



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 13, 2011

Mr. Robert E. Bastien
Tramonte, Tramonte & Bastien, P.C.
2127 Broadway
Galveston, Texas 77550

OR2011-13148

Dear Mr. Bastien:

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# 429673.

The Galveston Housing Authority (the "GHA"), which you represent, received a request for the following information: (1) GHA annual financial reports for specified years; (2) correspondence regarding and written responses to a specified request for qualifications; (3) vendor reports, invoices, and the amounts of payments made to GHA attorneys and consultants during a specified period; and (4) particular insurance proceeds during a specified time period. You claim that the submitted 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 information.¹

Initially, we note you have not submitted information responsive to the portions of the request for annual financial reports or insurance proceeds for our review. To the extent information responsive to these aspects of the request existed on the date the GHA received

¹We assume that the "representative sample" of information 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.

the request, we assume the GHA has released it. If not, the GHA must do so at this time. *See* Gov't Code §§ 552.301, .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to the requested information, it must release the information as soon as possible).

Section 552.104 of the Government Code protects from required public disclosure "information which, if released, would give advantage to competitors or bidders." Gov't Code § 552.104. The purpose of section 552.104 is to protect the purchasing interests of a governmental body in competitive bidding situations where the governmental body wishes to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 (1991). Section 552.104 protects information from disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* Open Records Decision No. 463 (1987). Generally, section 552.104 does not except bids from disclosure after bidding is completed and the contract has been awarded. *See* Open Records Decision No. 541 (1990).

You state that the submitted information in Exhibits B-1, B-2, and C relates to an ongoing competitive bidding process for a Master Developer contract with the GHA. You explain that while a finalist has been selected, the contract has not yet been finalized. You assert that release of the information at issue would negatively impact negotiations between the GHA and the selected bidder because the bidder would be less willing to negotiate in a manner that is favorable to the GHA. You further assert that in the event a contract is not awarded, the release of the information at issue would negatively impact the GHA's negotiating position with future bidders. Based on your representations and our review, we determine that the GHA has demonstrated that release of the submitted information in Exhibits B-1, B-2, and C would harm its interests in a competitive situation. Accordingly, the GHA may withhold the submitted information in Exhibits B-1, B-2, and C under section 552.104 of the Government Code.²

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 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)

²As we make this determination, we do not address your claim under section 552.111 of the Government Code for Exhibit C.

(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). 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. *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 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 submitted e-mail strings in Exhibits D-1 and D-2 consist of communications between GHA officials, consultants, and attorneys made in furtherance of the rendition of professional legal services. You also state the communications were made in confidence and the confidentiality has been maintained. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the GHA may withhold the submitted e-mail strings in Exhibits D-1 and D-2 under section 552.107(1) of the Government Code.

In summary, the GHA may withhold (1) the submitted information in Exhibits B-1, B-2, and C under section 552.104 of the Government Code; and (2) the submitted e-mail strings in Exhibits D-1 and D-2 under section 552.107(1) of the Government Code.

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,

A handwritten signature in black ink, appearing to read "Cindy Nettles". The signature is fluid and cursive, with the first name being more prominent.

Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 429673

Enc. Submitted documents

c: Requestor
(w/o enclosures)