



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 12, 2006

Ms. Cary Grace
Assistant City Attorney
City of Austin Law Department
P. O. Box 1088
Austin, Texas 78767-1088

OR2006-03676

Dear Ms. Grace:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Public Information Act (the "Act"). Your request was assigned ID# 245950.

The City of Austin (the "city") received a request for eighteen categories of information related to the redevelopment of the Seaholm Power Plant. You state that the city has no information responsive to several categories of the request.¹ You state that the city will release some of the requested information but claim some of the submitted information is excepted from disclosure under sections 552.104 and 552.107 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.³

¹We note that the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustanante*, 562 S.W.2d 266 (Tex.Civ.App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

²You inform this office that the city is seeking clarification regarding item number eighteen of the request. Accordingly, should the requestor respond to the request for clarification, the city must seek a ruling from this office before withholding any responsive information from him. *See generally* Open Records Decision No. 633 (1999) (providing for tolling of ten-business-day deadline to request attorney general decision while governmental body awaits clarification).

³We assume that 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 that those records contain substantially different types of information than that submitted to this office.

We begin by noting that the a portion of the submitted information is not responsive to the instant request for information, as it was created after the date that the city received the request. This ruling does not address the public availability of any information that is not responsive to the request, and the city 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).

The city claims that section 552.104 of the Government Code excepts from required public disclosure Seaholm Power, LLC's ("Seaholm Power") response to a request for qualifications and certain documents related to the city's negotiations with Seaholm Power. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. The purpose of this section 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 bidder or 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. *Open Records Decision Nos. 306* (1982), 184 (1978).

You inform us that the city council voted to authorize the city manager to enter into an Exclusive Negotiation Agreement ("ENA") with Seaholm Power for the future redevelopment of the Seaholm Power Plant. You explain that the ENA sets out the terms for developing a Master Development Agreement ("MDA"). You further explain that, as of the date of the city's receipt of this request for information, no MDA has been entered into with respect to the city's solicitation. You explain that if the city and Seaholm Power fail to negotiate a mutually acceptable MDA, the city may enter into an ENA with another respondent. You argue that release of the information at this time would have a negative impact on the city's current negotiating position concerning the terms of the MDA. After considering your representations and reviewing the information at issue, we conclude that the city may withhold the information for which you claim section 552.104.

The city claims that the remaining responsive information is excepted from disclosure pursuant to section 552.107(1), which protects information that is encompassed by the attorney-client privilege. *See Gov't Code § 552.107(1)*. When asserting the attorney-client privilege under section 552.107, 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 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).

In this instance, you argue that the information at issue constitutes privileged attorney-client communications. You explain that these communications were made between city attorneys, the City Manager’s Office, the City’s Economic Growth and Redevelopment Services Department, and outside counsel for the purpose of providing legal advice. You state that the confidentiality of these communications has been maintained. Based on these representations and our review of the information at issue, we agree that the information that you have marked as privileged attorney-client communications may be withheld under section 552.107.

In summary, the city may withhold the information it has marked under sections 552.104 and 552.107 of the Government Code.

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).

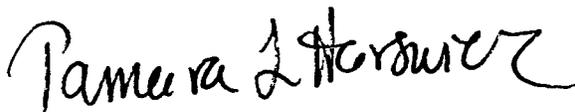
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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); *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 Office of the Attorney General 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. 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,



Tamara L. Harswick
Assistant Attorney General
Open Records Division

TLH/sdk

Ref: ID# 245950

Enc. Submitted documents

c: Mr. Mark Gentle
P.O. Box 1026
Austin, Texas 78767
(w/o enclosures)