



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 3, 2011

Mr. R. John Cullar
Cullar & McLeod
801 Washington Avenue, Suite 500
Waco, Texas 76701

OR2011-16170

Dear Mr. Cullar:

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# 435103.

The City of Lorena (the "city"), which you represent, received a request for all e-mails from the city manager during a specified time period. You state the city is withholding e-mail addresses of members of the public under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).¹ You state the city has released some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.104, 552.107, and 552.108 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

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(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). Moreover, section 552.104

¹Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

²Although you state the information submitted as Tab 4 is protected from disclosure by section 552.101 of the Local Government Code, we note that section does not exist. We understand you to raise section 552.107 of the Government Code, as this is the proper exception for the substance of your argument.

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). This office has long held that section 552.104 does not except information relating to competitive bidding situations once a contract is in effect. *See, e.g.*, Open Records Decision Nos. 541 (1990), 514 (1988), 306 (1982), 184 (1978), 75 (1975).

You state the information submitted at Tab 5 pertains to the city's attempts to secure a long-term source of water. You state the city is currently contracted with one entity for a water supply, but is negotiating with additional entities to become the city's source of long-term water supply. We understand a contract arising from the negotiation process has not yet been awarded or executed. You claim release of the information at issue would undermine the contract negotiation process because it would give an advantage or cause a disadvantage to the potential parties. Based on your representations and our review, we conclude you have demonstrated the applicability of section 552.104 to the information at Tab 5. Accordingly, the city may withhold Tab 5 under section 552.104 of the Government Code until such time as a contract has been executed. *See* Open Records Decision No. 170 at 2 (1977) (release of bids while negotiation of proposed contract is in progress would necessarily result in an advantage to certain bidders at expense of others and could be detrimental to public interest in contract under negotiation).

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) (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, 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. *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 information submitted at Tab 4 consists of communications involving city attorneys and legal staff, the city manager in his capacity as a client, and individuals involved in the renegotiation of bonds on behalf of the city. You indicate these communications were made in furtherance of the rendition of professional legal services to the city. You state these communications were confidential, and you state the city has not waived the confidentiality of the information at issue. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to some of the information in Tab 4. Accordingly, the city may generally withhold the information we have marked in Tab 4 under section 552.107 of the Government Code. However, you state the communications in Tab 4 relate to contractual negotiations between the city and third parties relating to the city’s bonded indebtedness. Because the city was involved in negotiations with these third parties at the time the communications were made, we find their interests were adverse at that time. Accordingly, we find, at the time the communications were made, the city and the third parties at issue did not share a common interest that would allow the attorney-client privilege to apply. *See TEX. R. EVID. 503(b)(1)(c); 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)). Further, some of the communications in Tab 4 are with individuals whom you have not identified. Therefore, you have failed to demonstrate how either the communications between the city and the third parties or the communications between the city and the unidentified parties consist of communications between privileged parties. *See TEX. R. EVID. 503(b)(1)(c)*. One of the individual e-mails contained in an otherwise privileged e-mail string consists of a communication with these unidentified individuals and third parties whom you have not shown to be privileged parties. Thus, to the extent the non-privileged e-mail, which we have marked, exists separate and apart from the otherwise privileged e-mail string, it may not be withheld under section 552.107(1). Further, the remainder of the information in Tab 4 consists of communications with non-privileged parties. Thus, the city may not withhold the remainder of the information at issue under section 552.107(1) of the Government Code.

You claim section 552.108 of the Government Code for the information submitted at Tabs 2 and 3. Section 552.108(a)(1) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental

body claiming section 552.108(a)(1) must reasonably explain how and why this exception is applicable to the information at issue. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state the information submitted at Tab 2 relates to a criminal case that is still under investigation. Based upon your representation, we conclude release of the information in Tab 2 will interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Based on your representation and our review, we find the city may withhold Tab 2 under section 552.108(a)(1) of the Government Code.

Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that did not result in conviction or deferred adjudication. *See Gov't Code* § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). You state the information submitted at Tab 3 relates to a case that is closed and in which no charges have been or will be filed. Thus, you state the information at Tab 3 relates to a closed case that did not result in conviction or deferred adjudication. Based on your representations and our review, we find the city may withhold Tab 3 under section 552.108(a)(2) of the Government Code.

We note the remaining information contains e-mail addresses that may be subject to section 552.137 of the Government Code.³ 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). *See id.* § 552.137(a)-(c). Because we are unable to determine whether the e-mail addresses we have marked are excluded by subsection (c), we must rule conditionally. Therefore, to the extent the marked e-mail addresses belong to members of the public who have not affirmatively consented to their release, the city must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code.⁴ However, to the extent the marked e-mail addresses belong to agents of companies with contractual relationships or who seek to contract with the city, the e-mail addresses may not be withheld under section 552.137.

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).*

⁴We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

In summary, the city may withhold Tab 5 under section 552.104 of the Government Code until such time as a contract has been executed. The city may withhold the information we have marked in Tab 4 under section 552.107 of the Government Code; however, to the extent the non-privileged e-mail we have marked exists separate and apart from the otherwise privileged e-mail string, it may not be withheld under section 552.107(1). The city may withhold Tab 2 under section 552.108(a)(1) of the Government Code, and may withhold Tab 3 under section 552.108(a)(2) of the Government Code. To the extent the e-mail addresses we have marked belong to members of the public who have not affirmatively consented to their release, the city must withhold the personal e-mail addresses under section 552.137 of the Government Code. However, to the extent the marked e-mail addresses belong to agents of companies with contractual relationships or who seek to contract with the city, the e-mail addresses may not be withheld under section 552.137 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, 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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/agn

Ref: ID# 435103

Enc. Submitted documents

c: Requestor
(w/o enclosures)