



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 30, 2016

Mr. Joseph R. Crawford and Mr. Jeffrey W. Giles
Assistant City Attorney's
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2016-26519

Dear Mr. Crawford and Mr. Giles:

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# 635886 (GC Nos. 23726, 23819).

The City of Houston (the "city") received a request for all proposals submitted in response to the city's request for proposals number S33-T25658, information related to the evaluation of the proposals at issue, and any information used by the city to make a determination regarding specified proposals. The city received a second request from a different requestor for information related to the same request for proposals. You state the city will release some information to the requestors. You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.104, and 552.107 of the Government Code. You also state release of some of the submitted information may implicate the proprietary interests of Griffin & Strong, P.C. ("Griffin"), Colette Holt & Associates ("Holt"), Keen Independent Research ("Keen"), Mason Tillman Associates ("Tillman"), MGT of America Consulting ("MGT"), Miller Consulting, Inc. ("Miller"), and NERA Economic Consulting ("NERA"). Accordingly, although you take no position regarding the public availability of the third parties' information, you state the city has notified these 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 Griffin,

Holt, Keen, and NERA. We have considered the submitted arguments and reviewed the submitted information, a portion of which consists of a representative sample of information.¹

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). You state Exhibits 2 and 2A consist of information relating to a contract that has been awarded and executed. However, you further explain the city “solicits proposals for professional services, including the same types of services at issue here, on a recurring basis.” You assert the disclosure of the submitted proposals in Exhibit 2 and the city’s evaluation documents in Exhibit 2A would “undercut the city’s negotiating position with respect to future procurements for such contracts.” After review of the information at issue and consideration of the arguments, we find you have established the release of Exhibits 2 and 2A would give advantage to a competitor or bidder. Thus, we conclude the city may withhold the city’s evaluation documents and the information pertaining to Holt, Keen, Tillman, MGT, Miller, Griffin, and NERA from both requestors under section 552.104(a) of the Government Code.²

You seek to withhold the information in Exhibit 3 under section 552.107 of the Government Code. 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 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

¹We 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.

²As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

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 claim the submitted information in Exhibit 3 is protected by section 552.107(1) of the Government Code. You state the information in Exhibit 3 consists of communications involving the city’s attorneys, including outside counsel, and city employees in their capacities as clients. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the city and that these communications have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information in Exhibit 3. Accordingly, the city may withhold Exhibit 3 under section 552.107(1) of the Government Code.

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 the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). Upon review, we conclude the information we have marked in Exhibit 3A meets the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find no portion of the remaining information is

highly intimate or embarrassing and of no legitimate public concern, and the city may not withhold any of the remaining information under section 552.101 of the Government Code on the basis of common-law privacy.

In summary, the city may withhold the city's evaluation documents and the information pertaining to Holt, Keen, Tillman, MGT, Miller, Griffin, and NERA from both requestors under section 552.104(a) of the Government Code. The city may withhold Exhibit 3 under section 552.107(1) of the Government Code. The city must withhold the information we marked in Exhibit 3A under section 552.101 of the Government Code in conjunction with common-law privacy. 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.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,



Kieran Hillis
Assistant Attorney General
Open Records Division

KH/akg

Ref: ID# 635886

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

5 Third Parties
(w/o enclosures)