



**ATTORNEY GENERAL OF TEXAS**  
**GREG ABBOTT**

December 20, 2004

Ms. Amy L. Sims  
Assistant City Attorney  
P. O. Box 2000  
Lubbock, Texas 79457

OR2004-10727

Dear Ms. Sims:

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# 215312.

The City of Lubbock (the "city") received two requests for information from the same requestor related to "BID #001-04/VK." You indicate that some responsive information will be provided to the requestor. You have submitted some responsive information that you claim is excepted from disclosure under sections 552.106, 552.107, and 552.137 of the Government Code.<sup>1</sup> Further, although you take no position with regard to the public availability of the remaining information that you have submitted, you believe that this information implicates the proprietary interests of a third party under section 552.110 of the Government Code. You notified Utility Contractors of America, Ltd. ("UCA"), the interested third party, of these requests for information and of UCA's right to submit

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<sup>1</sup>Although you also raise section 552.103, you do not submit arguments in support of a claim under section 552.103. Therefore, you have waived any claim of exception from disclosure under this section of the Government Code. See Gov't Code §§ 552.301, .302; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103). We further note that you raise section 552.305 of the Government Code as an exception to disclosure. Section 552.305 does not except information from public disclosure under the Act, but is a procedural provision permitting a governmental body to withhold certain information while the governmental body is seeking an attorney general's decision under the Act.

arguments to this office as to why its information should not be released.<sup>2</sup> We received correspondence from UCA. We have considered all of the submitted arguments and have reviewed the submitted information.

First, we address UCA's argument that its information was submitted to the city "in confidence." However, information that is subject to disclosure under the Act may not be withheld simply because the party submitting it anticipates or requests confidentiality. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 676-78 (Tex. 1976). Further, it is well-settled that a governmental body's promise to keep information confidential is not a basis for withholding that information from the public, unless the governmental body has specific authority to keep the information confidential. *See Open Records Decision Nos. 514 at 1 (1988), 476 at 1-2 (1987), 444 at 6 (1986)*. Consequently, the information at issue must fall within an exception to disclosure in order to be withheld.

Next, we address UCA's argument that portions of its information are excepted from disclosure under section 552.104 of the Government Code. Section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. *See Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general)*. As the city does not raise section 552.104, this section does not apply to the requested information. *See Open Records Decision No. 592 (1991) (governmental body may waive section 552.104)*. Therefore, the city may not withhold any of the information at issue under section 552.104.

Section 552.110(b) of the Government Code excepts from disclosure "[c]ommercial 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[.]" Gov't Code § 552.110(b). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *See Open Records Decision No. 661 at 5-6 (1999) (stating that business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm); see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

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<sup>2</sup>*See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances)*.

After reviewing UCA's arguments and the information at issue, we conclude UCA has demonstrated that release of its customer list, which we have marked, would result in substantial competitive harm to it for purposes of section 552.110(b); however, we conclude that UCA has not established with specific factual evidence that release of the remaining information would result in substantial competitive harm. *See* Open Records Decision Nos. 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative), 494 at 6 (1988) (general allegations of unspecified competitive harm not sufficient under statutory predecessor to section 552.110). We note that the pricing information of a winning bidder is generally not excepted under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Moreover, we believe the public has a strong interest in the release of prices in government contract awards. *See* Open Records Decision No. 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). Therefore, only the marked information is excepted from release under section 552.110(b).

Next, we address the city's claim under section 552.106 of the Government Code. This section excepts from disclosure "[a] draft or working paper involved in the preparation of proposed legislation." Gov't Code § 552.106(a). Section 552.106 ordinarily applies only to persons with a responsibility to prepare information and proposals for a legislative body. Open Records Decision No. 460 (1987). The purpose of section 552.106 is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body, and, therefore, it does not except from disclosure purely factual information. *Id.* at 2. This office has concluded that the drafts of municipal ordinances and resolutions which reflect policy judgments, recommendations, and proposals are excepted by section 552.106. Open Records Decision No. 248 (1980). Based upon your representations and our review of the draft resolution submitted in Exhibit D, we conclude that the draft is excepted from disclosure in its entirety under section 552.106.

Next, the city claims that the information in Exhibit C 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 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)(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).

Based on your arguments and our review of the information that you claim is protected from disclosure under the attorney-client privilege, we agree that this information reflects confidential communications exchanged between privileged parties in furtherance of the rendition of legal services to a client. Accordingly, we conclude that the city may withhold the information in Exhibit C pursuant to section 552.107(1) of the Government Code.

In some instances, e-mail addresses obtained from members of the public are excepted from disclosure under section 552.137 of the Government Code. Section 552.137 makes confidential certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with a governmental body. However, this exception does not apply to an e-mail address that is provided to a governmental body either by a person who has a contractual relationship with the governmental body or that is contained in a response to a request for bids or proposals. Gov't Code § 552.137(c)(1), (3). The e-mail address that you seek to withhold is the business e-mail addresses of an individual who has a contractual relationship with the city. Therefore, the e-mail address at issue may not be withheld under section 552.137.

Finally, we note that the remaining submitted information contains insurance policy numbers, which are subject to section 552.136 of the Government Code. Section 552.136

states that “[n]otwithstanding any other provision of this chapter, 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.” Gov’t Code § 552.136. Therefore, the city must withhold the insurance policy numbers that we have marked under section 552.136.

In summary, we conclude that (1) the city must withhold the information that we have marked under sections 552.110(b) and 552.136, (2) the information in Exhibit D may be withheld under section 552.106, and (3) the city may withhold the information in Exhibit C pursuant to section 552.107(1). The remaining submitted information must be released to the requestor.

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,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/krl

Ref: ID# 215312

Enc. Submitted documents

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