



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 3, 2019

Ms. Janis Schmees Burke
Chief Executive Officer
Harris County-Houston Sports Authority
701 Avenida de las Americas, Suite 450
Houston, Texas 77010

OR2019-18279

Dear Ms. Burke:

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# 773646.

The Harris County-Houston Sports Authority (the "authority") received a request for all legal services agreements between the authority and privately retained law firms and attorneys over a specified time period as well as information pertaining to the hourly rate schedule for these privately retained law firms and attorneys.¹ The authority claims the submitted information is excepted from disclosure under sections 552.107 and 552.136 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence. Additionally, the authority states release of the submitted information may implicate the proprietary interests of Drumheller, Hollingsworth & Monthy, L.L.P.; Hunton Andrews Kurth L.L.P.; Norton Rose Fulbright US, L.L.P.; and Orrick, Herrington & Sutcliffe, L.L.P. ("Orrick"). Accordingly, the authority states, and provides documentation showing, it notified these third parties of the request for information and of the right to submit arguments

¹The authority states it sought and received clarification of the request for information. See Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

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 Orrick. We have reviewed the submitted arguments and the submitted information.

Initially, although the authority asserts portions of the submitted information are not responsive to the instant request, we note the submitted information consists of the requested agreements and rate schedule. Upon review, we find the entirety of the submitted information is responsive to the request for information. Accordingly, we will consider all the submitted information.

Next, 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* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from the remaining third parties explaining why the submitted information should not be released. Therefore, we have no basis to conclude the remaining third parties 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 authority may not withhold the submitted information on the basis of any proprietary interest the remaining third parties may have in the information.

Next, the authority informs us, and we agree, some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body; [and]

...

(16) information that is in a bill for attorney's fees and is not privileged under the attorney-client privilege[.]

Gov't Code § 552.022(a)(3), (16). The information at issue contains contracts and attorney fee bills that are subject to sections 552.022(a)(3) and 552.022(a)(16). Information subject to sections 552.022(a)(3) and 552.022(a)(16) must be released unless such information is made confidential under the Act or other law. *See id.* § 552.022(a)(3), (16). The authority seeks to withhold portions of the information subject to 552.022 under section 552.107 of the Government Code. However, section 552.107 is discretionary in nature and does not make information confidential under the Act. *See Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions).* Therefore, the information subject to 552.022 may not be withheld under section 552.107 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider the authority's assertion of the attorney-client privilege under Texas Rule of Evidence 503 for the information subject to section 552.022(a)(3) and section 552.022(a)(16). Additionally, Orrick claims the information subject to section 552.022 is excepted from disclosure under sections 552.104 and 552.107 of the Government Code. As stated above, section 552.107 is discretionary in nature and does not make information confidential under the Act; therefore, the authority may not withhold the information subject to section 552.022 under section 552.107 of the Government Code. However, section 552.104(b) provides information encompassed by section 552.022 may be withheld under section 552.104 of the Government Code. *See Gov't Code § 552.104(b) (information protected by section 552.104 not subject to required public disclosure under section 552.022(a)).* Accordingly, we will consider Orrick's arguments under section 552.104 of the Government Code for the information subject to section 552.022 of the Government Code. Additionally, as section 552.136 of the Government Code makes information confidential under the Act, we will address the applicability of this exception to the information subject to section 552.022. We will also address the submitted arguments for the information not subject to 552.022 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." *Id.* § 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. Orrick states it has competitors. In addition, Orrick states release of its information at issue "would provide competitors with a roadmap of how best to compete against Orrick." Orrick states release

of its information at issue would cause the firm substantial harm. 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 (1990) (public has interest in knowing terms of contract with state agency), 514 (1988) (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 831, 839. After review of the information at issue and consideration of the arguments, Orrick has established the release of its information at issue would give advantage to a competitor or bidder. Thus, we conclude the authority may withhold the information we have marked under section 552.104(a) of the Government Code on behalf of Orrick.²

Texas Rule of Evidence 503(b)(1) provides the following:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

- (A) between the client or the client's representative and the client's lawyer or the lawyer's representative;
- (B) between the client's lawyer and the lawyer's representative;
- (C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;
- (D) between the client's representatives or between the client and the client's representative; or

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

(E) among lawyers and their representatives representing the same client.

Tex. R. Evid. 503(b)(1). A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made to further the rendition of professional legal services to the client or reasonably necessary to transmit the communication. *Id.* 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must 1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; 2) identify the parties involved in the communication; and 3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. *See* ORD No. 676. Upon a demonstration of all three factors, the entire communication is confidential under rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

The authority asserts some of the information at issue in the submitted fee bills consists of privileged attorney-client communications between attorneys for the authority and authority representatives that were made for the purpose of providing legal services to the authority. However, upon review, we find the information at issue does not document a communication nor does it reveal the content of a communication for purposes of rule 503. Thus, we find the authority has failed to demonstrate the applicability of the attorney-client privilege to the information at issue in the submitted fee bills. Therefore, the authority may not withhold any portion of the information subject to section 552.022(a)(16) of the Government Code on the basis of the attorney-client privilege in rule 503 of the Texas Rules of Evidence. However, the authority states portions of the remaining information subject to section 552.022(a)(3) consist of communications between attorneys for the authority and authority representatives that were made for the purpose of providing legal services to the authority. The authority states the communications were intended to be confidential and have remained confidential. Based on these representations and our review, we find the authority has established the information at issue, which we have marked, consists of privileged attorney-client communications the authority may withhold pursuant to rule 503 of the Texas Rules of Evidence.

Section 552.136 of the Government Code provides, “Notwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code

§ 552.136(b); *see id.* § 552.136(a) (defining “access device”). This office has determined bank account numbers and routing numbers are access device numbers for purposes of section 552.136. Accordingly, the authority must withhold the bank account and routing numbers it has marked under section 552.136 of the Government Code.

In summary, the authority may withhold the information we have marked under section 552.104(a) of the Government Code on behalf of Orrick. The authority may withhold the information we have marked pursuant to rule 503 of the Texas Rules of Evidence . The authority must withhold the bank account and routing numbers it has marked under section 552.136 of the Government Code. The authority 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,



Lecelle Clarke
Attorney
Open Records Division

LC/mo

Ref: ID# 773646

Enc. Submitted documents

c: Requestor
(w/o enclosures)

4 Third Parties
(w/o enclosures)