



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 29, 2011

Ms. Allyson Collins  
Records & Legal Services  
Eanes Independent School District  
601 Camp Craft Road  
Austin, Texas 78746

OR2011-04287

Dear Ms. Collins:

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# 412767 (Eanes ISD TPIA Request #3096).

The Eanes Independent School District (the "district") received a request for the proposal from Western Hills Little League in response to a specified request for proposals and e-mails and correspondence referenced in a specified school board action item. You state the requestor will be provided some of the responsive documents. You claim the submitted information is excepted from disclosure under sections 552.104, 552.105, and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.107(1) of the Government Code protects information that comes 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. *See* 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. *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 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, and lawyer representatives. See 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. See *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 information you have marked consists of communications between district officials and attorneys for the district made for the purpose of facilitating the rendition of legal services. You state the communications were confidential and that the district has not waived confidentiality. Accordingly, we conclude the district may withhold most of the information you have marked under section 552.107 of the Government Code.<sup>1</sup> However, one of the marked e-mails and one of the marked memos consist of communications relating to contract negotiations between the district and the entity seeking to lease land from the district. Because this party and the district were negotiating a contract, their interests in these communications were adverse. Thus, these parties do not share a common interest that would allow the attorney-client privilege to apply to the information at issue. See *In re Monsanto*, 998 S.W.2d 917, 922 (Tex. App.—Waco 1999, no pet.) (discussing the “joint-defense” privilege incorporated by rule 503(b)(1)(C)). Therefore, you have failed to demonstrate that this information, which we have marked for release, consists of communications between privileged parties, and the district may not withhold the remaining information under section 552.107. In addition, we note some of the individual e-mails and some of the attachments contained in otherwise privileged e-mail strings are communications with these individuals. Thus, to the extent this non-privileged information, which we have marked, exists separate and apart from the submitted e-mail strings, it may not be withheld under section 552.107.

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<sup>1</sup>As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

Section 552.105 of the Government Code excepts from disclosure information relating to “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(2). Section 552.105 is designed to protect a governmental body’s planning and negotiating position with respect to particular transactions. Open Records Decision Nos. 564 at 2 (1990), 357 (1982), 310 (1982). Information that is excepted from disclosure under section 552.105 that pertains to such negotiations may be excepted from disclosure so long as the transaction relating to that information is not complete. *See* ORD 310. But the protection offered by section 552.105 is not limited solely to transactions not yet finalized. This office has held that section 552.105 applies to leases as well as purchases of real estate. *See* Open Records Decision No. 348 (1982). 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 with regard to particular transactions is a question of fact. Accordingly, 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 state the district is currently involved in negotiations to lease a specified tract of land. Further, you assert the district has made a good-faith determination that the information you have marked relates to the lease price of the specified tract of land and that release of this information would harm the district’s negotiating position with respect to the lease at issue. Based on your representations and our review, we conclude the district may withhold the remaining information you have marked under section 552.105 of the Government Code.<sup>2</sup>

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. The purpose of section 552.104 is to protect a governmental body’s interests in competitive bidding situations, including where the governmental body may wish to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 at 8 (1991). Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a bidder will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). Generally, section 552.104 does not except information relating to competitive bidding situations once a contract has been executed. *See id.* at 5. Furthermore, section 552.104 does not apply when there is only a single individual or entity seeking a contract because there are no “competitors” for that contract. *See* Open Records Decision No. 331 (1982).

You state the submitted information pertains to a request for proposals related to a 50 acre tract of land. You state the district received a single proposal and has negotiated initial lease

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<sup>2</sup>As our ruling is dispositive for this information, we need not address your remaining argument against its disclosure.

terms. You further state that if negotiations are unsuccessful, the district's board "may decide to begin negotiations with another offer or until a final contract can be reached." Upon review, we find the district has failed to demonstrate how the release of the remaining information would affect an ongoing competitive bidding situation. Thus, the district has failed to demonstrate the applicability of section 552.104 to the information, and the district may not withhold the information at issue under section 552.104 of the Government Code.

In summary, with the exception of the information we have marked for release, the district may withhold the information you have marked under section 552.107 of the Government Code. However, to the extent the information we have marked exists separate and apart from the submitted e-mail strings, it may not be withheld under section 552.107 of the Government Code. The district may withhold the remaining information you have marked under section 552.105 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](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,



Tamara Wilcox  
Assistant Attorney General  
Open Records Division

TW/tf

Ref: ID# 412767

Enc. Submitted documents

c: Requestor  
(w/o enclosures)