



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 7, 2011

Mr. J. Frank Davis
Assistant District Attorney
Hays County Criminal District Attorney's Office
110 East Martin Luther King
San Marcos, Texas 78666

OR2011-14600

Dear Mr. Davis:

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# 432274.

The Hays County Criminal District Attorney's Office (the "district attorney") received a request for all documents and correspondence related to the creation or operation of the Hays County Water and Wastewater Authority.¹ You state the district attorney has released some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.107 and 552.131(a) of the Government Code. In addition, you inform us the district attorney has notified the Coalition of Central Texas Utilities Development Corporation (the "coalition") and the Lower Colorado River Authority (the "LCRA") of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the exceptions you claim and reviewed the submitted

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

information, a portion of which is a representative sample.² We have also considered comments submitted by the coalition and the LCRA.

Initially, we note the coalition asserts that the information it submitted for our review is excepted from disclosure under sections 552.105, 552.107, 552.110, and 552.111 of the Government Code. We note, however, the district attorney did not submit any of this information to our office in response to the instant request for information. This ruling does not address information beyond what the district attorney has submitted to us for review. *See id.* § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested). Accordingly, this ruling is limited to the information the district attorney submitted as responsive to the request for information. *See id.*

The LCRA raises section 552.104 of the Government Code for Exhibit B. Section 552.104 excepts from public disclosure “information that, if released, would give advantage to a competitor or bidder.” *Id.* § 552.104(a). The purpose of section 552.104 is to protect a governmental body’s interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor 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. Open Records Decision Nos. 306 (1982), 184 (1978) (section 552.104 no longer applicable when bidding had been completed and contract is in effect).

The LCRA states Exhibit B pertains to a bid the coalition, of which Hays County is a member, submitted to the LCRA for the purchase of the LCRA’s water and wastewater system assets. The LCRA also states the bids and terms for these system assets are not final and may continue to be negotiated. The LCRA explains release of Exhibit B would impact the LCRA’s negotiations with all those bidding for the system assets at issue because this information would allow bidders competing with the coalition to modify all or portions of their respective bids in response to the coalition’s bid and valuation, which would give a competitive advantage to the competing bidders the LCRA may negotiate with. Based on these representations and our review, we find the LCRA has demonstrated release of Exhibit B would cause specific harm to the LCRA’s interest in this particular competitive situation.

²We 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.

Accordingly, the district attorney may withhold Exhibit B under section 552.104 of the Government Code.³

You assert the information the district attorney submitted as Exhibit C is excepted from disclosure under section 552.107 of the Government Code. This section 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).

You inform us Exhibit C consists of communications from the district attorney to a legal services provider that were made in furtherance of the rendition of professional legal services to the district attorney. You state none of these communications were intended to be disseminated to third parties. You also state, to the best of your knowledge, none of the communications were shown or forwarded to any third party. Based on your representations and our review, we conclude the district attorney has established Exhibit C is protected by

³As our ruling for this information is dispositive, we need not address the district attorney’s argument against disclosure or the LCRA’s remaining argument against disclosure.

the attorney-client privilege. Therefore, the district attorney may withhold Exhibit C under section 552.107(1) of the Government Code.

In summary, the district attorney may withhold Exhibit B under section 552.104 of the Government Code, and Exhibit C 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,



Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/agn

Ref: ID# 432274

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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