ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 15, 2014

Mr. Chris Sterner
Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2014-00909

Dear Mr. Sterner:

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# 511135.

The Office of the Governor (the "governor's office") received a request for any communications involving the Governor or his staff, including interoffice memos, related to the Texas Economic Development Corporation (the "corporation") or Texas One during a specified period. You state the governor's office has released some information. We understand you have redacted some e-mail addresses pursuant to Open Records Decision No. 684 (2009).[1] You claim the submitted information is excepted from disclosure under sections 552.101, 552.104, and 552.107 of the Government Code. You also state the proprietary interests of RSH Group ("RSH") might be implicated. Accordingly, you notified RSH of the request and of its right to submit arguments to this office explaining why its information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* 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 considered the exceptions you claim and reviewed the submitted information.

Initially, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the

[1]Open Records Decision No. 684 serves as a previous determination to all governmental bodies permitting them to withhold certain categories of information, including the e-mail addresses of members of the public under section 552.137 of the Government Code, without requesting a decision from this office.

date of this letter, we have not received arguments from RSH. Thus, RSH has not demonstrated it has a protected proprietary interest in any of the submitted information. *See id.* § 552.110(a)–(b); Open Records Decision Nos. 661 at 5–6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the governor's office may not withhold the information in Exhibit E on the basis of any proprietary interests RSH may have in the information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses section 6103(a) of title 26 of the United States Code, which makes tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns). Section 6103(b) defines the term "return information" as a taxpayer's "identity, the nature, source, or amount of his income[.]" *See* 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *aff'd in part*, 993 F.2d 1111 (4th Cir. 1993). Upon review, we find the information we marked in Exhibit B consists of confidential tax return information. The governor's office must withhold this information under section 552.101 of the Government Code in conjunction with section 6103 of title 26 of the United States Code. However, for the remaining 1096 form, the corporation is not a taxpayer; instead, it is an employer reporting to the Internal Revenue Service the amounts of income tax withheld from employee taxpayer wages in a given time period as required by federal law. *See id.* § 3402(a) ("every employer making payment of wages shall deduct and withhold upon such wages a tax"). Thus, we find you have failed to demonstrate how the remaining 1096 form, which only indicates the total wages paid by the corporation to its employees and reflects the total income tax withheld for a given time period, constitutes "return information" as defined in section 6103(b). Accordingly, the governor's office may not withhold the 1096 form under section 552.101 of the Government Code.

Section 552.104 of the Government Code excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. This exception protects a governmental body's interests in connection with competitive bidding and in certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). This office has held a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the "competitive advantage" aspect of this exception if it can satisfy two criteria. *See id.* First, the governmental body must demonstrate that it has specific marketplace interests. *See id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *See id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body's legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body's demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *See id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988). You explain the governor's office, on behalf of the State of Texas, competes with other governmental entities to recruit and attract new businesses or to assist existing businesses expand. Thus, you argue the governor's office competes in the marketplace of business expansion and recruitment. You further explain the information you marked in Exhibit D identifies entities and individuals who are considering relocating or expanding a business. You state the governor's office is negotiating with these entities and individuals, and no final contract has been signed. You argue the release of the information you marked would reveal which businesses are considering relocating or expanding, and this would harm the competitive interests of the governor's office by allowing other states to approach these specific businesses with competing incentives. Based on these representations and our review, we agree the governor's office competes in the marketplace of business expansion and recruitment, and the release of the information you marked would harm its competitive interests in that marketplace. Accordingly, the governor's office may withhold the information you marked in Exhibit D under section 552.104 of the Government Code.

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 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. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding).

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 e-mails submitted as Exhibit C were sent between an attorney for the governor's office and the governor's office staff. You explain these e-mails were sent in order to provide legal services to the governor's office, and these e-mails were intended to be, and have remained, confidential. Based on these representations and our review, we agree the governor's office may withhold the information in Exhibit C under section 552.107(1) of the Government Code.

In summary, the governor's office must withhold the information we marked in Exhibit B under section 552.101 of the Government Code in conjunction with section 6103 of title 26 of the United States Code. The governor's office may withhold the information you marked in Exhibit D under section 552.104 of the Government Code. The governor's office may withhold the information in Exhibit C under section 552.107(1) of the Government Code. The governor's office 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.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,

Neal Falgoust
Assistant Attorney General
Open Records Division

NF/som

Ref: ID# 511135

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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(w/o enclosures)