



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 30, 2013

Mr. Kenneth A. McKanders
Associate General Counsel
Texas Southern University
3100 Cleburne Avenue
Houston, Texas 77004

OR2013-22413

Dear Mr. McKanders:

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# 509752.

Texas Southern University (the "university") received eleven requests from the same requestor for bid responses, scoring matrices, bid tabulations, correspondence, and other information pertaining to specified projects and proposals. You state the university does not have some of the requested information.¹ The university claims the submitted information is excepted from disclosure under sections 552.103, 552.104, and 552.107 of the Government Code. We have considered the claimed exceptions and reviewed the submitted representative sample of information.² We have also considered comments submitted by the requestor, Pepper Lawson/Horizon, JV ("Horizon"), and SpawGlass, an interested third party. *See* Gov't Code §§ 552.304 (interested party may submit comments stating why information should or should not be released), .305(d); *see also* Open Records Decision No. 542 at 3 (1990) (statutory predecessor to section 552.305 permits governmental body to

¹The Act does not require a governmental body to disclose information that did not exist when the request for information was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

²We assume the "representative sample" of records submitted to this office is 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.

rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances).

Section 552.103 of the Government Code provides in part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.³ Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation

³In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

must be “realistically contemplated”). On the other hand, this office has determined if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

You inform us the university awarded a contract to a competitor of the requestor as a result of a request for proposals, and Horizon has filed protests with the university regarding this matter. You have submitted two pieces of correspondence from a law firm representing Horizon that the university received before receiving the request for information. In the first, Horizon asserts it “is seriously considering whether to exercise its statutory right to void the award [of the contract at issue] in a Texas state district court on the basis that [the university] has failed to comply with the competitive bidding laws.” Horizon also states in this correspondence the evaluation by the university’s evaluation committee of Horizon’s proposal is not credible and “[i]f we are not able to rectify this matter prior to the board vote, then Horizon will be seeking the depositions of . . . staff members associated with this Project as well as the members of the evaluation committee[.]” In the second piece of correspondence, Horizon states, “if [the university] continues down this troubling path, [Horizon] will not only protest that the Project was awarded to a bidder that submitted a non-responsive and high bid, but [Horizon] will immediately proceed with seeking an injunction in a Texas state district court[.]” That correspondence also states, if the university does not award the contract at issue to Horizon, Horizon “will be forced to file a lawsuit seeking injunctive relief to insure [the university’s] compliance with Texas competitive bidding laws.” Horizon asserts it has not instigated litigation against the university or taken any affirmative steps toward bringing litigation, despite the fact that its demands were not met. However, upon review of the submitted representations and documents, we conclude, for purposes of section 552.103, the university has established litigation was reasonably anticipated when it received the request for information. We also find the university has established Exhibit 16 is related to the anticipated litigation for purposes of section 552.103(a). Therefore, we agree the university may withhold Exhibit 16 under section 552.103.⁴

We note, however, once the information has been obtained by all parties to the anticipated litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

You assert Exhibit 17 is excepted from disclosure under section 552.104 of the Government Code, which excepts from required public disclosure “information which, if released, would give advantage to competitors or bidders.” Gov’t Code § 552.104(a). The purpose of section 552.104 is to protect the purchasing interests of a governmental body in competitive bidding situations where the governmental body wishes to withhold information in order to

⁴As our ruling is dispositive, we do not address the other argument to withhold this information.

obtain more favorable offers. *See* Open Records Decision No. 592 (1991). Section 552.104 protects information from disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* Open Records Decision No. 463 (1987). Generally, section 552.104 does not except bids from disclosure after bidding is completed and the contract has been executed. *See* Open Records Decision No. 541 (1990).

As noted in part above, the contract at issue has been awarded to a competitor of Horizon, but you inform us it has not yet been executed. Based on this representation and our review, we conclude the university has demonstrated release of Exhibit 17 could harm its interests with respect to this project. Accordingly, we conclude the university may withhold Exhibit 17 under section 552.104 of the Government Code.⁵ *See* Open Records Decision No. 170 at 2 (1977) (release of bids while negotiation of proposed contract is in progress would necessarily result in an advantage to certain bidders at expense of others and could be detrimental to public interest in contract under negotiation).

You assert Exhibit 18 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 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). 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, *id.*, 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).

⁵As our ruling is dispositive, we do not address the other arguments to withhold this information.

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, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain 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).

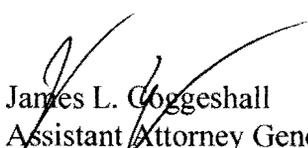
You explain Exhibit 18 constitutes confidential communications between an attorney for and an official of the university that were made in furtherance of the rendition of professional legal services. You also assert the communications were intended to be confidential and their confidentiality has been maintained. After reviewing your arguments and the information at issue, we find you have demonstrated the applicability of the attorney-client privilege to Exhibit 18. Therefore, the university may withhold Exhibit 18 under section 552.107(1) of the Government Code.

To conclude, the university may withhold Exhibit 16 under section 552.103 of the Government Code. The university may withhold Exhibit 17 under section 552.104 of the Government Code. Finally, the university may withhold Exhibit 18 under section 552.107(1) of the Government Code.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/tch

Ref: ID# 509752

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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