



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 12, 2010

Mr. Kevin B. Laughlin
Nichols, Jackson, Dillard, Hager & Smith, L.L.P
1800 Lincoln Plaza
500 North Akard Street
Dallas, Texas 75201

OR2010-00582

Dear Mr. Laughlin:

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# 366974.

The City of Farmers Branch (the "city"), which you represent, received one request for thirty-seven categories of information related to a specified request for proposals ("RFP"), and a second request for all bids submitted in response to the aforementioned RFP. You claim that the submitted information is excepted from disclosure under sections 552.104, 552.107, and 552.137 of the Government Code, and privileged under Texas Rule of Evidence 503. You also state that a portion of the submitted information may be excepted from disclosure under section 552.110 of the Government Code, but you take no position as to whether the information is excepted under this section. Accordingly, you submit documentation showing that you provided a notice statement to all parties involved pursuant to the Act. *See Gov't Code § 552.305(d)* (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have considered the exceptions you claim, and reviewed the submitted information. We have received comments from Allied Waste Services of Plano ("Allied"), Community Waste Disposal.com ("CWD"), IESI North/East Texas ("IESI"), and have reviewed the submitted arguments. We have also received and considered comments submitted by the requestor. *See Gov't Code § 552.304* (interested party may submit comments stating why information should or should not be released).

Section 552.104 of the Government Code 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, including where the governmental body may wish to withhold information in order to obtain more favorable offers. *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). Generally, section 552.104 does not except information relating to competitive bidding situations once a contract has been awarded and is in effect. *See id.* at 5.

You state a portion of the submitted information pertains to a request for proposals for commercial solid waste collection services. You inform this office that the city is involved in an ongoing competitive bidding process. You assert that the competitive bidding process is necessary for the city to secure the best possible rates for city businesses and maximize potential revenues for the city. You argue that release of the information at issue during negotiations would be detrimental to the city’s negotiating position and allow one or more of the remaining competitors to gain an unfair advantage over the others. You state that, if no award is made to the current preferred competitor, the city may need to begin negotiations with another competitor. Based on your representations and our review, we conclude the city may withhold the submitted information you have marked, as well as the information we have marked, under section 552.104 of the Government Code, until such time as the agreement has been finalized.¹

You raise section 552.107(1) of the Government Code for a portion of the remaining information. Section 552.107(1) 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 a capacity other than that of attorney). 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

¹As our ruling is dispositive, we need not address your remaining argument against disclosure of this information, or the arguments submitted by the interested third parties.

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 e-mails you have marked constitute communications between city staff and city attorneys that were made for the purpose of providing legal advice to the city. You have identified the parties to the communications. You state that these communications were made in confidence and have maintained their confidentiality. Based on your representations and our review, we find the city may withhold the submitted e-mails you have marked under section 552.107 of the Government Code.²

You have marked e-mail addresses as confidential 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 purposes 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). Gov’t Code § 552.137 (a)-(c). We note the city has marked an e-mail address that was provided to the city on letterhead. This e-mail address, which we have marked for release, may not be withheld under section 552.137. *See id.* § 552.137(c)(4) (stating that section 552.137 does not apply to e-mail addresses provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public). You inform us that the owners of the remaining e-mail addresses at issue have not affirmatively consented to their public disclosure. Therefore, the city must withhold the remaining marked e-mail addresses under section 552.137.³

²As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

³We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

In summary, the city may withhold the submitted information you have marked, as well as the information we have marked, under section 552.104 of the Government Code, until such time as the agreement has been finalized. The city may also withhold the submitted e-mails you have marked under section 552.107 of the Government Code. With the exception of the e-mail address we have marked for release, the city must withhold the remaining marked e-mail addresses under section 552.137. The remaining responsive information must be released.

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,



Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/dls

Ref: ID# 366974

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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