



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 26, 2019

Ms. Deidra Penny
Deputy City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2019-23809

Dear 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# 782513 (GC No. 25945).

The City of Houston (the "city") received a request for every contract over \$25,000 into which the city has entered that has not been approved by the city's council.¹ You state you will release some information. You claim the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence and rules 192.3 and 192.5 of the Texas Rules of Civil Procedure. Additionally, you state release of some of this information may implicate the proprietary interests of third parties.² Accordingly, you state, and provide

¹ You state the city sent the requestor a cost estimate of charges pursuant to section 552.2615 of the Government Code, and the requestor accepted the cost estimate. *See* Gov't Code § 552.2615. The estimate of charges required the requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. *See id.* § 552.263(a). You inform us the requestor paid the cost estimate in full on June 4, 2019. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date governmental body receives bond or deposit).

² The notified third parties consist of: Alexander Dubose Jefferson & Townsend LLC ("Alexander Dubose"); Bevel, Gardner & Associates, Inc.; Beveridge & Diamond, P.C.; Bone & Joint Clinic, P.A.; COMSEC Inc. d/b/a Magellan Research Corporation; DLA Piper LLP; Elite Medical Experts, LLC; Gardere Wynne Sewell LLP Law Firm; Harper Brothers Construction LLC; Husch Blackwell, LLP; Jackson Lewis P.C.; Kennedy & Rand Consulting, Inc. d/b/a PRM Consulting Group; Legal Media, Inc.;

documentation showing, you notified these third parties of the request for information and of their rights to submit arguments to this office as to why the information at issue 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 Alexander Dubose. We have considered the submitted arguments and reviewed the submitted information.

Initially, 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) of the Government Code 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 those parties have protected proprietary interests 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 city may not withhold any portion of the submitted information related to those third parties on the basis of any proprietary interest they may have in the information.

Next, we note 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[.]

Gov't Code § 552.022(a)(3). The submitted information consists of information in an account, contract, or voucher relating to the receipt or expenditure of funds by the city that is subject to section 552.022(a)(3) of the Government Code. The city seeks to withhold the information at issue under sections 552.107(1) and 552.111 of the Government Code. However, sections 552.107(1) and 552.111 are discretionary and do not make information

confidential under the Act. *See* Open Records Decision Nos. 677 (2002) (governmental body may waive attorney work product privilege under section 552.111), 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, the city may not withhold any portion of the submitted information under section 552.107(1) or section 552.111. However, the Texas Supreme Court has held the Texas Rules of Evidence and the Texas Rules of Civil Procedure are “other law” within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will address the city’s claims of the attorney-client privilege under rule 503, the consulting expert privilege under rule 192.3, and the attorney work product privilege under rule 192.5. Alexander Dubose claims some of the information subject to section 552.022(a)(3) is excepted from disclosure under sections 552.104 and 552.110 of the Government Code. 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)). Further, section 552.110 of the Government Code makes information confidential under the Act for purposes of section 552.022. Accordingly, we will consider Alexander Dubose’s arguments under sections 552.104 and 552.110 of the Government Code for the information subject to section 552.022(a)(3) of the Government Code.

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

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

TEX. R. EVID. 503(b)(1). A communication is “confidential” if it is not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

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* ORD 676 at 6-7. Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must (1) show 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 the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. *Id.* Upon a demonstration of all three factors, the entire communication is privileged and confidential under rule 503, provided the client has not waived the privilege or the document 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 extends to entire communication, including factual information).

The city states some of the information subject to section 552.022 of the Government Code consists of communications between the city and outside attorneys for the city that were made for the purpose of facilitating the rendition of professional legal services to the city. The city does not indicate it has waived the attorney-client privilege with regard to the communications. Upon review, we find the city may withhold Exhibits 3 and 5 under Texas Rule of Evidence 503.³

Alexander Dubose asserts portions of its information are 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. Alexander Dubose states it has competitors. In addition, Alexander Dubose states the information at issue, if released, would put the [f]irm in a financially disadvantageous position relative to other existing and prospective clients, and would expose information never intended to be made public. 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

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

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, we find Alexander Dubose has established the release of the information at issue, which we marked, would give advantage to a competitor or bidder. Thus, we conclude the city may withhold the information we marked under section 552.104(a) of the Government Code.⁴

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”⁵ 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 find the information we marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the city must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.136 of the Government Code provides, “[n]otwithstanding 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 insurance policy numbers are access device numbers for purposes of section 552.136. *See* Open Records Decision No. 684 at 9 (2009). Upon review, the city must withhold the insurance policy numbers in the remaining information under section 552.136 of the Government Code.

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

⁵ The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

In summary, the city may withhold Exhibits 3 and 5 under Texas Rule of Evidence 503. The city may withhold the information we marked under section 552.104(a) of the Government Code. The city must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. The city must withhold the insurance policy numbers in the remaining information under section 552.136 of the Government Code. 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,



D. Michelle Case
Assistant Attorney General
Open Records Division

DMC/mo

Ref: ID# 782513.

Enc. Submitted documents

c: Requestor
(w/o enclosures)

24 Third Parties
(w/o enclosures)