



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 1, 2011

Ms. YuShan Chang
Assistant City Attorney
City of Houston Legal Department
P.O. Box 368
Houston, Texas 77001-0368

OR2011-12737

Dear Ms. Chang:

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# 428631 (GC No. 18666).

The City of Houston Airport System (the "system") received a request for all memoranda and correspondence relating to (1) the system's series 2011 bond ordinance, (2) the term sheet agreement for Terminal B, (3) the Terminal D lease, (4) information sent to or received from United Continental relating to the system's 2011 bond ordinance, term sheet agreement for Terminal B, Terminal D lease, and Special facilities bonds, and (5) outside consultants utilized for the system's 2011 series 2011 bonds, term sheet agreement for Terminal B, Terminal D lease, and Special facilities bonds. You claim that the requested information is excepted from disclosure under sections 552.104, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹ We have also considered comments from a representative of the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

¹We assume that 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 that those records contain substantially different types of information than that submitted to this office.

Initially, we note that in response to the requestor's brief submitted to this office pursuant to section 552.304, you inform us the system sought clarification from the requestor with respect to a portion of the request. *See id.* § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also* Open Records Decision No. 31 (1974) (when presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed). You have not informed us whether the system has received clarification of the portion of the request at issue. Thus, for the portion of the requested information for which you have not received clarification, we find the system is not required to release information in response to that portion of the request. Accordingly, we do not address your arguments for the information you submitted as Exhibit 2. However, if the requestor clarifies the portion of the request for information at issue, the system must seek a ruling from this office before withholding any responsive information from the requestor. *See City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010).

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, orig. proceeding.). 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 system raises section 552.107(1) for Exhibit 3. The system states that this information consists of communications between attorneys for and officials and employees of the system that were made for the purpose of facilitating the rendition of professional legal services to the system. The system also states that the communications were intended to be and remain confidential. Based on the system's representations and our review of the information at issue, we find you have demonstrated the applicability of the attorney-client privilege to most of the information in Exhibit 3. However, two of the e-mails in Exhibit 3, which we have marked, were sent to an individual whom you have not demonstrated to be a privileged party. These e-mails do not consist of confidential attorney-client communications and may not be withheld under section 552.107(1) on that basis. Accordingly, with the exception of the e-mails which we have marked as non-privileged, we conclude the system may withhold Exhibit 3 under section 552.107(1) of the Government Code.² For the non-privileged e-mails, we will address your arguments under section 552.104.

Section 552.104 of the Government Code excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. 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 generally assert that release of the submitted information could provide a competitive advantage to other tenants by revealing information which would enable them to undermine the system's negotiating strategy. You also contend that the system has specific marketplace interests in the submitted information because the system competes with other airports with regard to leasing airport space. You have not, however, demonstrated how release of the

²As section 552.107 is dispositive regarding this information, we do not address your remaining arguments for this information.

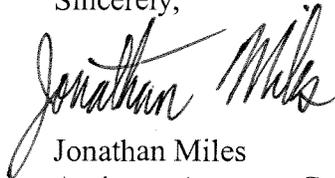
information at issue would harm the system's interests in a specific competitive situation. Consequently, the system may not withhold the remaining information under section 552.104 of the Government Code.

In summary, with the exception of the non-privileged e-mails, the system may withhold Exhibit 3 under section 552.107(1) of the Government Code. The non-privileged e-mails 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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/em

Ref: ID# 428631

Enc. Submitted documents

c: Requestor
(w/o enclosures)