



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 7, 2005

Ms. Amanda M. Bigbee
Henslee, Fowler, Hepworth & Schwartz, L.L.P.
306 West 7th Street, Suite 1045
Fort Worth, Texas 76102

OR2005-08150

Dear Ms. Bigbee:

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# 231833.

The De Leon Independent School District (the "district"), which you represent, received a request for: 1) attorney fee bills pertaining to the disposition of a specified district property; 2) a copy of the bids and bid sign-in sheet pertaining to the specified property; 3) a copy of the request submitted to the Texas Education Agency (the "agency") for approval of the sale of the specified property; and 4) a copy of the request submitted to the agency for approval of a specified lease. You inform us that the district does not have any information responsive to the third part of the request.¹ You claim that the remaining requested information is excepted from disclosure under section 552.104, 552.105, and 552.107 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted

¹We note that the requestor disputes the district's claim that it does not have information responsive to this portion of the request. Because this office cannot resolve disputes of fact in the open records process, we must rely on the representations of the district that the requested document did not exist at the time the request was received. *See* Open Records Decision Nos. 554 (1990), 552 (1990). The Act does not require a governmental body to disclose information that did not exist at the time the request was received, nor does it require a governmental body to prepare new information in response to a request. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975); *see also* Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 416 at 5 (1984).

²Although you also assert that the submitted information is excepted from disclosure under section 552.022 of the Government Code, we note that this section is not an exception to public disclosure. Rather, section 552.022 specifies 18 categories of information that must be released to the public, unless the information is expressly confidential under other law or, in the case of section 552.022(a)(16), is subject to the attorney-client privilege. *See* Gov't Code § 552.022(a).

information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that person may submit comments stating why information should or should not be released).

Initially, we note that you have not submitted information responsive to part 4 of this request. Therefore, if such information existed on the date of the district's receipt of this request, we assume the district has already released it to the requestor. If the district has not released this information, the district must release it to the requestor at this time. *See* Gov't Code §§ 552.006, .301, .302; Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible under circumstances).

The information submitted as Exhibits B and D consists of attorney fee bills that are subject to section 552.022 of the Government Code. This section provides in pertinent part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code § 552.022(a)(16). Under section 552.022, attorney fee bills must be released unless they are expressly confidential under other law. The district seeks to withhold the information at issue under section 552.107. We note, however, that this section is a discretionary exception to public disclosure that protects the governmental body's interests and may be waived. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.107 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the district may not withhold any of the submitted information under section 552.107.

We note, however, that the attorney-client privilege is also found in rule 503 of the Texas Rules of Evidence. The Texas Supreme Court has held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Rule 503 of the Texas Rule of Evidence encompasses the attorney-client privilege and provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or
- (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if 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). Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You assert that the attorney fee bills submitted as Exhibits B and D constitute communications made for the purpose of facilitating the rendition of legal services to the district. We note that you have not identified the individuals listed in the fee bills. We have, however, been able to identify some of these unidentified individuals as representatives of the district or its attorneys. *See* Open Records Decision Nos. 542 (1990) (stating that governmental body has burden of establishing that exception applies to requested information), 532 (1989), 515 (1988), 252 (1980). Only communications between the district and its attorneys, and their representatives, may be protected by the attorney-client

privilege. *See* Tex. R. Evid. 503. Based on your representations and our review, we have marked the information that is protected by the attorney-client privilege encompassed by rule 503. Since you have failed to demonstrate that the remaining information is protected under the attorney-client privilege, it must be released.

We next address the sealed bids, which you have submitted as Exhibit C. Section 552.104(a) excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Section 552.104(b) provides that “[t]he requirement of Section 552.022 that a category of information listed under Section 552.022(a) is public information and not excepted from required disclosure under this chapter unless expressly confidential under law does not apply to information that is excepted from required disclosure under [section 552.104].” The purpose of section 552.104 is to protect a governmental body’s interests in competitive bidding situations. *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 bidding situations once a contract has been awarded. Open Records Decision Nos. 306 (1982), 184 (1978).

You argue that “releasing the bids at this time would have a detrimental effect on the position of [the district] in negotiations with a successful bidder.” Furthermore, you state that “the contract has not been finally awarded to the chosen bidder.” Therefore, we conclude that the information submitted as Exhibit C may be withheld under section 552.104.³

In summary, the district may withhold the information we have marked under Texas Rule of Evidence 503. The sealed bids submitted as Exhibit C may be withheld under section 552.104 of the Government Code. The remaining submitted information must be released to the requestor.

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.

³As we are able to make this determination, we need not address your remaining claim against disclosure for this information.

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); *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 Office of the Attorney General 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,



L. Joseph James
Assistant Attorney General
Open Records Division

LJJ/seg

Ref: ID# 231833

Enc. Submitted documents

c: Mr. Roy Johnson
P.O. Box 52
Desdemona, Texas 76445
(w/o enclosures)