



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 13, 2008

Mr. Jason Rammel
Sheets & Crossfield, P. C.
Attorney for City of Round Rock
309 East Main Street
Round Rock, Texas 78664-5246

OR2008-08138

Dear Mr. Rammel:

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# 312739.

The Cross County Water Supply Corporation ("Cross County"), which you represent, received a request for seventeen categories of information related to the creation and operation of Cross County, including supply and purchase contracts, facilities, permits, and right-of-way acquisition. You claim that the submitted e-mails, maps, appraisal reports, and memoranda are excepted from disclosure under sections 552.105, 552.107, and 552.111 of the Government Code and protected under rule 192.3(e) of the Texas Rules of Civil Procedure.¹ We have considered the arguments you make and reviewed the submitted information, some of which is a representative sample.²

¹ To the extent any additional responsive information existed on the date Cross County received this request, we assume Cross County has released it. If Cross County has not released any such records, Cross County must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

² We 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.

Initially, we note that some of the e-mails submitted in Exhibit F were created after Cross County received the request for information. Thus, this information, which we have marked, is not responsive to the request. This decision does not address the public availability of the non-responsive information, and that information need not be released.

Next, we note that although Cross County claims the submitted appraisal reports are protected under rule 192.3(e) of the Texas Rules of Civil Procedure, Cross County failed to raise this rule within ten business days of its receipt of the written request for information, as required by section 552.301(b). See Gov't Code § 552.301(b). Rule 192.3(e) is discretionary in nature and serves only to protect a governmental body's interests; as such, it may be waived. By failing to timely raise rule 192.3(e), we find that you have waived your claim under this rule. See TEX. R. EVID. 511; *Jordan v. Court of Appeals*, 701 S.W.2d 644, 649 (Tex. 1985); *Arkla, Inc. v. Harris*, 846 S.W.2d 623, 630 (Tex. Civ. App.—Houston [14th Dist.] 1993, orig. proceeding); *Aetna Cas. & Surety Co. v. Blackmon*, 810 S.W.2d 438, 440 (Tex. Civ. App.—Corpus Christi 1991, writ denied). Consequently, Cross County may not withhold the submitted appraisal reports under rule 192.3. However, because your other claimed exceptions were timely asserted, we will consider their applicability to the submitted information.

Next, we note that Exhibits B and C contain information that is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in part, that

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;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1), (3). In this instance, Exhibits B and C contain completed appraisal reports and Exhibit B contains a check issued by Cross County that are subject to sections 552.022(a)(1) and 552.022(a)(3) of the Government Code. Although you seek to withhold the completed appraisal reports and check under section 552.105 of the Government Code, that section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. See *id.* § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 564 (1990) (statutory

predecessor to section 552.105 subject to waiver). As such, section 552.105 is not other law that makes information confidential for the purposes of section 552.022. Therefore, Cross County may not withhold these reports and check, which we have marked, under section 552.105. As you have claimed no other exceptions to disclosure for the appraisal reports in Exhibits B and C, they must be released.

We note, however, that the check in Exhibit B contains a bank account and routing number that are subject to section 552.136(b) of the Government Code. This section states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b). Thus, Cross County must withhold the bank account and routing numbers that we have marked in Exhibit B under section 552.136 of the Government Code.

We will now consider your claim under section 552.105 with respect to the remaining information in Exhibits B and C, and the information in Exhibits D and E. Section 552.105 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 that is excepted from disclosure under section 552.105 that pertains to such negotiations may be excepted from disclosure so long as the transaction relating to that information is not complete. *See* ORD 310. But, the protection offered by section 552.105 is not limited solely to transactions not yet finalized. This office has concluded that information about specific parcels of land obtained in advance of other parcels to be acquired for the same project could be withheld where release of the information would harm the governmental body’s negotiating position with respect to the remaining parcels. *See* ORD 564 at 2. 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.’” ORD 357 at 3 (quoting Open Records Decision No. 222 (1979)). The question of whether specific information, if publicly released, would impair a governmental body’s planning and negotiating position with 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* ORD 564.

You state the remaining information in Exhibit B is “related to the appraisal[s] and purchase price[s] of several water line easements that have been acquired prior to easements on other parcels.” You also assert that the remaining information in Exhibit C relates to the appraisals and purchase prices of land parcels that have not yet been acquired. You further contend that Exhibit D consists of purchase offer letters with stated prices for land not yet acquired, and Exhibit E contains a map of proposed facilities and land parcels not yet purchased for the project. You explain that the land already acquired and the land to be purchased is part of a water line construction project that requires the acquisition of certain real property. You claim that release of the remaining information in Exhibits B and C, as well as the information in Exhibits D and E, would significantly harm Cross County’s negotiating position with the landowners of the parcels to be acquired. Based on your representations and our review of the information in question, we conclude that Cross County may withhold the remaining information in Exhibits B and C, along with the information in Exhibits D and E, under section 552.105 of the Government Code.

You assert the information in Exhibit F is protected under section 552.107(1) of the Government Code, which 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 a capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). 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 assert the responsive information in Exhibit F consists of communications made for the purpose of facilitating the rendition of professional legal services. We note, however, that you have failed to identify any of the parties listed in the e-mails. Because you have not identified the parties in the e-mails, nor have you informed us how each is a privileged party, we find that you have failed to demonstrate the applicability of the attorney-client privilege to the information in Exhibit F. Accordingly, Cross County may not withhold the responsive information in Exhibit F under section 552.107. *See* TEX. R. EVID. 511 (person waives a discovery privilege if he voluntarily discloses the privileged information). As you have raised no other exceptions to disclosure of this information, it must be released.

You assert that the information in Exhibit G is excepted from disclosure under the deliberative process privilege encompassed by section 552.111 of the Government Code. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

Section 552.111 can also encompass communications between a governmental body and a third-party, including a consultant or other party with a privity of interest. *See* Open Records Decision Nos. 631 at 2 (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body's consultants). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See* ORD 561 at 9.

Although you assert that the e-mails and memorandum in Exhibit G contain advice, recommendations, and opinions of Cross County officials and consultants related to policymaking matters, you have not identified the parties included in the e-mails, nor have you explained how they share a privity of interest. Thus, we find that you have not established that the deliberative process privilege applies to the e-mails in Exhibit G. Furthermore, although the parties involved in the memorandum are identified and share a privity of interest, the memorandum does not include advice, recommendations, and opinions related to policymaking matters. Thus, you have failed to establish that the deliberative process privilege applies to the memorandum in Exhibit G. Accordingly, Exhibit G may not

be withheld under section 552.111 of the Government Code. As you have not raised any other exceptions to disclosure for this information, it must be released.

In summary, Cross County must withhold the information we have marked in Exhibit B under section 552.136 of the Government Code. Cross County may withhold the remaining information in Exhibits B and C, along with the information in Exhibits D and E under section 552.105 of the Government Code. The remaining information must be released.³

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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).

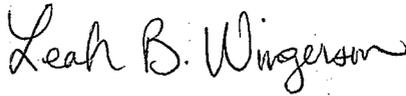
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

³ We note the remaining information contains social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/ma

Ref: ID# 312739

Enc. Submitted documents

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(w/o enclosures)