



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 20, 2009

Mr. Jerry Wallace  
Blanco Ordoñez & Wallace, P.C.  
5715 Cromo Drive  
El Paso, Texas 79912

OR2009-05201

Dear Mr. Wallace:

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# 340438.

The Ysleta Independent School District (the "district"), which you represent, received a request for: (1) a summary of all benefits currently offered by the district and the pricing for each of these benefits; (2) names of carriers currently offering these benefits; and (3) the legal opinion stating that the district may update its previous benefits bidding without opening a new Request for Proposals ("RFP"). You claim that the submitted information is excepted from disclosure under sections 552.104 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that a portion of the submitted information, which we have marked, is not responsive to the instant request because it was created after the date of this request. The district need not release non-responsive information in response to this request, and this ruling will not address such information.

Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). This exception protects the interests of a governmental body in competitive bidding situations where the governmental body wishes to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 (1991). 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. *See* Open Records Decision No. 541 at 4 (1990).

You explain that the district issued an RFP in April 2008 for a contract for employee health benefits. You state that, due to a failure by the district's existing provider to provide the contracted benefits, the district subsequently decided to "revisit the RFP's in an attempt to . . . secure network services quickly" and that the re-opened competitive process is in progress. You argue that, because the requested documents are the April 2008 RFP responses that are still under review, the requested documents are protected from production while the competitive process is ongoing. However, we note that the present request is for summaries of benefits currently in place, not for the responses to the April 2008 RFP. Moreover, much of the submitted information relates to employee benefits other than health benefits. Thus, you have not shown how release of any of the submitted information would adversely affect the district's position in a competitive situation related to the district's employee health benefits contract. Accordingly, we conclude that the district may not withhold any portion of the submitted information under section 552.104 of the Government Code.

You also argue that "all information regarding network provider rates constitutes trade secrets and therefore is protected from production by the attached [court] order and the Public Information Act." Section 552.107(2) of the Government Code excepts information from public disclosure if "a court by order has prohibited disclosure of the information." Gov't Code § 552.107(2). You have submitted for our review a copy of an "Agreed Judgment and Permanent Injunction Order" dated July 15, 2005, in the case styled *Access Administrators, Inc., v. Ysleta Independent School District*, No. 2005-2439 (County Ct. No. 7, El Paso County, Tex.), which prohibits the district from disclosing to the public certain information contained within Access Administrators, Inc.'s, response to the Employee Benefits Program Competitive Sealed Proposal Rebid issued by the district on September 16, 2004. Upon review, we conclude that you have not established that the order prohibits the release by the district of any of the submitted information. Therefore, the submitted information is not excepted from disclosure under section 552.107(2) of the Government Code.

Based on your assertion that the submitted information constitutes trade secrets excepted from production by the Act, we understand you to claim that release of this information may implicate the proprietary rights of third parties. Accordingly, pursuant to section 552.305 of the Government Code, you were required to notify the interested third parties of the request and of their opportunity to submit comments to this office explaining why their information should be withheld from disclosure. *See id.* § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* 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). As of the date of

this letter, this office has not received comments from any third party explaining how release of the requested information will affect its proprietary interests. Thus, no third party has demonstrated that any of the requested information is proprietary for purposes of the Act. *See* Gov't Code § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990). Therefore, the district may not withhold any of the submitted information as a trade secret.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. *See id.* § 552.107(1). 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. *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 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). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* 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, 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 state that a portion of the submitted information consists of an e-mail from the district's outside counsel to a district employee. You further state that this communication was made in furtherance of the rendition of legal services to the district and has remained confidential.

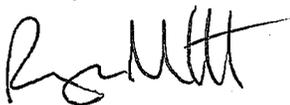
Based on your representations and our review, we agree that the e-mail we have marked constitutes privileged attorney-client communication. Accordingly, the district may withhold this e-mail under section 552.107 of the Government Code.

In summary, the district may withhold the e-mail we have marked under section 552.107, but must release the remainder of the submitted responsive information.

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

Sincerely,



Ryan T. Mitchell  
Assistant Attorney General  
Open Records Division

RTM/cc

Ref: ID# 340438

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)