



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 10, 2009

Mr. Jesús Toscano, Jr.  
Administrative Assistant City Attorney  
City of Dallas  
1500 Marilla Street, Room 7BN  
Dallas, Texas 75201

OR2009-09534

Dear Mr. Toscano:

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# 348699.

The City of Dallas (the "city") received two requests for all e-mails containing the term HVS, or variations of that term, from the e-mail accounts of several individuals from January 1, 2009 through April 22, 2009. You state you will release some information to the requestors. You claim portions of the remaining requested information are excepted from disclosure under sections 552.104, 552.107, 552.110, and 552.111 of the Government Code and privileged under Texas Rule of Evidence 503.<sup>1</sup> You also state release of some of the requested information may implicate the proprietary interests of third parties.<sup>2</sup> You inform us, and have provided documentation showing, you have notified these third parties of the requests and of their opportunity to submit comments to this office as to why the requested

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<sup>1</sup>Although you initially raised section 552.105 of the Government Code, you have not submitted arguments explaining how this exception applies to the submitted information. Therefore, we presume that you have withdrawn this exception. *See* Gov't Code §§ 552.301, 552.302.

<sup>2</sup>Although you also seek to withhold some of the submitted information under section 552.305 of the Government Code, we note that section 552.305 is not an exception to disclosure. *See* Gov't Code § 552.305. Section 552.305 addresses the procedural requirements for notifying third parties that their interests may be affected by a request for information. *See id.*

information should not be released to the requestors.<sup>3</sup> See Gov't Code § 552.305(d); *see also* 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 the applicability of exception to disclose under Act in certain circumstances). We have considered the submitted arguments and reviewed the submitted representative samples of information.<sup>4</sup>

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 section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 at 8 (1991). Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a bidder will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). Moreover, section 552.104 does not except from disclosure information relating to competitive bidding situations once a contract has been executed. Open Records Decision Nos. 306 (1982), 184 (1978).

You explain the information in Exhibits D, E, F, and H pertains to the city's Request for Proposals ("RFP") for Hotel Operator of Dallas Convention Center Hotel. You inform us that although the city is currently negotiating with one of the proposers to the RFP, the city is still in negotiations and has not yet entered into an agreement. You argue that release of the information at issue would result in an advantage to another proposer and "hinder the city's ability to receive the best possible offer." You further argue that until the city completes its negotiations with one proposer and executes a final agreement, the information at issue should remain exempt from disclosure. Based on your arguments and our review of the information at issue, we agree release of this information would give advantage to a competitor or bidder. Therefore, the city may withhold Exhibits D, E, F, and H under section 552.104 of the Government Code.<sup>5</sup> We note the city may no longer withhold this information under section 552.104 once the negotiations have concluded and the related contract has been executed.

Next, you assert Exhibits I and J are excepted from required public disclosure under section 552.107 of the Government Code. Section 552.107(1) protects information that

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<sup>3</sup>We understand the following third parties were notified: Citigroup Global Markets, Inc. ("Citigroup"), HVS Consulting ("HVS"), Marriott Hotels and Resorts ("Marriott"), and Omni Hotels ("Omni").

<sup>4</sup>We assume the "representative samples" of records submitted to this office are 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 those records contain substantially different types of information than that submitted to this office.

<sup>5</sup>As our ruling on this issue is dispositive, we need not address your remaining arguments against disclosure of this information.

comes within the attorney-client privilege.<sup>6</sup> 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 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). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1). 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, 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 assert Exhibits I and J constitute confidential communications between city attorneys, outside legal counsel, and a city department. You state these e-mail communications were made for the purpose of rendering or seeking professional legal services for the city. You also indicate these communications were confidential when made and have remained confidential. Based on these representations and our review of the information at issue, we agree the information in Exhibits I and J constitutes privileged attorney-client

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<sup>6</sup>You also argue Exhibit I is privileged under rule 503 of the Texas Rules of Evidence. We note that as this information is not subject to section 552.022 of the Government Code, rule 503 does not apply in this instance. *See* Open Records Decision No. 676 at 4 (2002).