



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 30, 2005

Mr. Jesús Toscano, Jr.
Administrative Assistant City Attorney
City of Dallas
1500 Marilla - Rm 7DN
Dallas, Texas 75201

OR2005-10735

Dear Mr. Toscano:

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# 237094.

The City of Dallas (the "city") received a request for:

- 1) Contracts and correspondence between the city of Dallas and Integrated for the two referenced projects,
- 2) Any and all documents filed by Integrated with the city enclosing M/WBE Contract Documentation, Good Faith Effort Documentation, Schedule of Work and Actual Payment Loan, Ethnic Workforce Composition Report,
- 3) All documents relating to the funds paid to integrated, and
- 4) All documents relating to the amounts authorized and approved for each scope of work for the projects.

You state that the city will provide the requestor with an opportunity to inspect a portion of the requested information, but claim that the submitted information is excepted from disclosure under sections 552.107 and 552.137 of the Government Code. In addition, you assert that some of the information is proprietary and, pursuant to section 552.305 of the Government Code, notified TXI Operations, LP ("TXI") of the request and of its opportunity to submit comments to this office. *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 to disclosure in certain circumstances). We have considered your arguments and reviewed the submitted information.¹

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, TXI has not submitted to this office any reasons explaining why its information should not be released. We thus have no basis for concluding that Exhibit B constitutes proprietary information. *See* Gov't Code §§ 552.110(a)-(b), 552.131(a); Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information under Gov't Code § 552.110(b), party must show by specific factual evidence, not conclusory or generalized allegations, that release of information would cause that party substantial competitive harm), 552 at 5 (1990) (if governmental body takes no position under Gov't Code § 552.110(a), third party must establish *prima facie* case that information is trade secret). Accordingly, Exhibit B must be released.

Turning to your claimed exceptions, section 552.107 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 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. *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 Texas 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, 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, *id.* 503(b)(1),

¹We 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.

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, 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 claim that Exhibits D and E constitute confidential communications between city attorneys and city employees. You state that these communications “were made for the purpose of facilitating the rendition of professional legal services” and indicate that the confidentiality of these communications has been maintained. Based on these representations and our review of the information at issue, we agree that Exhibits D and E consist of privileged attorney-client communications that the city may withhold under section 552.107.

Lastly, section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See Gov’t Code* § 552.137(a)-(c). You state that the e-mail addresses you have marked in Exhibit F are not excluded by section 552.137(c). In addition, you indicate that the city has not received consent for the release of the e-mail addresses at issue. Therefore, the city must withhold the e-mail addresses you have marked in Exhibit F under section 552.137.

In summary, Exhibits D and E consist of privileged attorney-client communications that the city may withhold under section 552.107. The city must withhold the e-mail addresses you have marked in Exhibit F under section 552.137. 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 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); *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,



José Vela III
Assistant Attorney General
Open Records Division

JV/krl

Ref: ID# 237094

Enc. Submitted documents

c: Donald H. Grissom
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(w/o enclosures)