ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 5, 2011

Ms. Cindy J. Crosby
Bickerstaff Heath Delgado Acosta, L.L.P.
For County of Bastrop
3711 South Mopac Expressway, Building 1, Suite 300
Austin, Texas 78746

OR2011-00283

Dear Ms. Crosby:

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# 404978.

The County of Bastrop (the "county"), which you represent, received a request for five categories of information related to the Central Texas Airport. You state some information has been made available to the requestor. You claim some of the submitted information is excepted from disclosure under sections 552.107, 552.110, and 552.137 of the Government Code.[1] You also indicate that release of the submitted information may implicate the proprietary interests of the Central Texas Airport and Green Corporate Centers ("CTA"). Accordingly, you indicate you have notified CTA of the request and of the company's right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.305(d); *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). We have received comments from CTA. We have considered the submitted arguments and reviewed the submitted information.

[1]Although you raise section 552.101of the Government Code in conjunction with rule 1.05 of the Texas Disciplinary Rules of Professional Conduct and rule 503 of the Texas Rules of Evidence, we note that section 552.101 does not encompass discovery privileges. *See* Open Records Decision No. 676 at 1-3 (2002).

You state some of the submitted information, which we have marked, is not responsive to the instant request for information because it does not consist of the information specified in the request. This ruling does not address the public availability of any information that is not responsive to the request, and the county is not required to release that information in response to the request.

CTA states the majority of its submitted information is marked confidential and that it intended its information to be provided only to county personnel. Information is not confidential under the Act, however, simply because the party that submits the information anticipates or requests it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act through an agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract."), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110 of the Government Code). Consequently, unless the submitted information comes within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

The county and CTA raise section 552.107 of the Government Code for portions of the submitted information. Section 552.107 excepts from disclosure "information that . . . an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Evidence or the Texas Disciplinary Rules of Professional Conduct." Gov't Code § 552.107(1). We note that section 552.107 protects the interests of governmental bodies, as distinguished from exceptions which are intended to protect the interests of third parties. *See* Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege under section 552.107), 522 (1989) (discretionary exceptions in general). As the county does not raise section 552.107 for any portion of CTA's information, we will not consider CTA's argument under this exception. *See* ORD 630. However, we will address the county's arguments under 552.107.

As noted above, section 552.107(1) of the Government Code 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 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).

The county states the information in Exhibit F was communicated between county employees and the county's attorney and was made to facilitate the rendition of legal advice and services to the county. The county states this communication was made in confidence and has maintained its confidentiality. Based on the county's representations and our review, we conclude the county may withhold the information in Exhibit F under section 552.107 of the Government Code.

The county and CTA also raise section 552.110 of the Government Code for some of the remaining information. We note that section 552.110 is designed to protect the interests of third parties such as CTA, not the interests of a governmental body. Thus, we do not address the county's arguments under section 552.110. However, we will address CTA's arguments under 552.110 for its information.

CTA contends portions of its submitted information are excepted under section 552.110(b) of the Government Code, which protects "[c]ommercial 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[.]" Gov't Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* Open Records Decision No. 661 at 5-6 (1999). Upon review of CTA's arguments and the information at issue, we find CTA has established that some of its information, which we have marked, constitutes commercial or financial information, the release of which would cause it substantial competitive harm.

Thus, the county must withhold the information we have marked under section 552.110(b) of the Government Code. We note, however, that CTA has made some of the information it seeks to withhold publicly available on its website. Further, we find that CTA has made only conclusory allegations that release of the remaining information at issue would cause the company substantial competitive injury. *See* ORD 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show specific factual evidence that substantial competitive injury would result from release of particular information at issue). Accordingly, the county may not withhold any of the remaining information under section 552.110(b) 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). *See* Gov't Code § 552.137(a)-(c). Subsections 552.137(c)(1) and (3) specifically exclude e-mail addresses "provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent" and e-mail addresses "provided to a governmental body in the course of negotiating the terms of a contract or potential contract." *See id.* § 552.137(c)(1), (3). We have marked an e-mail address in Exhibit G that is not excluded by subsection (c) and must be withheld under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure.[2] However, we note the remaining e-mail addresses either belong to individuals who have contractual relationships with the county or were provided to the county in the course of negotiating the terms of a contract with the county. These remaining e-mail addresses are among the types that are specifically excluded under section 552.137(c) and may not be withheld under section 552.137 of the Government Code.

In summary, the county may withhold the information in Exhibit F under section 552.107 of the Government Code. The county must withhold the information in Exhibit E we have marked under section 552.110(b). The county must also withhold the information in Exhibit G we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public 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.

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

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,

Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/dls

Ref: ID# 404978

Enc. Submitted documents

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