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January 13, 2023

Via Priority Mail RRR (9465 9112 0620 3582 8627 15)

Honorable Ken Paxton
Office of the Attorney General
Open Records Division
P.O. Box 12548
Austin, Texas 78711-2548

Re: Request for Open Records Ruling

Dear Attorney General Paxton:

By letter dated January 6, 2023, Del Valle Independent School District (the “District”) requested your decision that certain information is exempt from disclosure under the Texas Public Information Act (the “Act”). The ten business-day statutory deadline for requesting your decision was January 6, 2023.¹ The 15 business-day statutory deadline for submitting written comments is January 13, 2023.² The District has met both deadlines.

¹ Tex. Gov’t Code § 552.301(b). The District was closed for Winter Break from December 19, 2022 to December 30, 2022. *2022–2023 Academic Calendar*, Del Valle Independent School District, <https://www.dvisd.net/calendar> (last visited Jan. 5, 2023). Your office does not currently count holidays or skeleton crew days observed by the District as business days for the purpose of calculating the District’s deadlines under the Act. Office of the Att’y Gen. of Tex., *Public Information Act Handbook 2022*, at 42.

The District is aware that the Austin Court of Appeals recently held that skeleton crew days and holidays observed by a governmental body that do not fall on Saturdays, Sundays, or certain legal holidays do not toll TPIA deadlines. *Tex. Comm’n on Env’t Quality*, No. 03-21-00256-CV, 2022 WL 17096693 (Tex. App.—Austin Nov. 22, 2022, no pet. h.). The District understands that your office is not enforcing this decision while it is being appealed.

² Tex. Gov’t Code § 552.301(e).

BACKGROUND

As stated in the District's January 6, 2023 letter, Ms. Kristen Stanciu requested the following information on December 9, 2022:

For the time period of 01/01/2020 to present: [] Communications in the possession of the superintendent and the board of trustees regarding the Chapter 313 value limitation agreement (no. 1496) and supplemental payment agreements with Colorado River Project[,] LLC for their electric vehicle manufacturing plant. Communications include[] but [are] not limited to emails, text messages, messages on social media, Slack or whatever other internal messaging services your district uses, postal mail, and/or handwritten notes. This includes all email addresses and smartphones used by any or all of these parties for official business, whether they are personal or district[-]owned.³

In its January 6, 2023 letter, the District requested a ruling that portions of the requested information were exempt from disclosure under Sections 552.101 through 552.151 of the Government Code.⁴ As required by the Act, the District submits these "written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld."⁵ The District has attached a representative sample of the requested information, marked and highlighted to indicate which portions the District seeks to withhold.⁶

³ Exhibit A.

⁴ Tex. Gov't Code § 552.301(a).

⁵ *Id.* § 552.301(e)(1)(A).

⁶ *Id.* § 552.301(e)(2). The representative sample of records submitted to your office is truly representative of the requested records as a whole. *See generally* Open Records Decision No. 499 (1988). Moreover, any redactions that are in the submitted information were made by third parties before the District possessed the information. Exhibit B-2 at 3 (redacting an account number).

Where a page contains a reference to specific exceptions (*e.g.*, 552.107, 552.111) and highlighted material, the District only seeks to withhold the highlighted material. Where a page only contains a reference to specific exceptions with no highlighted material, the District seeks to withhold the entire page (or believes a third party may have interests in withholding the entire page).



STANDARD OF REVIEW

The attorney general does not resolve factual disputes in the open records ruling process.⁷ When fact issues are not resolvable as a matter of law, the attorney general must rely upon the facts alleged by the governmental body requesting the opinion or the facts discernable from the submitted documents.⁸

ARGUMENTS AND AUTHORITIES

A. Attorney-Client Privilege

Communications between attorneys and their clients are generally excepted from disclosure under the Act.⁹ Specifically, Section 552.107 of the Government Code states that information is excepted from required disclosure if:

it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Evidence or the Texas Disciplinary Rules of Professional Conduct¹⁰

Section 552.107 encompasses the same information protected by Texas Rule of Evidence 503, which protects attorney-client communications.¹¹ The attorney-client privilege is “the oldest of the privileges for confidential communications known to the common law.”¹² The privilege is designed “to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.”¹³

To establish that information is attorney-client privileged, a governmental body must establish the following: (1) the information constitutes or documents a

⁷ See Open Records Decision No. 592 at 2 (1991).

⁸ See Open Records Decision No. 552 at 4 (1990).

⁹ Tex. Gov’t Code § 552.107(1).

¹⁰ *Id.*

¹¹ Open Records Decision No. 676 at 6–7 (2002).

¹² *United States v. Zolin*, 491 U.S. 554, 562 (1989).

¹³ *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).



communication; (2) the communication was made “to facilitate the rendition of professional legal services” to the District; (3) the communication was between or among clients, client representatives, lawyers, or lawyer representatives; and (4) the communication was confidential.¹⁴ Here, the District can meet its burden.

First, the emails at issue constitute or document communications. Email is “a system for sending messages” over the internet.¹⁵ Your office has routinely concluded that emails are “communications.”¹⁶ Further, some of the emails have contracts or resolutions attached or document legal advice rendered in another setting.

Second, the communications were made to facilitate the rendition of professional legal services. For example, the emails provide draft documents and contain advice regarding legal strategy to facilitate the process under Chapter 313 of the Tax Code. To the extent any emails or attachments contain factual information, it was collected and prepared by the District’s attorneys as support to render legal advice.¹⁷

Third, the communications were between or among District representatives and outside counsel. Your office requires governmental bodies to inform you “of the identities and capacities of the individuals to whom each communication at issue has been made.”¹⁸ Therefore, the District identifies the following individuals:

ATTORNEYS

Michelle Morris and Rogers, Morris,
Grover, LLP, *Outside Counsel*

DISTRICT REPRESENTATIVES

Annette Tielle, *Superintendent*
Rebecca Birch, *Trustee*
Jonathan Harris, *Chief Compliance,
Governmental and Community
Relations Officer*
Daniel Casey, *District Consultant*
Kathy Mathias, *District Consultant*

¹⁴ Open Records Decision No. 676 at 6–11.

¹⁵ *Email*, DICTIONARY.COM, <https://bit.ly/3d2AcCv> (last visited Aug. 8, 2022).

¹⁶ *See, e.g.*, Tex. Att’y Gen. OR2022-31154, OR2013-12509, OR2013-12111.

¹⁷ *See Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328, 334–35 (Tex. App.—Austin 2000, pet. denied).

¹⁸ Open Records Decision No. 676 at 8.



The identified attorney and law firm represented the District as attorneys – not as investigators, business advisors, or in any other capacity.¹⁹ To the extent some of the emails contain facts, the District observes that the rendition of legal advice was predicated on those facts.²⁰ Further, all the emails at issue were between District employees and attorneys, as evidenced by the domain “dvisd.net” in the District employees’ email addresses.²¹ Other District representatives, such as Daniel Casey and Kathy Mathias, were financial consultants that facilitated the Chapter 313 process.

Fourth, the communications at issue were confidential. Many were marked as “Privileged and Confidential” and included confidentiality notices. Additionally, the District has trained its trustees and employees on how emails from attorneys are confidential and should not be disclosed to third parties. District trustees, employees, consultants, and outside counsel did not share these confidential communications with third parties. Further, all of the communications at issue are between attorneys and clients.

A governmental body may waive the attorney-client privilege through voluntary or inadvertent disclosure.²² On information and belief, the information has remained confidential since its inception and has only been released for the purpose of seeking your decision. Therefore, the District did not waive the privilege.

Therefore, the District requests your determination that the information marked “552.107,” and the whole to which it is representative, is excepted from disclosure by the attorney-client privilege.²³

B. Deliberative Process Privilege

Section 552.111 of the Government Code excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with an agency”²⁴ Your office has interpreted Section 552.111 to incorporate the deliberative process privilege, which protects from disclosure intraagency and interagency communications consisting of advice, opinion, or recommendations on

¹⁹ See, e.g., *Cornyn*, 25 S.W.3d at 332–35.

²⁰ *Id.*

²¹ See generally Exhibit B-1.

²² Tex. R. Evid. 511(a)(1); *Paxton v. City of Dallas*, 509 S.W.3d 247, 263 (Tex. 2017).

²³ Exhibit B-1.

²⁴ Tex. Gov’t Code § 552.111.



policymaking matters of the governmental body at issue.²⁵ The deliberative process privilege is designed “to encourage frank and open discussions within the agency in connection with its decision-making processes” pertaining to policy matters.²⁶ But “[a]n agency’s policymaking functions do not encompass routine internal administrative and personnel matters.”²⁷ Moreover, your office has determined that:

where a document is genuinely a preliminary draft of a document that has been released or is intended for release in its final form, the draft necessarily represents the advice, opinion, and recommendation of the drafter as to the form and content of the final document. To the extent the content of the preliminary draft has appeared in the final version, it is already on the public record. The release of an edited version of the preliminary draft that includes only material incorporated into the final draft would not make more of the subject matter available to the public. It would, however, reveal something about the deliberative process by indicating where additions and deletions were made in the preliminary draft as it was reviewed.²⁸

Section 552.111 protects factual information in the draft that will also be included in the final version of the document.²⁹ Your office has applied this same reasoning to draft contracts and other documents.³⁰

Here, the marked emails are between District employees. The marked emails and their attachments (including a draft contract) have only been reviewed internally by District employees, the District’s attorneys, and the District’s financial consultants in some instances. They have not been shared with any other third party. Furthermore, the marked documents consist of advice, opinions, or recommendations on policymaking matters of the District. And even to the extent the District’s representatives or attorneys do not

²⁵ *Arlington Indep. Sch. Dist. v. Tex. Att’y Gen.*, 37 S.W.3d 152, 158 (Tex. App.—Austin 2001, no pet.).

²⁶ *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ).

²⁷ *City of Garland v. Dall. Morning News*, 22 S.W.3d 351, 363–64 (Tex. 2000).

²⁸ Open Records Decision No. 559 at 2 (1990).

²⁹ *Id.* at 2–3.

³⁰ *E.g.*, Tex. Att’y Gen. OR2010-0284 (draft contracts and resolutions), OR2016-08417 at *2 (draft contract), OR2012-07734 at *2 (same), OR2010-15653 at *1 (same).



expressly denote advice and recommendations apart from the drafts themselves, “the draft[s] necessarily represent[] the advice, opinion, and recommendation of the drafter[s].” The correspondence and related drafts not only address the specific Chapter 313 project at issue, but they also have a broader impact on the District’s practices and strategies for evaluating, negotiating, and approving future Chapter 313 applications, agreements, and resolutions. Indeed, the draft contract and related emails demonstrate the ongoing deliberative process. As such, the information marked “552.111” relates to significant policymaking subject matters for the District. Lastly, the submitted draft (and the whole that it represents) are available for viewing in its final form and are not the subject of this request.³¹ Your office has concluded that identical information was excepted from disclosure under analogous circumstances.³²

Moreover, Section 552.111 can also encompass communications between a governmental body and a third party, including consultants or other governmental bodies with a common deliberative process or privity of interest.³³ Such is the case here.

First, Moak Casey and two of its individual employees, Daniel Casey and Kathy Mathias, acted as the District’s financial consultants to facilitate the Chapter 313 process. The District used the financial consultants’ advice in its policymaking role to deliberate on its strategies and decisions under Chapter 313 of the Tax Code. Both the District and Moak Casey share privity of interest and a common deliberative process and do not have adverse interests. The final forms of any drafts generated are available for viewing in their final form and are not the subject of this request.³⁴ Your office has concluded that similar information was excepted from disclosure under analogous circumstances.³⁵

Second, Section 313.028 of the Tax Code expressly entitles school district “to request and receive assistance from . . . the [Texas] [C]omptroller [of Public Accounts]” (the “Comptroller”).³⁶ Pursuant to this section, the Comptroller assists school districts in performing their duties under Chapter 313 of the Tax Code. Here, the District requested and received assistance from the Comptroller with respect to the Chapter 313 process. Both

³¹ See generally Exhibit A (only requesting “communications”). While the final forms of the documents are not subject to this request, the District has nonetheless produced them for the requestor.

³² *Supra* note 30.

³³ See Open Records Decision No. 561 at 9 (1990).

³⁴ See generally Exhibit A (only requesting “communications”).

³⁵ *E.g.*, Tex. Att’y Gen. OR2015-26536 at *3.

³⁶ Tex. Tax Code § 313.025(c)(1).



entities share a privity of interest in fulfilling their statutory obligations with respect to Chapter 313 applications. For example, both the Comptroller and the District share an interest in improving the state's economy and job market.³⁷ And the Comptroller's correspondence, recommendations, and advice constitute a common deliberative process. The District and the Comptroller were not negotiating a contract, nor were their interests adverse.³⁸ The documents generated following the common deliberative process are available for viewing in their final form and have been released to the requestor.³⁹ Your office has concluded that similar information was excepted from disclosure under analogous circumstances.⁴⁰

Therefore, the District requests your determination that the information marked "552.111," and the whole to which it is representative, is excepted from disclosure under the deliberative process privilege.⁴¹

C. Competition

Section 552.104 of the Government Code excepts from disclosure "information [that, if released,] would harm [the governmental body's] 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."⁴² The "test under [S]ection 552.104 is whether knowing another bidder's [or competitor's information] would be an advantage, not whether it would be a decisive advantage."⁴³

In enacting Chapter 313 of the Tax Code, the Legislature intended to facilitate Texas's economic development. Section 313.003 of the Tax Code explains the multiple purposes contemplated by the Legislature:

³⁷ *Id.* § 313.003(4);

³⁸ *See* Open Records Decision No. 561 at 9.

³⁹ The final versions of the documents are also available on the Comptroller's website. *Texas Comptroller of Public Accounts, Del Valle ISD No. 1496, Colorado River Project, LLC and Tesla Inc. f/k/a Colorado River Project, LLC*, <https://bit.ly/3k44sAt> (last visited Jan. 11, 2022).

⁴⁰ *E.g.*, Tex. Att'y Gen. OR2018-00874, OR2012-03037.

⁴¹ Exhibit B-1.

⁴² Tex. Gov't Code § 552.104(a).

⁴³ *Boeing Co. v. Paxton*, 466 S.W.3d 831, 841 (Tex. 2015).



The purposes of [Chapter 313 of the Tax Code] are to:

- (1) encourage large-scale capital investments in this state;
- (2) create new, high-paying jobs in this state;
- (3) *attract to this state large-scale businesses that are exploring opportunities to locate in other states or other countries;*
- (4) *enable state and local government officials and economic development professionals to compete with other states by authorizing economic development incentives that are comparable to incentives being offered to prospective employers by other states and to provide state and local officials with an effective means to attract large-scale investment;*
- (5) strengthen and improve the overall performance of the economy of this state;
- (6) expand and enlarge the ad valorem tax base of this state;
and
- (7) enhance this state's economic development efforts by providing state and local officials with an effective economic development tool.⁴⁴

Consistent with these statutory purposes, the Legislature specifically intended for “economic development decisions involving school district taxes should occur at the local level with oversight by the state and should be consistent with identifiable statewide economic development goals.”⁴⁵ In other words, the Legislature has expressly charged “local government officials” at school districts with helping Texas “compete with other states” to “attract . . . large-scale businesses that are exploring opportunities to locate in other states or other countries.”⁴⁶

⁴⁴ Tex. Tax Code § 313.003 (emphasis added).

⁴⁵ *Id.* § 313.004.

⁴⁶ *Id.* § 313.003(3)–(4).



In accordance with the Legislature’s statutory purposes and intent, the District is committed to partnering with private businesses to facilitate job creation in Texas.⁴⁷ This statutorily authorized practice benefits Texas generally, but it also (1) improves work prospects for District graduates, and (2) ensures that the District’s career readiness educational programming will serve its students well.⁴⁸ In engaging in the Chapter 313 process, the District facilitates “competing with other states for the expansion and recruitment of businesses by providing various incentives and employing strategies designed to attract new business to the state or assist with the expansion of an existing business within the state.”⁴⁹ Accordingly, the District has “specific marketplace interests in the information at issue because it [assists in] compet[ing] on behalf of the state to recruit and expand businesses within the state.”⁵⁰ If the information is released, it “would provide a competitive advantage to competing states, as well as companies considering relocation or expansion in the state.”⁵¹ Accordingly, it would undermine the competitive mission the Legislature charged the District with carrying out. Your office has concluded that identical information was excepted from disclosure under analogous circumstances.⁵²

Therefore, the District requests your determination that the information marked “552.104,” and the whole to which it is representative, is excepted from disclosure.⁵³

D. Third-Party Interests

Section 552.305(d) of the Government Code provides that “[i]f release of a person’s proprietary information may be subject to [certain exceptions], the governmental body that requests an attorney general decision . . . shall make a good faith attempt to notify that

⁴⁷ See generally *id.* §§ 313.001–.171.

⁴⁸ See generally Tex. Educ. Code §§ 11.002 (charging school districts with “the primary responsibility for implementing the state’s system of public education and ensuring student performance in accordance with this code”), 11.186 (requiring school districts to “adopt college, career, and military readiness plans”); see also generally Del Valle ISD, *Career & Technical Education (CTE)*, <https://bit.ly/3CGy7Gn> (last visited Jan. 10, 2023).

⁴⁹ See, e.g., Tex. Att’y Gen. OR2021-22296 at *1; see also Tex. Tax Code § 313.003(3).

⁵⁰ See Tex. Att’y Gen. OR2021-22296 at *1.

⁵¹ See *id.* For example, [REDACTED] E.g., Exhibit B-2 at 2–3, 5–6. The public availability of such information would competitively disadvantage the state and District alike when competing against other states.

⁵² *Id.*

⁵³ Exhibit B-2.



person of the request for the attorney general decision.”⁵⁴ Third parties may be able to assert certain exceptions to disclosure to protect their proprietary interests.⁵⁵ Such exceptions include Sections 552.104, 552.110, and 552.1101 of the Government Code.⁵⁶

The District has already presented arguments with respect to Section 552.104. The District takes no position as to whether information should be excepted from disclosure under Sections 552.110 or 552.1101 of the Government Code.⁵⁷ Nonetheless, releasing portions of the submitted information marked “552.104,” “552.110,” or “552.1101” may implicate the proprietary interests of Tesla Inc. (“Tesla”), formerly known as the Colorado River Project, LLC. [REDACTED]

[REDACTED]⁵⁸ Therefore, the District notified the third parties of the request for information and the right to submit arguments to your office as to why the submitted information should not be released.⁵⁹

CONCLUSION

The District has presented sufficient facts to affirmatively demonstrate that portions of the information requested are attorney-client privileged. Moreover, other portions of the requested information are protected by the deliberative process privilege, would competitively undermine the District and the state if released, and may implicate the proprietary interests of third parties. Accordingly, the District requests your determination that the marked information is excepted from disclosure under the Act.

⁵⁴ Tex. Gov’t Code § 552.305(d).

⁵⁵ *Id.* §§ 552.110, .1101. The District observes that significant portions of the submitted information have already been released to the Comptroller, which has posted most of the information on its website. *Texas Comptroller of Public Accounts, Del Valle ISD No. 1496, Colorado River Project, LLC and Tesla Inc. f/k/a Colorado River Project, LLC*, <https://bit.ly/3k44sAt> (last visited Jan. 11, 2022). The materials attached as Exhibit B-2 are confidential tabs excluded from the application available at the link above.

⁵⁶ Tex. Gov’t Code § 552.305(d) (enumerating specific exceptions); *Boeing Co.*, 466 S.W.3d at 833 (concluding that “a private party may assert [Section 552.104] to protect its competitively sensitive information”).

⁵⁷ Tex. Gov’t Code § 552.305(a) (authorizing a governmental body to “decline to release the [information potentially implicating privacy or property interests] for the purpose of requesting an attorney general decision”); *see also* Exhibit B-2.

⁵⁸ Exhibit B-2 at 5–6.

⁵⁹ Tex. Gov’t Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Section 552.305 permits the governmental body to rely on an interested third party to raise and explain the applicability of an exception in the Act under certain circumstances).



The District appreciates your attention to this matter. In accordance with the Act, the District provided the requestor with a copy of these written comments, with permissible redactions as permitted by Section 552.301(e-1) of the Government Code.⁶⁰ Please let me know if you require any additional information from the District.

Sincerely,

ROGERS, MORRIS & GROVER, L.L.P.



Kyle Stone
ATTORNEY FOR DEL VALLE ISD

Enclosures: Exhibit A
Exhibit B

cc: Ms. Kristen Stanciu
Mr. Jonathan Harris

*Via email (w/o encls.): kstanciu@texasscorecard.com
Via email: jonathan.harris@dvisd.net*

Telsa Inc.
Attn: Karen Steakley
Mike McCrary
Walt Gonzales
1 Tesla Road
Austin, Texas 78725

*(Via Priority Mail 9465 9112 0620 3582 3739 45)
(Via Email: ksteakley@tesla.com)
(Via Email: mmccrary@tesla.com)
(Via Email: wgonzales@tesla.com)*

⁶⁰ Tex. Gov't Code § 552.301(e-1).

