



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

October 21, 2016

Ms. Amanda Davis  
Associate General Counsel  
Dallas County Schools  
612 North Zang Boulevard  
Dallas, Texas 75208

OR2016-23734

Dear Ms. 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# 631701.

Dallas County Schools ("DCS") received a request for a named individual's e-mails on a specified subject over a specified period of time. You claim the submitted information is excepted from disclosure under sections 552.104, 552.107, and 552.110 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from 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, we note a portion of the submitted information, which we have marked, is not responsive to the instant request because it does not pertain to the named individual. This ruling does not address the public availability of non-responsive information, and DCS need not release non-responsive information in response to the request.

Section 552.104(a) of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." *Id.* § 552.104(a). The "test under

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<sup>1</sup>Although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 507, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

section 552.104 is whether knowing another bidder's [or competitor's information] would be an advantage, not whether it would be a decisive advantage." *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). DCS states it has specific marketplace interests in the information at issue because DCS is competing against other entities attempting to enter into the stop-arm camera marketplace. In addition, DCS states release of the information at issue would "harm its marketplace interests and will provide a competitive advantage to its competitors who are attempting to enter into the marketplace." After review of the information at issue and consideration of the arguments, we find DCS has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude DCS may withhold the information it has indicated under section 552.104(a) of the Government Code.<sup>2</sup>

DCS states some of the submitted information is excepted from disclosure under section 552.107(1) of the Government Code. Section 552.107(1) protects information coming within the attorney-client privilege. *See* 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. *See* ORD 676 at 6-7. First, a governmental body must demonstrate the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "to facilitate 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, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (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. Finally, 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: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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, orig. proceeding). 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

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<sup>2</sup>As our ruling is dispositive, we do not address the remaining arguments against disclosure of this information.

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).

DCS states some of the information at issue consists of communications between DCS attorneys and employees. DCS asserts the communications were made for the purpose of providing legal counsel to DCS. Further, DCS states these communications were not intended to be disclosed and have not been disclosed to non-privileged parties. Upon review, we find DCS has demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, DCS may withhold the information it has indicated under section 552.107(1) of the Government Code.

In summary, DCS may withhold the information it has indicated under section 552.104(a) of the Government Code. DCS may withhold the information it has indicated under section 552.107(1) of the Government Code. DCS must release the remaining responsive 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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Erin Groff  
Assistant Attorney General  
Open Records Division

EMG/som

Ref: ID# 631701

Enc. Submitted documents

c: Requestor  
(w/o enclosures)