



KEN PAXTON  
ATTORNEY GENERAL OF TEXAS

September 30, 2019

Ms. Michele Freeland  
Legal Assistant  
Texas Department of Public Safety  
P.O. Box 4087  
Austin, Texas 78773-0001

OR2019-27328

Dear Ms. Freeland:

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# 788454 (PIR Nos. 19-3014, 19-3041, 19-3222, 19-3333, 19-3432, and 19-3518).

The Texas Department of Public Safety (the "department") received six requests for information pertaining to two related requests for proposals. You claim some of the submitted information is excepted from disclosure under section 552.104 of the Government Code. You also state you notified CBN Secure Technologies; Gemalto, Inc. ("Gemalto"); HID Global Corporation ("HID"); IDEMIA; and Valid USA, Inc. 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 Gemalto, HID, and IDEMIA. 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 to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this ruling, we have not received comments from the remaining third parties. Thus, we have no basis to conclude any remaining third party has

a protected proprietary interest in the submitted information. *See id.* § 552.110(a) (b); 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 department may not withhold any of the submitted information on the basis of any proprietary interest any of the remaining third parties may have in the information.

We note the submitted contract is subject to section 2261.253 of the Government Code. Section 2261.253 provides, in relevant part, as follows:

(a) For each contract for the purchase of goods or services from a private vendor, each state agency shall post on its Internet website:

(1) each contract the agency enters into, including contracts entered into without inviting, advertising for, or otherwise requiring competitive bidding before selection of the contractor, until the contract expires or is completed[.]

...

(b) A state agency monthly may post contracts described by Subsection (a) that are valued less than \$15,000.

...

(e) A state agency that posts a contract on its Internet website as required under this section shall redact from the posted contract

(1) information that is confidential under law; [and]

(2) information the attorney general determines is excepted from public disclosure under [the Act.]

...

(f) The redaction of information under Subsection (e) does not exempt the information from the requirements of Section 552.021 or 552.221.

Gov't Code § 2261.253(a)(1), (b), (e)(1)-(2), (f). The contract at issue is between the department, a state agency, and Gemalto, a private vendor, for the purchase of goods or services. We note the contract is valued at more than \$15,000 and has not expired nor been

completed. Gemalto raises sections 552.101, 552.102, 552.104, and 552.110 of the Government Code for the contract at issue; however, the exceptions to disclosure found in the Act do not generally apply to information that other statutes make public. See Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). The 85th Legislature amended section 2261.253; pursuant to the amendments, state agencies shall redact from contracts subject to section 2261.253 information that is confidential under law or information the attorney general determines is excepted from public disclosure under the Act. Gov't Code § 2261.253(e)(1)-(2); see also *id.* § 2261.253(f). We note the amendments “apply only in relation to a contract for which a state agency first advertises or otherwise solicits bids, proposals, offers, or qualifications on or after [September 1, 2017].” Act of May 29, 2017, 85th Leg., R.S., ch. 556, § 17(c), 2017 Tex. Sess. Law Serv. 1535, 1540. Upon review, we find the contract at issue is subject to the amendments. Therefore, pursuant to subsection 2261.253(e)(2), we will address the applicability of sections 552.101, 552.102, 552.104, 552.107, 552.110, and 552.136 to the submitted information.<sup>1</sup>

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). 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.” *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). You represent the information pertains to a competitive bidding situation. In addition, you state release of the information you indicated would harm the department's purchasing interests and weaken its bargaining position as it deliberates options and negotiates best value now and in the future because it would allow competing vendors to know the prices offered, which you contend “could artificially inflate prices and prevent the [department] from getting best value[.]” Gemalto, HID, and IDEMIA state they have competitors. In addition, Gemalto, HID, and IDEMIA state release of the information at issue would give an advantage to their competitors. Gemalto seeks to withhold the terms of the contract. 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

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<sup>1</sup> The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

consideration of the arguments, we find the department, Gemalto, HID, and IDEMIA have established the release of some of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the department may withhold the information we marked and indicated under section 552.104(a) of the Government Code.<sup>2</sup> Upon review, however, we find you have failed to demonstrate the applicability of section 552.104(a) to the remaining information at issue. Consequently, the department may not withhold the remaining information at issue on that basis.

IDEMIA raises section 552.102(a) of the Government Code as an exception to disclosure of a portion of its proposal. Section 552.102(a) excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]” Gov’t Code § 552.102(a). Section 552.102(a) protects information relating to public officials and employees. *See* Open Records Decision No. 345 (1982). In this instance, the information at issue is related to a private entity, IDEMIA. Therefore, the department may not withhold any portion of IDEMIA’s proposal under section 552.102(a) of the Government Code.

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. Exck*, 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 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.

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

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).

IDEMIA argues portions of its proposal are confidential under section 552.107 of the Government Code. Upon review, we find IDEMIA has failed to establish the information at issue constitutes a privileged communication for the purposes of section 552.107(1). Thus, the department may not withhold the information at issue on that basis.

Section 552.136(b) 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 concluded insurance policy numbers constitute access device numbers for purposes of section 552.136. Accordingly, the department must withhold all bank account, routing numbers, and insurance policy numbers in the remaining information under section 552.136 of the Government Code.

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.

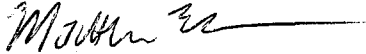
In summary, the department may withhold the information we marked and indicated under section 552.104(a) of the Government Code. The department must withhold all bank account, routing numbers, and insurance policy numbers in the remaining information under section 552.136 of the Government Code. The department must release the remaining information; however, any information subject to copyright may only be released in accordance with copyright law.

After review of the information at issue and consideration of the arguments, we find the department has established the release of the information would give advantage to a competitor or bidder. Thus, we conclude the department may withhold the information, you have indicated under section 552.104(a) 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 <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,

A handwritten signature in black ink, appearing to read "Matthew Taylor", followed by a horizontal line.

Matthew Taylor  
Assistant Attorney General  
Open Records Division

MHT/jxd

Ref: ID# 788454

Enc. Submitted documents

c: Requestor  
(w/o enclosures)