



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 10, 2014

Mr. Robert Schell
Assistant Director General Counsel
North Texas Tollway Authority
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OR2014-09918

Dear Mr. Schell:

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# 525600 (NTTA File No. 2013-00390).

The North Texas Tollway Authority (the "authority") received two requests for information pertaining to a specified law firm's interactions with the authority, including a proposal the specified law firm submitted to the authority in response to a specified proposal request; copies of contracts the authority executed with the specified law firm; records of payments made to the specified law firm; any communications between the authority and the specified law firm; copies of evaluations provided to the authority that assisted in selecting the specified law firm; invoices from the specified law firm to the authority; and copies of Minority/Women Business Enterprises compliance reports pertaining to the hiring of legal counsel. The second requestor also sought all proposals submitted to the authority in response to the specified proposal request. You state some information will be released to the requestors. You claim the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.104, 552.107, 552.110, 552.111, and 552.130 of the

Government Code.^{1 2} Additionally, you state release of some of the submitted information may implicate the proprietary interests of a number of third parties. Accordingly, you state you notified the third parties of the request for information and of the right of each 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 received comments from Newby Davis, P.L.L.C., and Roberts & Watson, P.C. We have reviewed the submitted arguments and the submitted representative sample of information.³

Initially, we note some of the information you submitted was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2013-18570 (2013). In Open Records Letter No. 2013-18570, we determined the authority may withhold portions of the fee bills at issue under Texas Rule of Evidence 503, as well as the proposals at issue under section 552.104 of the Government Code. We understand there has been no change in the law, facts, or circumstances on which the previous ruling was based. Therefore, with regard to the fee bills and proposals we have marked, we conclude the authority may continue to rely on Open Records Letter No. 2013-18570 as a previous determination and withhold information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes information is or is not excepted from disclosure).⁴

¹Although you also raise section 552.136 of the Government Code, you have not submitted any arguments regarding the applicability of this exception, nor have you identified any information you seek to withhold under the exception. Therefore, we assume you no longer assert section 552.136 as an exception to disclosure. *See* Gov't Code §§ 552.301, .302.

²We note you have submitted certain court-filed documents as Attachment C. Based on your briefing, we are unable to determine whether you seek a ruling as to the public availability of this information. In any event, we find the information in Attachment C is not responsive to the instant requests. Thus, this ruling does not address the public availability of non-responsive information and the authority is not required to release the information in Attachment C in response to these requests.

³We 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 that those records contain substantially different types of information than that submitted to this office.

⁴As our ruling is dispositive for the fee bills and proposals we have marked, we need not address the remaining arguments against their disclosure.

You claim the remaining responses to the specified request for qualifications (“RFQ”) for legal work are exempted in their entirety under section 552.104. Section 552.104 of the Government Code exempts from required public 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 the purchasing interests of a governmental body in competitive bidding situations where the governmental body wishes to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 (1991) (discussing statutory predecessor). 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 exempt information from disclosure after bidding is completed and the contract has been executed. *See* Open Records Decision No. 541 (1990). However, in Open Records Decision No. 541, this office stated the predecessor to section 552.104 may protect information after bidding is complete if the governmental body demonstrates public disclosure of the information will allow competitors to undercut future bids, and the governmental body solicits bids for the same or similar goods or services on a recurring basis. *See id.* at 5 (recognizing limited situation in which statutory predecessor to section 552.104 continued to protect information submitted by successful bidder when disclosure would allow competitors to accurately estimate and undercut future bids); *see also* Open Records Decision No. 309 (suggesting that such principle will apply when governmental body solicits bids for same or similar goods or services on recurring basis).

You state the RFQ at issue “sought qualifications for many categories of legal services” in which firms were qualified and were “put on a registry of firms that could be called on to provide services.” You explain that contracts “are negotiated at the time the firm’s qualifications are matched with an assignment or matter for which [the authority needs] legal representation.” You further explain if the RFQ responses at issue are released, the authority would be disadvantaged because the qualified firms would have knowledge of these firms’ responses in negotiating a contract for other legal services. Based on your representations and our review, we agree the authority may withhold the remaining RFQ responses under section 552.104 of the Government Code.⁵

You seek to withhold the requested e-mail communications you have submitted as Exhibit B under section 552.107(1) of the Government Code. Section 552.107(1) protects information that comes within the attorney-client privilege. Section 552.107(1) of the Government Code protects information that comes 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. *See* 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,

⁵As our ruling is dispositive for this information, we need not address the remaining arguments against its disclosure.

the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. See 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. See *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 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). 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). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. See *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 state the information at issue consists of privileged communications between the authority’s employees, agents, and attorneys. You state the communications at issue were made in furtherance of the rendition of legal services to the authority, and have not been and were not intended to be disclosed to third parties. Based upon your representations and our review, we find the communications submitted as Exhibit B consist of privileged attorney-client communications. Accordingly, the authority may withhold these e-mail communications under section 552.107(1) of the Government Code.⁶

In summary, the authority may continue to rely on Open Records Letter No. 2013-18570 as a previous determination and withhold or release the attorney fee bills and proposals at issue in that ruling, which we have marked, in accordance with that decision. The authority may withhold the remaining submitted RFQ responses under section 552.104 of the Government

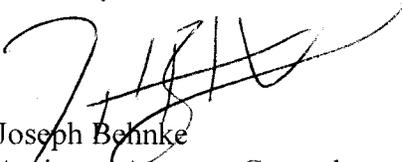
⁶As our ruling is dispositive for this information, we need not address the remaining arguments against its disclosure.

Code. The authority may withhold the requested e-mail communications in Exhibit B 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,



Joseph Behnke
Assistant Attorney General
Open Records Division

JB/som

Ref: ID# 525600

Enc. Submitted documents

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