



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

May 13, 2003

Mr. James M. Whitton
Brackett & Ellis, P.C.
100 Main Street
Fort Worth, Texas 76102-3090

OR2003-3217

Dear Mr. Whitton:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 180927.

The Grapevine-Colleyville Independent School District (the "district"), which you represent, received a request for information relating to the current lease and potential future sale of a particular piece of property. You state that you have released some of the requested information but claim that other information is excepted from disclosure under sections 552.104, 552.105, and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that much of the submitted information is subject to section 552.022 of the Government Code. This section provides, in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter *unless they are expressly confidential under 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[.]

Gov't Code § 552.022(a)(1) (emphasis added). The submitted information contains completed reports and evaluations made for the district that are expressly public under section 552.022(a)(1) unless excepted under section 552.108 or confidential under other law. You do not raise section 552.108. Instead, you assert that this information is excepted under sections 552.104 and 552.105. However, section 552.105 is a discretionary exception under the Public Information Act and does not constitute "other law" for purposes of section 552.022. *See* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary

exceptions in general). Because you also claim that this information is excepted from disclosure under section 552.104, we will address that argument. *See* Gov't Code § 552.104(b) (section 552.022 does not apply to information that is excepted from disclosure under section 552.104).

You assert that the information subject to section 552.022 and other documents pertaining to the property are excepted from disclosure under section 552.104. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Moreover, section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). Section 552.104 does not except information relating to competitive bidding situations once a contract has been awarded, *see* Open Records Decision Nos. 306 (1982), 184 (1978), or where the governmental body decides not to award a contract, *see* Open Records Decision No. 201 (1978).

You do not state that the district has a present intent to sell this property. Instead, you state that "the District's board of Trustees is considering the *possibility* of selling the old campus." (Emphasis added.) Further, you indicate that the district is considering whether to sell the property to the City of Grapevine and admit that, if the district chooses to pursue that option, no competitive bidding process will occur. *See* Local Gov't Code § 272.001(b)(5) (providing that notice and bidding requirements do not apply if real property is conveyed to governmental entity that has power of eminent domain). You state that, *if* the district decides to sell this property and *if* such as sale is not to the city, the district will be required to solicit bids from members of the public in order to sell the property. *See id.* § 272.001(a). You argue that "a bidder could use [certain] information to gain an advantage *if* the District does indeed decide to sell the property" and that other information "could likewise give advantage to a potential bidder on that property *should* the District decide to sell it" and that "*if* the District decides to sell the old campus . . . [other] information could influence, affect or give advantage to a potential bidder responding to the District's notice of proposed sale." (Emphases added.) Having considered your arguments, we find that you make only a general allegation of harm rather than a showing of actual or specific harm in a particular competitive situation. We therefore conclude that none of the submitted information may be withheld pursuant to section 552.104. Because you claim no other exceptions for this information and it is not otherwise confidential by law, it must be released.

We now address your arguments for the remaining information, which is not subject to section 552.022. You assert that this information is excepted from disclosure under section 552.107 of the Government Code, which 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 “for the purpose of facilitating 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 Texas 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)(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 to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of 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, no writ). 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). Having considered your arguments and the remaining information, we agree that it constitutes privileged attorney-client communications that may be withheld under section 552.107(1).

In summary, we have marked information that the district may withhold pursuant to section 552.107. All other submitted information must be released.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days.

Id. § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

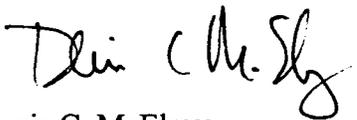
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 180927

Enc. Submitted documents

c: Ms. Dana M. Feldman
Attorney at Law
P. O. Box 1741
Colleville, Texas 76034
(w/o enclosures)