



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 5, 2017

Ms. Lisa K. Hargrove
General Counsel
Houston First Corporation
1001 Avenida de las Americas
Houston, Texas 77010

OR2017-22735

Dear Ms. Hargrove:

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# 678682.

The Houston First Corporation (the "corporation") received five requests from different requestors for specified information related to the corporation's Food and Beverage Management Services RFP. You claim some of the submitted information is excepted from disclosure under section 552.107 of the Government Code. Additionally, the corporation states release of the submitted information may implicate the proprietary interests of Aramark Sports and Entertainment Services of Texas, LLC ("Aramark"); Centerplate; and Levy Convention Centers ("Levy"). Accordingly, the corporation states, and provides documentation showing, it notified the third parties of the request for information and of their rights 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 Aramark, Centerplate, and Levy. We have considered the submitted arguments and reviewed the submitted information.

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. *See* Open Records Decision No. 676 at 6-7 (2002). 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. 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 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. *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 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 submitted as Exhibit C consists of communications between attorneys for the corporation and corporation employees that were made for the purpose of providing legal services to the corporation. You indicate the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find most of the information in Exhibit C consists of privileged attorney-client communications for the purposes of section 552.107(1). Accordingly, the corporation may generally withhold the information we marked in Exhibit C under section 552.107(1) of the Government Code.¹ We note, however, one of these otherwise privileged e-mail strings includes an e-mail and an attachment received from a non-privileged party. Furthermore, if the e-mail and attachment received from a non-privileged party are removed from the otherwise privileged e-mail strings in which they appear and stand alone, they are responsive

¹As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

to the request for information. Therefore, if the non-privileged e-mail and attachment, which we have marked, are maintained by the corporation separate and apart from the otherwise privileged e-mail string in which they appear, then the corporation may not withhold the non-privileged e-mail and attachment under section 552.107(1). In that event, we address the remaining arguments against disclosure of the non-privileged e-mail and attachment. Furthermore, you have failed to establish the remaining information in Exhibit C constitutes a privileged attorney-client communication for the purposes of section 552.107(1). Accordingly, the corporation may not withhold any portion of this information under section 552.107(1) of the Government Code.

Levy asserts portions of its information are protected under section 552.104 of the Government Code. Aramark and Centerplate assert all of their information at issue is protected under section 552.104 of the Government Code. Section 552.104(a) excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). 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. Aramark, Centerplate, and Levy state they have competitors. In addition, Aramark, Centerplate, and Levy state release of their information at issue would provide an advantage to their competitors. After review of the information at issue and consideration of the arguments, we find Aramark, Centerplate, and Levy have established the release of their information at issue would give advantage to a competitor or bidder. Thus, we conclude the corporation may withhold the information of Aramark, Centerplate, and Levy we marked and indicated under section 552.104(a) of the Government Code.²

We note some of the remaining information appears to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the corporation may generally withhold the information we marked in Exhibit C under section 552.107(1) of the Government Code; however, the corporation may not withhold the marked non-privileged e-mails and attachments if they are maintained separate and apart from the otherwise privileged e-mail strings in which they appear. The corporation may withhold the information of Aramark, Centerplate, and Levy we marked and indicated

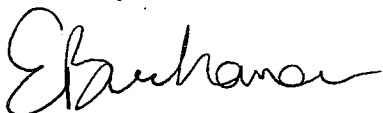
²As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

under section 552.104(a) of the Government Code. The corporation must release the remaining information; however, any information subject to copyright may only be released in accordance with copyright law.

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,



Emily Buchanan
Attorney
Open Records Division

EB/eb

Ref: ID# 678682

Enc. Submitted documents

c: 3 Requestors
(w/o enclosures)

6 Third Parties
(w/o enclosures)