



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 26, 2010

Ms. Blakely Fernandez
Tuggey, Rosenthal, Pauerstein, Sandoloski, Agather, L.L.P.
Attorney for Hidalgo County Regional Mobility Authority
755 East Mulberry, Suite 200
San Antonio, Texas 78212

OR2010-05899

Dear Ms. Fernandez:

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# 377297.

The Hidalgo County Regional Mobility Authority (the "authority"), which you represent, received a request for: (1) all employment or consulting contracts with Integ Corporation ("Integ"); (2) all correspondence between the authority and the Texas Department of Transportation regarding contracts, title, and compensation of a named individual and Integ; and; (3) all contracts and correspondence reflecting the amount paid to Hidalgo County Road Builders ("Road Builders") for certain fiscal years. You state you have released some of the requested information to the requestor. You claim that portions of the submitted information are excepted from disclosure under sections 552.104 and 552.107 of the Government Code. You also explain that a portion of the submitted information may contain the proprietary information of a third party subject to exception under the Act. Accordingly, you provide documentation showing that the authority notified Road Builders of the request for information and of its right to submit arguments to this office as to why the submitted information should not be released. *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 exceptions you claim and reviewed the submitted information.

Initially, we note 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) of the Government Code 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, we have not received any arguments from Road Builders. Thus, we have no basis for concluding that any portion of the submitted information constitutes the proprietary information of Road Builders. *See id.* § 552.110; 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. Accordingly, the authority may not withhold any of the submitted information based on the proprietary interests of Road Builders.

You assert the cost figures in Exhibit B are excepted under section 552.104 of the Government Code. 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 exception is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. *See* Open Records Decision No. 541 at 4 (1990). Furthermore, section 552.104 does not except information relating to competitive bidding situations once a contract has been awarded. *See* Open Records Decision Nos. 306 (1982), 184 (1978).

Exhibit B consists of cost figures pertaining to a particular development project. You inform us the authority has not yet entered into a "guaranteed maximum price contract with a pass-through agent" in regards to the project. You argue that the release of Exhibit B before a contract is finalized would harm the authority's competitive position. Specifically, you state that the release of this information would jeopardize the authority's ability to negotiate design and construction costs. Based on your representations and our review, we conclude the authority may withhold Exhibit B under section 552.104 of the Government Code until such time as the contract has been executed.

You raise section 552.107 of the Government Code for Exhibit C. 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 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. See TEX. R. EVID. 503(b)(1)(A)-(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 pet.). 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 the information submitted as Exhibit C constitutes communications between authority staff, consultants for the authority, and authority attorneys that were made for the purpose of providing legal advice to the authority. You also state these communications were made in confidence and that their confidentiality has been maintained. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the authority may withhold Exhibit C under section 552.107 of the Government Code.

We note some of the information in Exhibit D is subject to section 552.136 of the Government Code.¹ Section 552.136 states “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136. An access device number is one that may be used to (1) obtain money, goods, services, or another thing of value; or (2) initiate a transfer of funds other than a transfer

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

originated solely by paper instrument. *Id.* Thus, the authority must withhold the bank account and routing numbers we have marked under section 552.136 of the Government Code.²

In summary, the authority may withhold Exhibit B under section 552.104 of the Government Code. The authority may withhold Exhibit C under section 552.107 of the Government Code. The authority must withhold the marked bank account and routing numbers in Exhibit D under section 552.136 of the Government Code. As you raise no further exceptions against the disclosure of the remaining information, it 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,



Christina Alvarado
Assistant Attorney General
Open Records Division

CA/rl

Ref: ID# 377297

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

²We 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 bank account and routing numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.