



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 23, 2011

Ms. Andrea Sheehan
Ms. Elisabeth Donley Nelson
For the Carrollton-Farmers Branch Independent School District
Law Offices of Robert E. Luna, P.C.
4411 North Central Expressway
Dallas, Texas 75205

OR2011-12184

Dear Ms. Sheehan and Ms. Nelson:

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# 427819.

The Carrollton-Farmers Branch Independent School District (the "district"), which you represent, received a request for (1) appraisals, environmental studies, and earnest money contracts pertaining to a specified property in a specified Tax Increment Finance Zone and (2) correspondence related to the same property from July 2010 to the date of the request.¹ You state the district released some information with redactions to the requestor. You state the district redacted the personal e-mail address of a member of the public under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).² You also state the district redacted information subject to section 552.117 of the

¹We note the district asked for and received clarification regarding this request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

²This office issued Open Records Decision No. 684, a previous determination authorizing all governmental bodies 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.

Government Code as permitted by section 552.024(c) of the Government Code.³ You claim portions of the submitted information are excepted from disclosure under sections 552.107 and 552.137 of the Government Code.⁴ You also claim release of Exhibit C-1 may implicate the proprietary interests of GME Consulting Services, Inc. ("GME"). Accordingly, you notified GME of the request and of its right to submit arguments to this office as to why its information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain the applicability of exception to disclose under Act in certain circumstances). You have provided documentation stating GME does not object to the inspection of Exhibit C-1. We have considered the exceptions you claim and reviewed the submitted information, part of which is a representative sample.⁵

Initially, we note you have marked portions of the submitted information as not responsive to the instant request. This ruling does not address the public availability of any information that is not responsive to the request and the district is not required to release that information in response to the request.

Next, you inform us some of the responsive information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2010-18092 (2010). In that ruling, we determined the district (1) may withhold a portion of the information at issue under section 552.107 of the Government Code; (2) must withhold the e-mail address we marked under section 552.137 of the Government Code; and (3) release the remainder of the information at issue in accordance with copyright law. We have no indication there has been any change in the law, facts, and circumstances on which the prior ruling was based. Accordingly, with regard to the information responsive to the instant request for information that is identical to the information previously requested and ruled

³Section 552.117 of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body. Section 552.024 of the Government Code authorizes a governmental body to withhold information subject to section 552.117 without requesting a decision from this office if the employee or official, or former employee or official chooses not to allow public access to the information. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as amendments to Gov't Code §§ 552.117, .024(c)).

⁴You also raise the attorney-client privilege under rule 503 of the Texas Rules of Evidence for Exhibit B in the event Exhibit B is subject to section 552.022 of the Government Code. However, we only address your attorney-client privilege claim under section 552.107 of the Government Code as Exhibit B is not subject to section 552.022. *See* Open Records Decision No. 676 (1988).

⁵We assume the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

upon by this office, we conclude the district must continue to rely on Open Records Letter No. 2010-18092 as a previous determination and withhold or release the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely the same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes information is or is not excepted from disclosure).

We now turn to your argument under section 552.107 of the Government Code against release of Exhibit B. Section 552.107(1) 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. Open Records Decision 676 at 6-7 (1988). First, a governmental body must demonstrate 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *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, *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, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain 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 Exhibit B-1 contains e-mails between district representatives, a district agent, and attorneys for the district. You also state the information you have marked in Exhibit B-2 documents communications between district representatives and attorneys for the district. You further state these communications were made in furtherance of the rendition of legal services to the district. You have identified all parties to these communications. Additionally, you state these communications were made in confidence and their confidentiality has been maintained. Accordingly, we find you have demonstrated the applicability of the attorney-client privilege to Exhibit B-1 and the information you have marked in Exhibit B-2. As you acknowledge, the submitted e-mail strings in Exhibit B-1 contain communications with non-privileged parties. You state, to the extent these non-privileged communications exist separate and apart from the submitted e-mail strings, the district will release these non-privileged communications to the requestor. Therefore, we agree the district may withhold Exhibit B-1 and the information you have marked in Exhibit B-2 under section 552.107.

You also raise section 552.137 of the Government Code for some e-mail addresses in the remaining responsive information. Section 552.137 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). Section 552.137(c) provides, in relevant part:

(c) Subsection (a) does not apply to an e-mail address:

- (1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor’s agent;
- (2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor’s agent; [or]
- (3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or 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). Upon review, we find the district must withhold the e-mail addresses you have marked in Exhibit C-1 under section 552.137, unless the owners of the e-mail addresses at issue affirmatively consent to their release. We note the remaining e-mail addresses you have marked are subject to section 552.137(c). As such, the district may not withhold any of the remaining e-mail addresses under section 552.137.

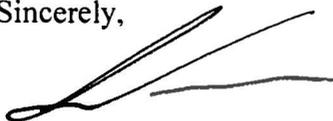
Finally, you and GME note, and we agree, some of the information in Exhibit C-1 may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, with regard to the information responsive to the instant request for information that is identical to the information previously requested and ruled upon by this office, we conclude the district must continue to rely on Open Records Letter No. 2010-18092 as a previous determination and withhold or release the identical information in accordance with that ruling. The district may withhold Exhibit B-1 and the information you have marked in Exhibit B-2 under section 552.107 of the Government Code. The district must withhold the e-mail addresses you have marked in Exhibit C-1 under section 552.137 of the Government Code, unless the owners of the e-mail addresses at issue affirmatively consent to their release. The remaining information in Exhibit C-1 must be released, but any information in Exhibit C-1 that is protected by copyright may only be released in accordance with copyright law.

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,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/agn

Ref: ID# 427819

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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