



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 25, 2012

Ms. Tiffany N. Evans  
Assistant City Attorney  
Legal Department  
City of Houston  
P.O. Box 368  
Houston, Texas 77001-0368

OR2012-08073

Dear Ms. Evans:

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# 454864 (Houston GC No. 19445).

The City of Houston (the "city") received a request for information for a specified time period pertaining to the certification as Housing and Community Development Organizations of named entities, a named individual, or any entities filing documents related to a specified address.<sup>1</sup> You state the city has released some of the requested information. You claim that portions of the submitted information are excepted from disclosure under section 552.107 of the Government Code. You also believe release of some of the submitted information may implicate the interests of Houston Sterling Court Senior Residences, L.P. ("Sterling"). Accordingly, you state, and provide documentation demonstrating, the city notified Sterling of the request for information and of its right to submit arguments stating why its information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to

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<sup>1</sup>We understand the city sought and received clarification of the request for information. *See* Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if a large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding that when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date the request is clarified or narrowed).

submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have received arguments from an attorney for Sterling. We have reviewed the submitted information and the submitted arguments.

Initially, Sterling argues its information, which is marked in the submitted information as Exhibit 4, is not responsive to the request because it is outside the scope of the request. The present request for information, in pertinent part, seeks information pertaining to named entities. Sterling states it received construction financing funding from the city through one of the named entities, which is an intermediate non-profit lender. The information at issue in Exhibit 4 consists of loan budget information, attachments to a loan agreement between the named entity and the city, and information pertaining to the loan agreement between the named entity and the city. A governmental body must make a good-faith effort to relate a request to information that is within its possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). In this instance, the city has reviewed its records and determined the submitted information is responsive to the request. Thus, we find the city has made a good-faith effort to relate the request to information within its possession or control. Accordingly, we will address Sterling's remaining argument against disclosure of this information.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). 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). 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 to only 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 to only 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. *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 state the information you have marked within Exhibit 2 constitutes communications between city attorneys, city employees, and outside legal counsel for the city that were made for the purpose of providing legal services to the city. You state the communications were intended to be confidential and have remained confidential. However, we note you have marked a portion of an e-mail string that was subsequently sent to non-privileged parties you have not identified. As such, the city may not withhold this information, which we have marked, on the basis of section 552.107(1). Based on your representations and our review, we find the remaining information you have marked in Exhibit 2 consists of privileged attorney-client communications that the city may generally withhold under section 552.107(1) of the Government Code. However, we find a portion of one privileged e-mail string you have marked includes a communication with a non-privileged party you have not identified. If the communication with this non-privileged party exists separate and apart from the otherwise privileged e-mail string in which it appears, then the city may not withhold this communication, which we have marked, under section 552.107(1).

We understand Sterling contends its information to be subject to section 552.110(b) of the Government Code. Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.* § 552.110(b); Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Sterling contends its apartment operating projections, cost and pricing information, pricing information and terms relating to equity investment, and audit information is commercial or financial information, release of which would cause substantial competitive harm to Sterling. Upon review of Sterling’s arguments under section 552.110(b), we conclude Sterling has established the release of its operating projections, which we have marked, would cause it substantial competitive injury. Accordingly, the city must withhold the information we have marked in Exhibit 4 under section 552.110(b). However, we find Sterling has made only

conclusory allegations that release of its remaining information would cause it substantial competitive injury, and has provided no specific factual or evidentiary showing to support such allegations. *See* Gov't Code § 552.110(b); *see also* Open Records Decision Nos. 509 at 5 (1988) (stating that because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative), 319 at 3 (1982) (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). Further, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov't Code 552.022(a)(3) (contract involving receipt or expenditure of public funds made expressly public); Open Records Decision No. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency). We therefore conclude that the city may not withhold any of the remaining information under section 552.110(b) of the Government Code.

We note the remaining information in Exhibit 2 contains e-mail addresses of members of the public.<sup>2</sup> Section 552.137 of the Government Code 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). Gov't Code § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, or an e-mail address maintained by a governmental entity for one of its officials or employees. The e-mail addresses we have marked are not of the types specifically excluded by section 552.137(c). Accordingly, the city must withhold the e-mail addresses we have marked in Exhibit 2 under section 552.137 of the Government Code unless the owners of the addresses affirmatively consent to their release.<sup>3</sup>

In summary, with the exception of the portion of the e-mail string we have marked for release and the portion of the e-mail string we have marked for release if it exists separate and apart from the otherwise privileged e-mail string in which it appears, the city may withhold the information you have marked in Exhibit 2 under section 552.107(1) of the Government Code. The city must withhold the information we have marked in Exhibit 4 under section 552.110(b) of the Government Code. The city must withhold the e-mail addresses

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<sup>2</sup>The 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).

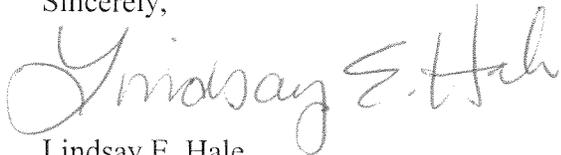
<sup>3</sup>We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

we have marked in Exhibit 2 under section 552.137 of the Government Code unless the owners of the addresses affirmatively consent to their release. The city must release the remaining information.

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](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,



Lindsay E. Hale  
Assistant Attorney General  
Open Records Division

LEH/ag

Ref: ID# 454864

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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