



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 5, 2005

Ms. Deborah H. Loomis
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98 San Jacinto Boulevard, Suite 1400
Austin, Texas 78701

OR2005-09046

Dear Ms. Loomis:

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# 233794.

Hays County (the "county"), which you represent, received a request for six categories of information related to a specified bond passed in 2001 and eminent domain condemnation proceedings.¹ You state that you have released some of the requested information, but you claim that the submitted information is excepted from disclosure under sections 552.103, 552.105, and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we must address the county's obligations under the Act. Pursuant to section 552.301(e) of the Government Code, within fifteen business days of receiving the request,

¹You state, and provide documentation showing, that the requestor subsequently amended his request to exclude category 5 of the request and narrowed the scope of the remaining requested categories of information. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also* Open Records Decision No. 31 (1974) (stating that when governmental bodies are presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed).

²We assume that 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.

a governmental body that seeks to withhold information from disclosure is required to submit (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e)(1)(A).

You state that the county received the initial request for information on July 12, 2005. On July 15, 2005, you state that the county asked the requestor to clarify and possibly narrow his request. *See id.* § 552.222; *see also* Open Records Decision No. 31 (1974). Thus, the statutory deadline imposed by section 552.301(e) was tolled on the date that the county sought clarification from the requestor. *See id.* § 552.301(e); *see also* Open Records Decision No. 663 at 5 (1999) (providing that statutory deadline is tolled during clarification process). You state that you received a response to your request for clarification on July 22, 2005. Accordingly, the fifteen-business-day deadline to submit the information required by section 552.301(e) was August 9, 2005. You did not, however, submit some of the requested information for our review until August 31, 2005. Accordingly, we find that you failed to comply with the requirements of section 552.301 with respect to this information.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Normally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Although you assert that the information not submitted within the fifteen-business-day deadline is excepted from disclosure pursuant to section 552.107 of the Government Code, that section is a discretionary exception to disclosure and is therefore not a compelling reason to overcome the presumption that the information is public. *See* Open Records Decision Nos. 676 at 12 (2002) (harm to governmental body's interests under section 552.107 not compelling reason for non-disclosure); 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1); 522 at 4 (1989) (discretionary exceptions in general). Accordingly, the information not submitted within the fifteen-business-day deadline may not be withheld under section 552.107. As you raise no further exceptions to disclosure for this information, and it is not otherwise confidential by law, you must release it to the requestor.

Next, we note that a portion of the remaining submitted information is subject to section 552.022 of the Government Code. Section 552.022 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:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The submitted information includes a completed appraisal report, which we have marked, made for the City of San Marcos; therefore, this appraisal report is made expressly public by section 552.022(a)(1), unless it is confidential under "other law." Section 552.105 of the Government Code is a discretionary exception under the Act that does not constitute "other law" for purposes of section 552.022. *See* Open Records Decision No. 564 (1990) (governmental body may waive statutory predecessor to section 552.105). Accordingly, the county may not withhold this appraisal report under section 552.105. As you claim no further exceptions to disclosure for this appraisal report, and it is not otherwise confidential by law, it must be released to the requestor.

We now address your arguments regarding the remaining submitted information. Section 552.107(1) of the Government Code protects information that is encompassed by the attorney-client privilege. *See* Gov't Code § 552.107(1). When asserting the attorney-client privilege, a governmental body maintains 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 that the information constitutes or documents a communication. *See 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. *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 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. *See* 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, *see 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." *See 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, 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).

In this instance, you state that the submitted documents numbered 1, 4, 116, 206 to 207, 209 to 211, 228 to 247, 249 to 250, and 256 to 284 constitute privileged attorney-client communications between county attorneys and county employees or agents made for the purpose of rendering professional legal advice. Furthermore, you assert that these communications were intended to be confidential and their confidentiality has been maintained. Based on these representations and our review of the information at issue, we agree that the submitted documents numbered 1, 4, 116, 206 to 207, 209 to 211, 228 to 247, 249 to 250, and 256 to 284 consist of privileged attorney-client communications that the county may withhold under section 552.107.³

Next, we address your claim under section 552.105 of the Government Code, which excepts from disclosure information relating to:

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Gov't Code § 552.105. Section 552.105 is designed to protect a governmental body's planning and negotiating position with regard to particular transactions. *See Open Records Decision Nos. 564 (1990), 357 (1982), 310 (1982)*. Information excepted from disclosure under section 552.105 that pertains to such negotiations may be excepted so long as the transaction relating to those negotiations is not complete. *See Open Records Decision No. 310 (1982)*. A governmental body may withhold information "which, if released, would impair or tend to impair [its] 'planning and negotiating position in regard to particular transactions.'" *Open Records Decision No. 357 at 3 (1982)* (quoting *Open Records Decision No. 222 (1979)*). The question of whether specific information, if publicly released, would impair a governmental body's planning and negotiation position in regard to particular transactions is a question of fact. Accordingly, this office will accept a governmental body's good faith determination in this regard, unless the contrary is clearly shown as a matter of law. *See Open Records Decision No. 564 (1990)*.

³As we are able to make this determination, we need not address your section 552.105 claim against disclosure for this information

You state that the submitted documents numbered 2 to 3, 6 to 7, 10 to 53, 64 to 92, 101 to 113, 117 to 192, 198 to 205, 208, 248, 251 to 255, and 277 to 280 pertain to “the purchase price of certain parcels of land to be used for road-improvement projects under the 2001 road bond.” You also state that the release of this information will harm the county’s negotiation position with respect to the procurement of the remaining parcels to be purchased for the projects at issue. *See* Open Records Decision No. 564 (1990) (information regarding a parcel of property acquired in advance of adjacent or nearby parcels may be excepted from disclosure if the release would harm the governmental body’s negotiating position with respect to the other parcels). Based on your representations and our review of the submitted information, we agree that section 552.105 is applicable to the submitted documents numbered 2 to 3, 6 to 7, 10 to 53, 64 to 92, 101 to 113, 117 to 192, 198 to 205, 208, 248, 251 to 255, and 277 to 280. Accordingly, we conclude that county may withhold such information pursuant to section 552.105.⁴

In summary, the submitted documents numbered 1, 4, 116, 206 to 207, 209 to 211, 228 to 247, 249 to 250, and 256 to 284 may be withheld under section 552.107 of the Government Code. The submitted documents numbered 2 to 3, 6 to 7, 10 to 53, 64 to 92, 101 to 113, 117 to 192, 198 to 205, 208, 248, 251 to 255, and 277 to 280 may be withheld under section 552.105 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. *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

⁴As we are able to make this determination, we need not address your remaining claim against disclosure.

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. 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,



Caroline E. Cho
Assistant Attorney General
Open Records Division

CEC/sdk

Ref: ID# 233794

Enc. Submitted documents

c: Mr. Charles O'Dell
Executive Director
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(w/o enclosures)