



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 3, 2005

Mr. C. Brian Cassidy
Locke Liddell & Sapp
100 Congress, Suite 300
Austin, Texas 78701-4042

OR2005-01842

Dear Mr. Cassidy:

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# 219625.

The Central Texas Regional Mobility Authority (the "authority"), which you represent, received a request for "all materials regarding the finances and financial analysis of upcoming bond sale for 183A." You state that some information has been released to the requestor, but claim that the submitted information is excepted from disclosure under section 552.107 of the Government Code. Alternatively, you claim that the submitted information is protected under Texas Rule of Evidence 503. We have considered your arguments and reviewed the submitted information.

Initially, we note that the documents submitted in Exhibit A are not responsive to the instant request for information, as they were created after the date that the authority received the request. This ruling does not address the public availability of any information that is not responsive to the request, and the authority need not release that information in response to this request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986) (governmental body not required to disclose information that did not exist at time request was received).

We next address your assertion that the responsive information may be excepted from disclosure pursuant to Texas Rule of Evidence 503. We acknowledge that the Texas

Supreme Court has held that “[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are ‘other law’ within the meaning of section 552.022.” *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). The responsive documents, however, do not fall into any of the categories of information enumerated in section 552.022. Because the responsive information does not fall into a section 552.022 category, we conclude that no portion of the responsive information may be withheld on the basis of Texas Rule of Evidence 503.

You also claim that the responsive information is excepted from disclosure pursuant to section 552.107(1) 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 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 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).

You state that the responsive information consists of communications between the authority and its legal counsel, and that these communications were made in furtherance of the

rendition of professional legal services to the authority. You further explain that the communications were intended to be confidential and they have not been shared with any non-privileged parties. Upon review of your arguments and the responsive information, we agree that the information submitted in Exhibits B, C and E may be withheld under section 552.107(1) of the Government Code. However, we note that the information submitted in Exhibit D was communicated to representatives of the U.S. Department of Transportation Federal Highway Administration (the "FHWA"), with whom you claim the authority is "in the process of negotiations regarding the terms and conditions of [a loan identified as one source of project funding]." Based on your representation and our review of the information, we find that you have failed to demonstrate that FHWA representatives are clients, client representatives, lawyers, or lawyer representatives of the authority. Therefore, no portion of Exhibit D may be withheld pursuant to section 552.107. As you claim no other exceptions for this information, the authority must release Exhibit D to the requestor.

In summary, the authority may withhold Exhibits B, C and E under section 552.107. The authority must release all remaining responsive information.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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,


Marc A. Barenblat
Assistant Attorney General
Open Records Division

MAB/sdk

Ref: ID# 219625

Enc. Submitted documents

c: Mr. Sal Costello
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(w/o enclosures)