



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 1, 2019

Mr. Joseph Behnke
Assistant General Counsel
Office of the Governor of the State of Texas
P.O. Box 12428
Austin, Texas 78711

OR2019-11559

Dear Mr. Behnke:

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# 762745 (ORR# 070-19).

The Office of the Governor (the "governor's office") received a request for records created during a specified time period related to specified entities, the Texas Enterprise Fund, and a proposed development. The governor's office states it will withhold some of the requested information in accordance with the previous determination issued in Open Records Letter No. 2017-22609 (2017). *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). The governor's office further states it is withholding certain information pursuant to Open Records Decision No. 684 (2009).¹ The governor's office states it is releasing some of the submitted information. The governor's office claims some of the submitted information is excepted

¹Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain information without the necessity of requesting an attorney general decision.

from disclosure under sections 552.101, 552.104, 552.107, and 552.111 of the Government Code. Additionally, the governor's office states release of the submitted information may implicate the proprietary interests of Apple, Inc. ("Apple"), and Impact DataSource, L.L.C. ("Impact"). Accordingly, the governor's office states, and provides documentation showing, it notified Apple and Impact of the request for information and of the 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 Apple and Impact. We have considered the submitted arguments and reviewed the submitted representative sample of information.²

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* 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 "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). 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

²We assume 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 those records contain substantially different types of information than that submitted to this office.

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).

The governor's office states some of the submitted information, which it marked, consists of communications involving attorneys for the governor's office and governor's office employees and officials in their capacities as clients. The governor's office states these communications were made in furtherance of the rendition of professional legal services to the governor's office. The governor's office states these communications were intended to be, and have remained, confidential. Based on these representations and our review, we find the governor's office has demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the governor's office may withhold the information it marked under section 552.107(1) of the Government Code.³

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). 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. The governor's office represents some of the remaining information, which it marked, pertains to a competitive bidding situation. The governor's office states it has a specific marketplace interest in the information at issue because Texas is competing with other states in the business expansion and recruitment marketplace. In addition, the governor's office states release of the information at issue will allow future business prospects seeking similar grants to obtain unfair leverage in negotiations and would allow competing states to modify their processes and negotiations, thereby undermining the governor's office's ability to successfully recruit businesses. In addition, Apple and Impact state they have competitors. Apple and Impact argue release of portions of their information would give their competitors an advantage and would cause harm to Apple's and Impact's competitive interests. After review of the information at issue and consideration of the arguments, we find the governor's office, Apple, and Impact have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude

³As our ruling is dispositive for this information, we need not address the remaining arguments against its disclosure.

the governor's office may withhold the information it marked and the information we noted under section 552.104(a) of the Government Code.⁴

Section 552.101 of the Government Code excepts "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 agree the information the governor's office marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, the governor's office must withhold the information it marked under section 552.101 of the Government Code in conjunction with common-law privacy.

We note some of the materials at issue may 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 governor's office may withhold the information it marked under section 552.107(1) of the Government Code. The governor's office may withhold the information it marked and the information we noted under section 552.104 of the Government Code. The governor's office must withhold the information it marked under section 552.101 of the Government Code in conjunction with common-law privacy. The governor's office must release the remaining information; however, any information that is subject to copyright may be released only in accordance with copyright law.

⁴As our ruling is dispositive for this information, we need not address the remaining arguments against its disclosure.

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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/mo

Ref: ID# 762745

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Parties
(w/o enclosures)