



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 15, 2009

Ms. Angela H. Robinson
Law, Snakard, & Gambill, P.C.
1600 West Seventh Street, Suite 500
Fort Worth, Texas 76102

OR2009-13017

Dear Ms. Robinson:

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# 355595.

The Tarrant County College District (the "district"), which you represent, received a request for information relating to the planned downtown Fort Worth campus, including documents to or from the Director of Facilities Planning and any settlements between the district and the Director of Facilities Planning; three construction contract change orders and attorney recommendations, information submitted to the district's board of trustees, the minutes of board meetings, and documents from a specific consultant regarding each change order; the contract between the consultant and the district; and all inquiries to the district regarding acquiring property intended for the downtown campus. You state you are releasing some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.103, 552.104, 552.105, 552.107, and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments submitted by the

¹ Although you correctly note that Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, are "other law" for purposes of section 552.022 of the Government Code, the information for which you claim these provisions is not subject to this section. See Gov't Code § 552.022 (listing categories of information that are expressly public under the Act and must be released unless confidential under "other law"). Therefore, this information is properly addressed under section 552.107, rather than rule 503, and under section 552.111 rather than rule 192.5. Open Records Decision Nos. 677 at 8-9 (2002), 676 at 3.

requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

You assert that the information in Exhibit 2 is excepted from disclosure under 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 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). 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 explain that Exhibit 2 consists of confidential communications between the district and its agents and attorneys that were made in furtherance of the rendition of professional legal services. You indicate that the communications were intended to be confidential and that their confidentiality has been maintained. Based on these representations and our review of the information at issue, we agree that the district may withhold the information in Exhibit 2

under section 552.107. As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

Next, we address your arguments against release of the information in Exhibit 6. 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 or a remote possibility that a bidder will gain an unfair advantage will not suffice. Open Records Decision Nos. 593 (1991) at 2; 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).

In this instance, although you assert that Exhibit 6 "contains information which could give an advantage [to] a competitor or bidder for real property[.]" you fail to provide specific arguments explaining how release of this information would harm the district's interests in a competitive situation. Therefore, we conclude section 552.104 does not apply to Exhibit 6, and the district may not withhold Exhibit 6 on this basis.

Section 552.105 of the Government Code excepts from disclosure information relating to:

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Gov't Code § 552.105. Section 552.105 is designed to protect a governmental body's planning and negotiating position with regard to particular transactions. *See* Open Records Decision Nos. 564 (1990), 357 (1982), 310 (1982). Information pertaining to such negotiations that is excepted from disclosure under section 552.105 may be withheld so long as the transaction relating to the negotiations is not complete. *See* ORD 310. Under section 552.105, a governmental body may withhold information "which, if released, would impair or tend to impair [its] 'planning and negotiating position in regard to particular transactions.'" ORD 357 at 3 (quoting Open Records Decision No. 222 (1979)). The question of whether specific information, if publicly released, would impair a governmental body's planning and negotiating position in regard to particular transactions is a question of fact. Thus, this office will accept a governmental body's good-faith determination in this regard, unless the contrary is clearly shown as a matter of law. *See* ORD 564.

You state Exhibit 6 "is related to information concerning the price of real property[.]" However, you do not indicate that the property will be used for a public purpose or that the

district received the request prior to public announcement of any particular project or the formal award of contracts for the property. We further note that the information at issue involves the district's disposition, not acquisition, of real property. Upon review, we find that you have failed to demonstrate the applicability of section 552.105 to Exhibit 6. Therefore, we conclude the district may not withhold Exhibit 6 on this basis.

Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code § 552.111. This exception encompasses the deliberative process privilege. See Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. See *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. See ORD 615 at 5. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. See Open Records Decision No. 313 at 3 (1982).

You inform us that Exhibit 6 reflects the policymaking processes of the district as they relate to a major policy decision, the disposition of real property. However, upon examination, we find the information in Exhibit 6 is purely factual. You fail to demonstrate how this factual information constitutes advice, recommendations, opinions, and other material reflecting the policymaking processes of the district. Therefore, we conclude section 552.111 does not apply to Exhibit 6, and the district may not withhold Exhibit 6 on this basis.

In summary, the district may withhold the information in Exhibit 2 under section 552.107 of the Government Code. The district must release Exhibit 6 in its entirety.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php,

or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Mack T. Harrison", with a large, sweeping flourish at the end.

Mack T. Harrison
Assistant Attorney General
Open Records Division

MTH/eeg

Ref: ID# 355595

Enc. Submitted documents

c: Requestor
(w/o enclosures)