



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 28, 2010

Mr. Slater C. Elza
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For Downtown Amarillo, Inc
P.O. Box 9158
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OR2010-16397

Dear Mr. Elza:

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# 398296.

Downtown Amarillo, Inc. ("DAI"), which you represent, received two requests for all board of directors meeting minutes, all financial reports presented to the board of directors, DAI's check register, and all e-mails between the executive director and the president of the board of directors. The first requestor seeks information created from the date of DAI's inception to present, and the second requestor seeks information created from February 24, 2010 to present. You state you have released some of the requested information. You claim portions of the remaining information are excepted from disclosure under sections 552.104, 552.105, 552.107, and 552.131 of the Government Code.¹ You also state release of this information may implicate the proprietary interests of three third parties. Accordingly, you have notified these third parties of the requests and of their right to submit arguments to this office as to why their information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have

¹Although you initially raised sections 552.101 and 552.128 you have not submitted to this office written comments stating the reasons why these sections would allow the information to be withheld. Thus, DAI has waived its claim under section 552.128. *See* Gov't Code § 552.301(e) (governmental body must provide comments explaining why exceptions raised should apply to information requested); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions in general). Further, DAI has not demonstrated that any of the submitted information is confidential for purposes of section 552.101. *See* Gov't Code §§ 552.301, .302.

received correspondence from one of these parties. We have also received comments from one of the requestors. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

In the first requestor's letter to this office, he asks this office to rule that DAI must open its meetings to the public. We note that this question relates to the Texas Open Meetings Act. *Id.* § 551.001 *et seq.* This inquiry is thus outside the scope of this office's ruling process under the Act. Accordingly, we do not address the requestor's open meetings question.

Next, we note that the third party that submitted comments only seeks to withhold information that was not submitted by DAI to this office for our review. Because such information was not submitted by the governmental body, this ruling does not address that information or the third party's arguments and is limited to the information submitted as responsive by DAI. *See id.* § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

Next, we note that 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) of the Government Code to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received any arguments from the remaining two companies DAI notified of these requests. We, thus, have no basis for concluding that any of the remaining information constitutes these companies' proprietary 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. Accordingly, DAI may not withhold any of the submitted information based on the proprietary interests of these remaining two companies.

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 a governmental body's interests in connection with competitive bidding and in certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). This office has held a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the "competitive advantage" aspect of this exception if it can satisfy two criteria. *See id.* First, the governmental body must demonstrate it has specific marketplace interests. *See id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *See id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body's legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body's demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *See id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

You state DAI is in the process of acquiring property located in downtown Amarillo for potential economic and civil development. You seek to withhold the identities of several companies and their representatives who are assisting DAI in this effort by negotiating with land owners and conducting market studies. You assert that release of the identities of these companies and their representatives would alert land owners that their property is being pursued, and may cause the land owners to increase the asking price of their property. Based on your representations and our review, we find you have demonstrated DAI has a specific marketplace interest and may be considered a "competitor" for purposes of section 552.104. Further, we find you have demonstrated that release of the identities of the companies and their representatives, which we have marked, would cause specific harm to DAI's marketplace interests. Accordingly, DAI may withhold the information we have marked under section 552.104 of the Government Code. However, the remaining information you have marked does not identify these parties. Further, we note that this information, which describes the types of projects being developed by DAI and the companies, is also available on DAI's website. Accordingly, we find you have failed to demonstrate how the release of the remaining information you have marked would cause potential harm to DAI's marketplace interest in this situation. DAI may not withhold any of the remaining information you have marked under section 552.104 of the Government Code.

Section 552.105 of the Government Code excepts from disclosure information relating to the following:

- (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 pertaining to such negotiations that is excepted from disclosure under section 552.105 may be withheld so long as the transaction relating to the negotiations is not complete. *See* ORD 310. Under section 552.105, 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 in regard to particular transactions is a question of fact. Thus, 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 seek to withhold portions of the remaining information under section 552.105. However, upon review, we find none of the remaining information relates to the location, appraisals, or purchase price of real or personal property. Accordingly, none of the remaining information may be withheld under section 552.105 of the Government Code.

You raise section 552.107 of the Government Code for portions of the remaining information. Section 552.107 protects information coming within the attorney-client privilege. Gov't Code § 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. 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, 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.*, 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). We note that communications with third party consultants with which a governmental body shares a privity of interest are protected. Open Records Decision Nos. 464 (1987), 429 (1985).

You state the e-mails and attachments you have indicated document communications between DAI and its attorneys. You have identified the parties to these communications and state these communications were made for the purpose of facilitating the rendition of professional legal services and were and have remained confidential. Upon review, we agree these e-mails and attachments constitute privileged attorney-client communications. Accordingly, DAI may withhold these e-mails and attachments, which we have marked, under section 552.107 of the Government Code.

You also raise section 552.131 of the Government Code for portions of the remaining information. Section 552.131 relates to economic development information and provides in part:

(a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

- (1) a trade secret of the business prospect; or
- (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].

Gov't Code § 552.131. Section 552.131(a) excepts from disclosure only "trade secret[s] of [a] business prospect" and "commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." *Id.* This aspect of section 552.131 is co-extensive with section 552.110 of the Government Code. *See id.* § 552.110(a)-(b). We have not received any third party arguments claiming any of the remaining information is a trade secret. Accordingly, DAI may not withhold any of the remaining information under section 552.131(a) of the Government Code. Furthermore, we find none of the remaining information pertains to a financial or other incentive being offered to a business prospect. Accordingly, DAI may not withhold any of the remaining information under section 552.131(b) of the Government Code.

We note the remaining information contains the cellular telephone number of a DAI employee, which we have marked. Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code.² *See id.* §§ 552.117(a)(1), .024. We note section 552.117 also

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

encompasses a personal cellular telephone number, unless the cellular service is paid for by a governmental body. *See* Open Records Decision Nos. 670 at 6 (2001), 506 at 5-7 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). DAI may only withhold information under section 552.117(a)(1) on behalf of a former or current employee who has made a request for confidentiality under section 552.024 prior to the date on which the request for information was made. You do not inform this office whether the employee whose cellular telephone number we have marked elected to keep her personal information confidential before DAI received the present request for information. Therefore, we must rule conditionally. To the extent the employee whose personal information we have marked timely elected to withhold such information under section 552.024 and if the employee at issue paid for the cellular telephone service with her own funds, the marked information must be withheld under section 552.117(a)(1). If the employee whose personal information we have marked did not timely elect to withhold such information under section 552.024 or if she did not pay for the cellular telephone service with her own funds, the marked information may not be withheld under section 552.117(a)(1).

Finally, we note the remaining information contains e-mail addresses subject to section 552.137 of the Government Code. 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). Gov't Code § 552.137(a)-(c). We note section 552.137(a) does not apply to the e-mail address provided by a person who has a contractual relationship with the governmental body or by the contractor's agent. *Id.* § 552.137(c)(1). We further note section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. Therefore, the e-mail addresses we have marked must generally be withheld under section 552.137 unless the owners of the addresses have affirmatively consented to their release.³ *See id.* § 552.137(b). However, we note the requestors have a right of access their own e-mail addresses. *Id.*

In summary, DAI may withhold the information we have marked under section 552.104 of the Government Code. DAI may withhold the e-mails and attachments we have marked under section 552.107 of the Government Code. To the extent the employee at issue timely elected to withhold her personal information under section 552.024 and paid for the cellular telephone number with her own funds, the marked telephone number must be withheld under section 552.117(a)(1). DAI must generally withhold the e-mail addresses we have marked

³We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

under section 552.137, unless it receives consent for their release. However, DAI may not withhold the requestors' own e-mail addresses from them. 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,



Kate Hartfield
Assistant Attorney General
Open Records Division

KH/em

Ref: ID# 398296

Enc. Submitted documents

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(w/o enclosures)

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