



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 18, 2007

Ms. Cathy Cunningham  
Senior City Attorney  
City Attorney's Office  
825 West Irving Boulevard  
Irving, Texas 75060

OR2007-09116

Dear Ms. Cunningham:

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# 284604.

The City of Irving (the "city") received a request for information

[1.] between the [city] and Omni Hotels related to the North Texas Super Bowl XLV Bid Committee, the effort to secure a Super Bowl in North Texas in 2011 and any effort to prevent or delay the release of records related to the Super Bowl bid to any media outlets[; and

2.] between the [city] and other cities, counties, government agencies and members of the North Texas Super Bowl XLV Bid Committee related to any effort to prevent or delay the release of records related to the Super Bowl bid to any media outlets and/or any other requestors.

You state that some responsive information has been released to the requestor, but claim that some of the submitted information is excepted from disclosure under sections 552.107 and 552.137 of the Government Code.<sup>1</sup> You also inform us that you notified the interested third parties of the city's receipt of the request for information and of their right to submit arguments to this office as to why the requested information should not be released to the

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<sup>1</sup>Although you also raise sections 552.104 and 552.111 of the Government Code, you have not provided any arguments in support of these claims. Thus, the city has waived its claims under sections 552.104 and 552.111. *See* Gov't Code § 552.301(e) (governmental body must provide comments explaining why exceptions raised should apply to information requested); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general).

third parties of the city's receipt of the request for information and of their right to submit arguments to this office as to why the requested information should not be released to the requestor.<sup>2</sup> *See Gov't Code § 552.305(d); see also Open Records Decision No. 542 (1990)* (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have considered the claimed exceptions and reviewed the submitted information.

You state that some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2007-06125 (2007). We note, however, that because the bid has since been awarded, the facts and circumstances on which the prior ruling was based have changed. Thus, the city may not rely on that ruling as a previous determination.<sup>3</sup> As you have failed to submit that information to this office for review, you must release it to the requestor at this time. *See Gov't Code §§ 552.301(e), .302. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information.*

We next note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See Gov't Code § 552.305(d)(2)(B).* As of the date of this letter, none of the interested third parties has submitted to this office any reasons explaining why the requested information should not be released. We thus have no basis for concluding that any portion of the submitted information constitutes proprietary information of any of these third parties, and the city may not withhold any portion of the submitted information on that basis. *See Open Records Decision Nos. 661 at 5-6 (1999)* (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), *552 at 5 (1990)* (party must establish *prima facie* case that information is trade secret), *542 at 3 (1990).*

You assert that some of the submitted information is excepted from public 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).*

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<sup>2</sup>The third parties notified pursuant to section 552.305 are the following: the North Texas Super Bowl XLV Bidding Committee, Inc.; the Irving Convention and Visitors Bureau; the City of Arlington; the Arlington Convention and Visitors Bureau; and the Omni Mandalay Hotel at Las Colinas.

<sup>3</sup>*See Open Records Decision No. 673 (2001)* (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

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 submitted information contains confidential communications between a city attorney and client representative. Based on our review of your representations and the submitted information, we find that you have demonstrated the applicability of the attorney-client privilege to the information you have marked. Accordingly, we conclude that the city may withhold the information you have marked pursuant to section 552.107(1) of the Government Code.

Finally, you claim that some of the remaining information is excepted under section 552.137 of the Government Code. Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See Gov’t Code* § 552.137(a)-(c). Section 552.137 does not apply to a government employee’s work e-mail address because such an address is not that of the employee as a “member of the public,” but is instead the address of the individual as a government employee. The marked e-mail addresses do not appear to be of a type specifically excluded by section 552.137(c), and you

do not inform us that a member of the public has affirmatively consented to their release. Therefore, the city must withhold the e-mail addresses you have marked under section 552.137 of the Government Code.

To conclude, the city may withhold the information you have marked under section 552.107 of the Government Code. The city must withhold the e-mail addresses you have marked under section 552.137 of the Government Code. The remaining 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, 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,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/mcf

Ref: ID# 284604

Enc. Submitted documents

c: Mr. Jeff Mosier  
Dallas Morning News  
P.O. Box 655237  
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(w/o enclosures)

Ms. Tara Green  
North Texas Super Bowl XLV  
Bidding Committee, Inc.  
c/o North Texas Commission  
P.O. Box 610246  
DFW Airport, Texas 75261  
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Ms. Maura Gast  
Irving Convention  
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Ms. Karen VanWinkle  
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Mr. Michael Vance  
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