



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 26, 2017

Ms. Bridget Hinze
Public Information Officer
San Antonio River Authority
P.O. Box 839980
San Antonio, Texas 78283-9980

OR2017-07458A

Dear Ms. Hinze:

Our office issued Open Records Letter No. 2017-07458 (2017) on April 10, 2017. We have determined the prior ruling should be corrected. *See* Gov't Code §§ 552.306, .352. Consequently, this decision serves as the corrected ruling and is a substitute for the decision issued on April 10, 2017. *See generally id.* § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act (the "Act")). Your request was assigned ID# 664417.

The San Antonio River Authority (the "authority") received a request for information pertaining to the selection of a contractor for the San Pedro Creek Improvements Project.¹ You state the authority has released some information. You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code. Additionally, you state release of this information may implicate the proprietary interests of Sundt/Davila Joint Venture ("Sundt/Davila"). Accordingly, you state, and provide documentation showing, you notified Sundt/Davila of the request for information and of its right to submit

¹We note the authority sought and received clarification of the information requested. *See* Gov't Code § 552.222 (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) (if a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

arguments to this office as to why the information at issue should not be released.² *See id.* § 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 Sundt/Davila. We have considered the submitted arguments and reviewed the submitted representative sample of information.³ We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Sundt/Davila argues its information is excepted under section 552.104 of the Government Code. 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). In considering whether a private third party may assert this exception, the supreme court reasoned because section 552.305(a) of the Government Code includes section 552.104 as an example of an exception that involves a third party's property interest, a private third party may invoke this exception. *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). 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.” *Id.* at 841. Sundt/Davila states it has competitors. In addition, Sundt/Davila states release of its information would give its competitors an advantage. For many years, this office concluded the terms of a contract and especially the pricing of a winning bidder are public and generally not excepted from disclosure. Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision Nos. 541 at 8 (public has interest in knowing terms of contract with state agency), 514 (public has interest in knowing prices charged by government contractors), 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). However, now, pursuant to *Boeing*, section 552.104 is not limited to only ongoing competitive situations, and a third party need only show release of its competitively sensitive information would give an advantage to a competitor even after a contract is executed. *Boeing*, 466 S.W.3d at 839. After review of the information at issue and consideration of the arguments, we find Sundt/Davila has established release of its information at issue would give advantage to a

²We note the authority did not comply with the requirements of section 552.301(e) of the Government Code with regard to Sundt/Davila's information. *See* Gov't Code § 552.301(e). Nonetheless, because third-party interests can provide a compelling reason to overcome the presumption of openness caused by a failure to comply with section 552.301, we will consider their applicability to the submitted information. *See id.* §§ 552.007, .302, .352.

³We 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.

competitor or bidder. Thus, we conclude the authority may withhold the information we indicated under section 552.104(a) of the Government Code.⁴

You claim the remaining information is excepted under section 552.107(1) of the Government Code. Section 552.107(1) 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 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 assert the information at issue consists of communications between representatives of the authority and Bexar County (the “county”) in their capacities as clients and client representatives, and attorneys and attorney representatives representing the authority and county. You explain, and provide documentation demonstrating, the authority and the county are represented by the same law firm with regard to the matter at issue. You thus indicate the county is a privileged party with respect to these communications. We also note an

⁴As our ruling is dispositive, we need not address the remaining argument against disclosure.

additional outside attorney representing the authority is party to these communications. You state the communications were sent for the purpose of facilitating the rendition of legal services to the authority. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the authority has demonstrated the remaining information consists of privileged attorney-client communications. Thus, the authority may withhold the remaining information under section 552.107(1) of the Government Code.

In summary, the authority may withhold the information we have indicated under section 552.104 of the Government Code. The authority may withhold the remaining information under section 552.107 of the Government Code.

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,

A handwritten signature in black ink, appearing to read 'Ramsey', with a long, sweeping horizontal line extending to the right.

Ramsey A. Abarca
Assistant Attorney General
Open Records Division

RAA/bw

Ref: ID# 664417

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)