



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 19, 2009

Ms. Susan C. Rocha
Denton, Navarro, Rocha & Bernal
Attorneys for City of Buda
2517 North Main Avenue
San Antonio, Texas 78212

OR2009-14755

Dear Ms. Rocha:

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# 358631.

The City of Buda (the "city"), which you represent, received a request for all communications and documentation pertaining to the Texas Capital Fund and the US Foods Service ("US Foods") grant. You indicate the city has provided some of the requested information to the requestor. You claim the submitted e-mails and grant proposal information are excepted from disclosure under sections 552.107 and 552.110 of the Government Code. Furthermore, you assert the submitted grant proposal information may contain proprietary information subject to exception under the Act. Accordingly, you state, and provide documentation showing, you notified US Foods of the city's receipt of the request for information and of the company's right to submit arguments to this office as to why its information should not be released to the requestor. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory 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 submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information). We have considered the exceptions you claim and reviewed the submitted information.

Initially, the requestor contends she was not timely notified of the city's request for a ruling from this office. Pursuant to section 552.301(d) of the Government Code, the governmental

body must provide the requestor, within ten business days after the date of its receipt of the request for information, a statement that the governmental body has asked for a decision from the attorney general and a copy of the governmental body's written communication to attorney general asking for a decision. *See id.* § 552.301(d). You state the city received the present request on July 30, 2009. We note this office does not count the date the request was received as a business day for the purpose of calculating a governmental body's deadlines under the Act. The requestor has provided information showing the city submitted the information required under section 552.301(d) to the requestor on August 12, 2009, within ten business days of the city's receipt of the request. *See id.* § 552.308(a) (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Based on this information, we find the city complied with the requirements of section 552.301 in requesting this ruling. Accordingly, we will address the city's argument against disclosure.

You claim the e-mails in Exhibits C and D are excepted from disclosure 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 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 lawyers representing another party in a pending action concerning a matter of common interest therein. TEX. R. EVID. 503(b)(1)(A)-(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 pet.). 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 the e-mails in Exhibit C are communications between an attorney for the city and city officials, and that these communications were made in furtherance of the rendition of professional legal services. You also state these communications were made in confidence, and indicate that confidentiality has been maintained. Based on your representations and our review of the information at issue, we find that you have demonstrated the applicability of the attorney-client privilege to some of the e-mails in Exhibit C. Thus, the city may withhold this information, which we have marked, under section 552.107 of the Government Code. However, you have failed to demonstrate how the remaining e-mails in Exhibit C were communicated in furtherance of the rendition of professional legal services. Therefore, the city may not withhold this information under section 552.107.

You state the e-mails in Exhibit D pertain to communications made in furtherance of the rendition of professional legal services between attorneys and officials of a governmental body other than the city. You have not, however, provided any arguments explaining how the privity between the privileged parties in the communications has been maintained while the e-mails are in the possession of the city. Furthermore, you have not explained that the communications were made in confidence and the confidentiality has been maintained. Thus, we find you have failed to demonstrate the applicability of the attorney-client privilege to Exhibit D. Consequently, Exhibit D may not be withheld under section 552.107 of the Government Code.

We note the remaining e-mails in Exhibit C contain an e-mail address, which we have marked, that may be subject to section 552.137 of the Government Code. This section 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).¹ *See Gov't Code* § 552.137(a)-(c). The marked e-mail address is not specifically excluded by section 552.137(c). As such, the marked e-mail address must be withheld under section 552.137 of the Government Code, unless the owner of the address has affirmatively consented to its release. *See id.* § 552.137(b).

You assert some of Exhibit E may be excepted under section 552.110 of the Government Code. We note, however, that section 552.110 is designed to protect the interests of third parties, not the interests of a governmental body. As stated above, you notified US Foods

¹The 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).

of the request for information and of its right to submit arguments explaining why its information should not be released. 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 id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from US Foods explaining why its grant proposal information submitted as Exhibit E should not be released. Therefore, we have no basis to conclude US Foods has protected proprietary interests in its submitted information. *See id.* § 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. Consequently, the city may not withhold Exhibit E on the basis of any proprietary interest US Foods may have in the information.

We note Exhibit E contains a bank account number. Section 552.136 of the Government Code provides:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding 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. We conclude the bank account number we have marked constitutes an access device number for purposes of section 552.136. Thus, the city must withhold the marked bank account number in Exhibit E under section 552.136 of the Government Code.

In summary, the city may withhold the marked e-mails in Exhibit C under section 552.107 of the Government Code. The city must withhold the marked e-mail address under section 552.137 of the Government Code, unless the owner of the address has consented to its release, and the marked bank account number under section 552.136 of the Government Code. 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, 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, toll free, at (888) 672-6787.

Sincerely,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

Ref: ID# 358631

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. John Fowler
US Foods Service
979 Springdale Road
Austin, Texas 78702
(w/o enclosures)