



KEN PAXTON  
ATTORNEY GENERAL OF TEXAS

October 5, 2016

Ms. Michelle Mellon-Werch  
Assistant General Counsel  
Texas Municipal Retirement System  
P.O. Box 149153  
Austin, Texas 78714-9153

OR2016-22419

Dear Ms. Mellon-Werch:

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# 629375.

The Texas Municipal Retirement System (the "retirement system") received a request for vendor contracts or purchase order documentation for specified assets.<sup>1</sup> You state you will release some information. You state you will withhold account numbers and identifiers intended for the electronic transfer of funds pursuant to section 552.136 of the Government Code.<sup>2</sup> You state release of the submitted information may implicate the proprietary interests of Agility Recovery Solutions, Inc. ("Agility"); AlertLogic, Inc. ("AlertLogic"); Diligent Board Member Services, Inc. ("Diligent"); DOCUmentation of Austin, Inc. ("DOCUmentation");

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<sup>1</sup>We note the retirement system sought and received clarification of the information requested. *See* Gov't Code § 552.222(b) (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

<sup>2</sup> Section 552.136 allows a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e).

Lexmark Enterprise Software (“Lexmark”); and Phoenix NAP, LLC (“Phoenix NAP”). Accordingly, you state, and provide documentation showing, you notified the third parties of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released. *See* Gov’t Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from Agility, AlertLogic, Diligent, and Lexmark. You claim the submitted information is excepted from disclosure under sections 552.104, 552.107, and 552.139 of the Government Code. 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 under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from DOCUmentation or Phoenix NAP explaining why the submitted information should not be released. Therefore, we have no basis to conclude these companies have a protected proprietary interest in the submitted information. *See id.* § 552.110; 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 retirement system may not withhold the submitted information on the basis of any proprietary interest DOCUmentation or Phoenix NAP may have in the information.

Next, we note the submitted information includes executed agreements for the purchase of services from a private vendor. We note these contracts are subject to the posting requirements in section 2261.253 of the Government Code. Section 2261.253(a) provides, in relevant part, as follows:

(a) For each contract for the purchase of goods or services from a private vendor, each state agency shall post on its Internet website:

(1) each contract the agency enters into, including contracts entered into without inviting, advertising for, or otherwise requiring competitive bidding before selection of the contractor, until the contract expires or is completed[.]

Gov’t Code § 2261.253(a)(1). Some of the submitted contracts are between the retirement system, which is a state agency, and private vendors for the purchase of services and are not expired or completed. *See id.* §§ 2261.002(2) (“state agency” has meaning assigned by Gov’t Code § 2151.002). Accordingly, the submitted contracts contained in Documents 2, 4, 6, 9, 11, 12, 13, and 15 are required to be posted on the retirement system’s internet website. The

retirement system seeks to withhold Documents 1-14 under section 552.104 of the Government Code. Agility seeks to withhold Document 2 under section 552.104, 552.110, 552.139, and 552.156 of the Government Code. AlertLogic seeks to withhold Document 4 under section 552.104, 552.110, and 552.139 of the Government Code. Diligent seeks to withhold Document 6 under section 552.110 of the Government Code. Lexmark seeks to withhold Document 9 under sections 552.101, 552.104, and 552.110 of the Government Code. We note the exceptions to disclosure found in the Act generally do not apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the retirement system may not withhold Documents 2, 4, 6, 9, 11, 12, or 13 under section 552.101, section 552.104, section 552.110, section 552.139, or section 552.156 of the Government Code. Accordingly, the retirement system must release Documents 2, 4, 6, 9, 11, 12, 13, and 15.<sup>3</sup>

Section 552.104(a) of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). The “test under 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). The retirement system states the information at issue relates to contracts that have been awarded and executed; however, it solicits proposals for similar services on a recurring basis and release of the information could significantly hinder the retirement system’s ability to negotiate and compete for better rates and terms. In addition, the retirement system states releasing the remaining information at issue could make it more difficult for the retirement system to find vendors willing to enter into an agreement with the retirement system or willing to provide favorable terms. After review of the information you marked and consideration of the arguments, we find the retirement system has established the release of the remaining information at issue would give advantage to a competitor or bidder. Thus, we conclude the retirement system may withhold the remaining information you marked under section 552.104(a).<sup>4</sup>

Section 552.107(1) of the Government Code protects information coming 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. 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 “to facilitate 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

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<sup>3</sup>As our ruling is dispositive, we need not address the submitted arguments against disclosure of this information.

<sup>4</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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, and lawyer representatives. 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. 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: (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. *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 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 marked consists of communications between an attorney for the retirement system and an employee of the retirement system that were made for the purpose of providing legal advice to the retirement system. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the retirement system has demonstrated the information at issue consists of privileged attorney-client communications. Thus, the retirement system may withhold the information you marked under section 552.107(1) of the Government Code.

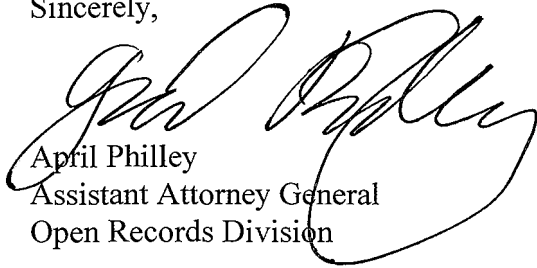
Section 552.139 provides that information is excepted from required public disclosure “if it is information that relates to computer network security, to restricted information under Section 2059.055, or to the design, operation, or defense of a computer network.” Gov’t Code § 552.139(a). You state the information you have marked under section 552.139 constitutes internet protocol addresses (“IP addresses”), disclosure of which could be used for malicious attacks on the retirement system’s computer system. Based on your representations and our review, we agree the retirement system must withhold the IP addresses it has marked in the remaining information under section 552.139 of the Government Code.

In summary, the retirement system must release Documents Exhibits 2, 4, 6, 9, 11, 12, 13, and 15 in accordance with section 2261.253 of the Government Code. The retirement system may withhold the remaining information it marked under section 552.104(a) of the Government Code. The retirement system may withhold the information it marked under section 552.107(1) of the Government Code. The retirement system must withhold the information it marked under section 552.139 of the Government Code. The retirement system 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](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,



April Philley  
Assistant Attorney General  
Open Records Division

AP/akg

Ref: ID# 629375

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

7 Third Parties  
(w/o enclosures)