



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 19, 2011

Mr. R. Brooks Moore
Managing Counsel, Governance
Texas A&M University System
200 Technology Way, Suite 2079
College Station, Texas 77845

OR2011-18602

Dear Mr. Moore:

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# 439345 (TAMU 11-585).

Texas A&M University (the "university") received a request for all e-mails sent to or from six named university employees that pertain to a named individual, a survey, or the Memorial Student Center during a specified time period.¹ You claim the requested information is excepted from disclosure under sections 552.104 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.104 of the Government Code protects from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. The purpose of section 552.104 is to protect the 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) (statutory predecessor to section 552.104 designed to protect interests of governmental body in competitive situation, and not interests of private parties submitting information to government). 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

¹We note the requestor also asked for e-mails sent or received on the day after which the university received his request. However, the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975); *see also* Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 416 at 5 (1984).

except bids from disclosure after bidding is completed and the contract has been executed. *See* Open Records Decision No. 541 (1990). Furthermore, section 552.104 does not apply when there is only a single individual or entity seeking a contract because there are no “competitors” for that contract. *See* Open Records Decision No. 331 (1982).

You state the university issued request for proposals (“RFP”) Main 11-0031 for a retail computer store to be located in the Memorial Student Center. You explain the university received a single proposal, submitted to our office as Exhibit B-1. You state the university is in discussions with the sole bidder but a contract has not been awarded at this time. You indicate that, in the event the university is unable to reach an agreement with this bidder, the university will issue a new request for proposals for the project at issue. You contend release of Exhibit B-1 at this time would harm the university’s negotiating position with other contractors. Based on the university’s representations and our review, we conclude the university may withhold the information in Exhibit B-1 under section 552.104 of the Government Code until such time as a contract has been executed.

We next address the university’s argument under section 552.107(1) of the Government Code for Exhibit B-2. 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. *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 Exhibit B-2 consists of a communication involving a university attorney and a university administrative employee. You state this communication was made in furtherance of the rendition of professional legal services to the university. You also state this communication was made in confidence, and the university has not waived the confidentiality of the communication. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information in Exhibit B-2. Accordingly, the university may withhold Exhibit B-2 under section 552.107(1) of the Government Code.

In summary, the university may withhold Exhibit B-1 under section 552.104 of the Government Code and Exhibit B-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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JLU/dls

Ref: ID# 439345

Enc. Submitted documents

c: Requestor
(w/o enclosures)