

The ruling you have requested has been modified pursuant to a court order. The court judgment has been attached to this document.



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 12, 2009

Ms. Maria Smith  
North Texas Tollway Authority  
P.O. Box 260729  
Plano, Texas 75026

OR2009-03282

Dear Ms. Smith:

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# 337125.

The North Texas Tollway Authority (the "authority") received a request for the following categories of information pertaining to the Trinity Parkway Design Section RFQ: (1) documents related to advertisement; (2) guidelines used by the authority to evaluate the responses; (3) documents related to the selection process; (4) scoring sheets used to rank the respondents; (5) lists of respondents and each respondent's stated project preference; (6) "shortlists" of respondents recommended and compiled by the authority; (7) lists of the final firms selected; (8) related correspondence, e-mails, and notes, including correspondence related to the selection process; and (8) reviews, reports, and analyses prepared to evaluate the fairness and legality of the RFQ and selection process. You claim that the requested information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code.<sup>1</sup> You indicate that the submitted information may contain proprietary information subject to exception under the Act. You also indicate the authority has notified the interested third parties of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released. See Gov't Code § 552.305(d); see also Open Records Decision No. 542 (1990) (statutory

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<sup>1</sup>We note that although you initially raise sections 552.101, 552.104, 552.110, 552.111, 552.117, and 552.137 of the Government Code, you have not submitted any arguments to support these exceptions. Therefore, we assume you have withdrawn your claim that these sections apply to the submitted information.

predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from Huitt-Zollars, Inc. (Huitt). We have considered the submitted arguments and reviewed the submitted information.

Initially, we note that Huitt has submitted comments to this office wherein it raises section 552.104 of the Government Code as an exception to disclosure for its Statement of Qualifications. However, the authority did not submit any Statements of Qualifications as responsive to the present request for information. This ruling does not address information that was not submitted by the authority and is limited to the information submitted as responsive by the authority. See Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested). Accordingly, we will not address Huitt's argument against disclosure.

Next, we address the authority's arguments against disclosure of the submitted information. Section 552.103 of the Government Code provides in part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

*Id.* § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You claim the submitted information pertains to pending litigation. You inform us, and provide documentation showing, that the requestor's firm filed a lawsuit against the authority

on December 29, 2008, in the 366<sup>th</sup> Judicial District Court of Collin County, Texas. We note however, that the present request for information was received by the authority on December 17, 2008, before the lawsuit was filed. Therefore, we determine you have failed to demonstrate that litigation was pending on the date the request was received. Accordingly, the authority may not withhold the submitted information under section 552.103 of the Government Code.

Next, you contend the information submitted as Exhibit C is excepted from disclosure under section 552.107 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 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 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *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), 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 Exhibit C consists of attorney-client communications between the authority and its attorneys that were made for the purpose of rendering professional legal advice to the authority. You also state these communications were made in confidence and that confidentiality has been maintained. Based on our review of the information at issue, we agree the information we have marked consists of privileged attorney-client communications the authority may withhold under section 552.107. However, you do not explain the authority's relationship with, or the capacities of, the parties involved in the remaining communications in Exhibit C. Thus, you have failed to demonstrate the remaining communications in Exhibit C document privileged attorney-client communications. Accordingly, the authority may not withhold the remaining communications in Exhibit C under section 552.107 of the Government Code.

We note that some of the remaining information consists of personal e-mail addresses that are subject to section 552.137 of the Government Code.<sup>2</sup> Section 552.137 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). The e-mail addresses we have marked are not a type specifically excluded by section 552.137(c). Accordingly, the authority must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their disclosure.

In summary, the authority may withhold the information we have marked under section 552.107 of the Government Code. The authority must withhold the information we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their disclosure. The remaining information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

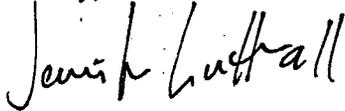
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public

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<sup>2</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Jennifer Luttrall  
Assistant Attorney General  
Open Records Division

JL/eeg

Ref: ID# 337125

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

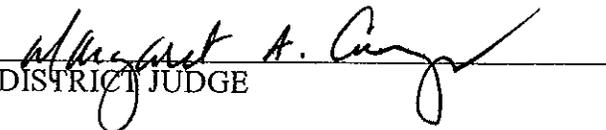
Mr. Robert J. McDermott, PE  
Executive Vice President  
Huitt-Zöllars  
3131 McKinney Avenue, Suite 600  
Dallas, Texas 75204-2489  
(w/o enclosures)



*mtc*

the NTTA ~~may continue to withhold the responsive documents~~. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that any relief sought by Defendant the Attorney General of Texas or Intervenors APM & Associates, Inc. and Afisu Olabimtan is hereby DENIED. And, IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Summary Judgment is hereby ENTERED in favor of the North Texas Tollway Authority and against the Attorney General of Texas, APM & Associates, Inc., and Afisu Olabimtan.

Signed this 10 day September, 2009.

  
DISTRICT JUDGE