OR2020-30822

Dear Mr. Ritter:

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# 857247 (Ref. No. G16262).

The City of McKinney and the McKinney Economic Development Corporation (collectively, the "city"), which you represent, each received a request from the same requestor for information pertaining to a specified city project. The city states it will release some of the requested information. The city claims the submitted information is excepted from disclosure under sections 552.107, 552.110, and 552.131 of the Government Code. Additionally, the city states release of the submitted information may implicate the proprietary interests of Tupps Brewery ("Tupps"). Accordingly, the city states, and provides documentation showing, it notified Tupps of the requests 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 § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have considered the exceptions the city claims and reviewed the submitted representative sample of information.¹ We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

¹ We 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 those records contain substantially different types of information than that submitted to this office.

Initially, we note some of the submitted information, which we have marked, is not responsive to the instant requests for information because it was created after the date the city received the instant requests for information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983). This ruling does not address the public availability of any information that is not responsive to the requests and the city is not required to release such information in response to these requests.

Next, we note the city raises section 552.110 of the Government Code. Section 552.110 of the Government Code protects (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See Gov't Code § 552.110(b)-(c)*. Although the city argues some of the responsive information is excepted under section 552.110, that exception is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address the city's argument under section 552.110 of the Government Code.

Next, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Tupps explaining why the information at issue should not be released. Therefore, we have no basis to conclude Tupps has a protected proprietary interest in the responsive information. *See, e.g., id.* § 552.110 (requiring the provision of specific factual evidence demonstrating the applicability of the exception). Accordingly, the city may not withhold the responsive information on the basis of any proprietary interest Tupps may have in the information.

Next, the city informs us some of the submitted information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2020-26610 (2020). In that ruling, we determined the city: (1) must release the requested e-mail communications pursuant to section 552.302 of the Government Code because the city did not submit them for our review; (2) may withhold the information we marked under section 552.131(b) of the Government Code; (3) must withhold the bank account and routing numbers we marked under section 552.136 of the Government Code; and (4) must release the remaining information. We assume the city released the information at issue. We have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, to the extent the requested information is identical to the information previously withheld in Open Records Letter No. 2020-26610, the city may continue to rely on Open Records Letter No. 2020-26610 as a previous determination and withhold any identical information in accordance with that ruling. *See Open Records Decision No. 673 (2001)* (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

However, we note you now seek to withhold information under sections 552.107 and 552.131 of the Government Code that may have been previously ordered released in Open Records Letter No. 2020-26610. We note the Act does not permit the selective disclosure of information. Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential by law. *See id.* § 552.007; Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the city may not now withhold the information that was previously released unless its release is expressly prohibited by law or the information is confidential by law. *See Gov't Code* § 552.007. Although the city seeks to withhold the information at issue under sections 552.107 and 552.131(b) of the Government Code, these sections are discretionary exceptions to disclosure and do not prohibit the release of information or make information confidential under the Act. *See* Open Records Decision Nos. 676 at 10-11 (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the city may not now withhold any information that was previously ordered released in Open Records Letter No. 2020-26610 under section 552.107 or section 552.131(b) of the Government Code. However, we will address the arguments against disclosure of the information that is not subject to the prior ruling.

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. ORD 676 at 6-7. 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). 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 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 states the information it indicated consists of communications between attorneys for the city and city employees and officials that were made in furtherance of the rendition of professional legal services to the city. The city states the communications were intended to be, and have remained, confidential. Based on these representations and our review, we find the city has demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, to the extent the information at issue was not previously released in accordance with Open Records Letter No. 2020-26610, the city may withhold the information it indicated under section 552.107(1) of the Government Code.²

Section 552.131 of the Government Code relates to economic development information and provides, in part, the following:

(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) excepts from disclosure only “trade secret[s] of [a] business prospect” and “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.” *Id.* § 552.131(a). Section 552.131(a) protects the proprietary interest of third parties that have

² In this instance, as our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

provided information to governmental bodies, not the interests of the government bodies themselves. Thus, we do not address the city's arguments under section 552.131(a) for the information at issue.

Section 552.131(b) protects information about a financial or other incentive that is being offered to a business prospect by a governmental body or another person. *See id.* § 552.131(b). Section 552.131(b) protects the interests of governmental bodies, not third parties. The city asserts the information at issue relates to confidential economic development negotiations that have not resulted in a final agreement with the business prospect. Upon review, we find some of the information at issue is protected by section 552.131(b). Accordingly, the city may withhold the information we have marked under section 552.131(b) of the Government Code. However, we find the city has not demonstrated any of the remaining information reveals financial or other incentives that are being offered to a business prospect. Thus, we conclude the city may not withhold any of the remaining information under section 552.131(b) of the Government Code.

Section 552.136(b) of the Government Code provides, “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.”³ *Id.* § 552.136(b); *see id.* § 552.136(a) (defining “access device”). Upon review, we find the city must withhold the bank account and routing numbers we have marked under section 552.136 of the Government Code.

In summary, to the extent the responsive information is identical to the information previously withheld in Open Records Letter No. 2020-26610, we conclude the city may rely on Open Records Letter No. 2020-26610 as a previous determination and withhold the identical information in accordance with that ruling. To the extent the city has previously released the information at issue, the city may not now withhold the information that was previously released in Open Records Letter No. 2020-26610 and must release any identical information. To the extent the information at issue was not previously released in accordance with Open Records Letter No. 2020-26610, the city may withhold the information it indicated under section 552.107(1) of the Government Code. In any event, the city may withhold the information we have marked under section 552.131(b) of the Government Code; must withhold the bank account and routing numbers we have marked under section 552.136 of the Government Code; and must release the remaining responsive 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

³ The 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).

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,

Alexandra C. Burks
Assistant Attorney General
Open Records Division

ACB/be

Ref: ID# 857247

Enc. Submitted documents

c: Requestor
(w/o enclosures)

1 Third Party
(w/o enclosures)