



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 28, 2011

Mr. Vic Ramirez
Associate General Counsel
Lower Colorado River Authority
P.O. Box 220
Austin, Texas 78767-0220

OR2011-19061

Dear Mr. Ramirez:

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# 440378.

The Lower Colorado River Authority (the "LCRA") received a request for four categories of information related to a specified sale being conducted by the LCRA. You state you do not maintain some of the requested information.¹ You claim that the submitted information is excepted from disclosure under sections 552.104, 552.107, and 552.111 of the Government Code. Additionally, you state release of this information may implicate the

¹In responding to a request for information under the Act, a governmental body is not required to disclose information that did not exist at the time the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990).

proprietary interests of California Water Service Group (“CWSG”), The Coalition of Central Texas Utilities Development Corporation (“CCTUDC”), and Corix Infrastructure, Inc. (“Corix”). Accordingly, you have notified these third parties of the request and of their right to submit arguments to this office as to why their information should not be released. *See* Gov’t Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have received comments from CWSG. We have considered the submitted arguments and reviewed the submitted representative sample of information.² We have also received and considered comments from an attorney for the requestor. *See* Gov’t Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, you state that portions of Exhibits E-1 and E-2 are not responsive to the request for information. However, we find Exhibits E-1 and E-2 relate to the specified sale at issue. Accordingly, we find this information is responsive to the instant request and must be released unless an exception to disclosure applies.

Section 552.104 of the Government Code excepts from required 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 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 executed. *See* Open Records Decision No. 541 (1990).

You state the LCRA is currently in negotiations regarding the sale of the specified LCRA system (the “system”). You state Exhibits D, E-1, E-2, F-1, and F-2 consist of the internal evaluations, responses to a request for proposals issued by the LCRA, and negotiations with potential buyers of the system that were collected in preparation of selecting a buyer and negotiating the sale of the system. You state the sale of the system is not yet final. You further state this information has not been released or published and that release of the information at issue would jeopardize LCRA’s bargaining position with regard to the sale.

²We 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.

Based on your representations and our review, we conclude the LCRA has demonstrated how release of the requested information would harm its interests in a competitive situation. Accordingly, the LCRA may withhold Exhibits D, E-1, E-2, F-1, and F-2 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).³

You raise section 552.107(1) of the Government Code for Exhibits C-1 and C-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). 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, 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).

³As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

You inform us Exhibits C-1 and C-2 contain communications made by and between LCRA attorneys, which were made for the purpose of facilitating professional legal services to LCRA employees. You also inform us these communications were not intended to be disclosed to third parties and have remained confidential. Based on your representations and our review, we find the LCRA has demonstrated the applicability of the attorney-client privilege to Exhibits C-1 and C-2. Thus, the LCRA may withhold this information under section 552.107(1) of the Government Code.⁴

In summary, the LCRA may withhold Exhibits D, E-1, E-2, F-1, and F-2 under section 552.104 of the Government Code. The LCRA may also withhold Exhibits C-1 and C-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,



Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/dls

Ref: ID# 440378

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴As our ruling for this information is dispositive, we need not address the remaining arguments against disclosure of the information.

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