



**ATTORNEY GENERAL OF TEXAS**  
**GREG ABBOTT**

October 15, 2004

Ms. Jeanene McIntyre  
Assistant City Attorney  
City of Arlington  
Box 90231  
Arlington, Texas 76004-3231

OR2004-8794

Dear Ms. McIntyre:

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# 210978.

The City of Arlington (the "city") received a request for all information related to any negotiations with the Dallas Cowboys. You state that the submitted information is excepted from disclosure under sections 552.104, 552.107, 552.111 and 552.131 of the Government Code. You state, and provide documentation showing, that you have notified the Dallas Cowboys Football Club, LLC (the "Dallas Cowboys") of the right to submit arguments to this office as to why the submitted information should not be released pursuant to section 552.305 of the Government Code. *See Gov't Code § 552.305* (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that 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 claimed and reviewed the submitted information.

You assert section 552.104 of the Government Code for the information submitted as Exhibit D. We note that the information submitted as Exhibit E is a duplicate of the information submitted as Exhibit D. Section 552.104 excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." This exception protects a governmental body's interests in connection with competitive bidding and in certain other competitive situations. *See Open Records Decision No. 593 (1991)*

(construing statutory predecessor). This office has held that a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the “competitive advantage” aspect of this exception if it can satisfy two criteria. First, the governmental body must demonstrate that it has specific marketplace interests. *Id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *Id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body’s legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body’s demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *Id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

In this case, you inform us that the information submitted as Exhibits D and E pertains to a proposed project authorized by Texas Local Government Code, chapter 334, as a sports and community venue project, for which negotiations between the city and the Dallas Cowboys are ongoing. You claim that other cities in the area are interested in negotiating with the Dallas Cowboys for the same project and transaction currently under negotiation, and that “competing cities could utilize information from early negotiations to the city’s detriment in their efforts to negotiate a transaction with the Dallas Cowboys.” Based on your representations and our review of the information at issue, we conclude that the information submitted as Exhibits D and E may be withheld under section 552.104.<sup>1</sup>

Next, you argue that the information submitted as Exhibit C is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) of the Government Code 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 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,

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<sup>1</sup> Because we reach this conclusion under section 552.104, we need not consider your remaining arguments against the disclosure of this information.

lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (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 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 Exhibit C consists of communications between the city and its attorneys, and that these communications were made in furtherance of the rendition of professional legal services to the city. Upon review of your arguments and this information, we conclude that the information reflects confidential attorney-client communications made in furtherance of the rendition of legal services to the city. Therefore, you may withhold the information in Exhibit C under section 552.107(1) of the Government Code.

You also claim section 552.111 as an exception to disclosure for some of the information. 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.” In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the deliberative or policymaking processes of the governmental body. Open Records Decision No. 615 at 5-6 (1993). An agency’s policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 at 5-6 (1993). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *See Arlington Indep. Sch. Dist. v. Texas Atty. Gen.*, 37 S.W.3d 152, 160 (Tex. App.—Austin 2001, no writ); Open Records Decision No. 615 at 4-5.

You state that the information you seek to withhold under section 552.111 consists of internal communications pertaining to policymaking matters of the city. Upon review, we agree that the submitted information contains advice, recommendations and opinions reflecting the policymaking processes of the city. Accordingly, we have marked the information that is excepted from disclosure under section 552.111 of the Government Code and may be withheld on that basis.

You also assert that the information submitted in Exhibit B is excepted under section 552.131 of the Government Code, which provides as follows:

(a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

(1) a trade secret of the business prospect; or

(2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].

Section 552.131(a) does not protect the interests of a governmental body regarding the release of information pertaining to economic development negotiations; therefore, none of the submitted information is excepted under section 552.131(a). However, you assert that (1) the Dallas Cowboys are a business prospect the city is seeking to have locate in the city, (2) the negotiations between the city and the Dallas Cowboys have not been finalized, and (3) Exhibit B relates to financial or other incentives that the city is offering the Dallas Cowboys. Therefore, we conclude that city may withhold the marked information in Exhibit B pursuant to section 552.131(b).<sup>2</sup>

In summary, we conclude that the city may withhold the information submitted as Exhibits D and E under section 552.104; the city may withhold the information in Exhibit C under section 552.107(1); the city may withhold the marked information under section 552.111; and the city may withhold some of the information in Exhibit B pursuant to section 552.131(b). The remaining information must be released.

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the

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<sup>2</sup> Because we reach this conclusion under section 552.131, we need not consider your remaining arguments against the disclosure of this information.

governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

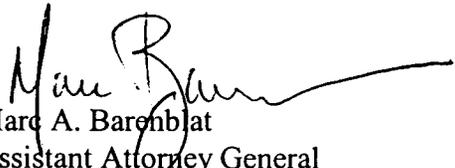
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

  
Marc A. Barenblat  
Assistant Attorney General  
Open Records Division

MAB/jh

Ref: ID# 210978

Enc. Submitted documents

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