



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 13, 2005

Ms. Julie Joe
Assistant County Attorney
County of Travis
P. O. Box 1748
Austin, Texas 78767

OR2005-06194

Dear Ms. Joe:

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# 228027.

The Travis County Attorney's Office (the "county attorney") received a request for all information regarding the correspondence between three named companies and representatives of Travis County (the "county"). You state that you will release some of the responsive information. However, you claim that the submitted information is excepted from disclosure under sections 552.101, 552.104, 552.107, and 552.137 of the Government Code.¹ You also state that the submitted information may contain proprietary information, and thus, pursuant to section 552.305 of the Government Code, you have notified Waste Management of Texas, Inc. ("WMTX"), of the request and of the company's right to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.305(d); *see also* 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 to disclosure under Public Information Act in certain circumstances). We have considered the submitted arguments and reviewed the submitted information.

¹While you also raise section 552.111 of the Government Code, you have provided no comments explaining why this exception should be applicable and you have not marked any portion of the submitted documents to indicate information that you claim is so excepted. We therefore presume the county attorney no longer intends to claim section 552.111 as an exception to disclosure.

You claim that some of the submitted information may be withheld under section 552.104 of the Government Code, which excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” The purpose of section 552.104 is to protect a governmental body’s interests in competitive matters. *See* Open Records Decision No. 592 (1991). Moreover, 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. Open Records Decision No. 541 at 4 (1990). Section 552.104 does not except information relating to competitive situations once a contract has been awarded. Open Records Decision Nos. 306 (1982), 184 (1978).

You state that the information you have marked as Exhibits #1 and #2 and the printed information in Exhibit #3 concerns a contract regarding closure of an existing landfill and the terms for potential acquisition of land for a new landfill site. You explain that the terms of this contract and a similar but separate contract are still being negotiated between the county and the operators of other landfills. You state that the operators of these landfills are competitors. You state that releasing the information at issue would jeopardize the county’s bargaining position in both contract negotiations by revealing the specific terms and concessions that the county is willing to offer the respective operators. You explain that if either entity obtains the details of the proposed contract with the other, the county may not be able to negotiate the most advantageous terms and conditions in either contract. After reviewing the submitted information and your arguments, we find that you have demonstrated how the release of the requested information will harm the county’s interests in this competitive matter. Therefore, you may withhold Exhibits #1 and #2 and the printed portions of Exhibit #3 under section 552.104 of the Government Code.²

You claim that the handwritten notes in Exhibit #3 are protected by section 552.107 of the Governmental 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).

²Because our ruling on Exhibits #1 and #2 and the printed portions of Exhibit #3 is dispositive, we need not address remaining arguments against disclosure.

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)(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 the handwritten notes in Exhibit #3 are confidential communications between a county attorney and the Travis County Commissioners Court. You also state that these notes were made in confidence, intended for the sole use of the parties involved, and have not been shared or distributed to others. Based on our review of your representations and the submitted information, we find that you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, we conclude that the county attorney may withhold the handwritten notes in Exhibit #3 pursuant to section 552.107(1) of the Government Code.

In summary, the county attorney may withhold Exhibits #1 and #2 and the printed portions of Exhibit #3 under section 552.104 of the Government Code. Additionally, the county attorney may withhold the handwritten notes in Exhibit #3 under section 552.107(1) of the Government Code.

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 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).

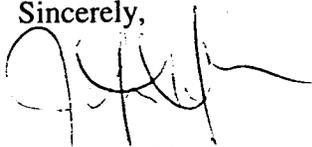
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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,



Jaclyn N. Thompson
Assistant Attorney General
Open Records Division

JNT/krl

Ref: ID# 228027

Enc. Submitted documents

c: B. Trek English
North East Action Group
3616 Quiette Drive
Austin, Texas 78754
(w/o enclosures)