



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

November 6, 2019

Mr. Mark Kratovil  
Assistant Criminal District Attorney  
Tarrant County Criminal District Attorney's Office  
401 West Belknap  
Forth Worth, Texas 76196

OR2019-31216

Dear Mr. Kratovil:

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# 792988.

The Tarrant County Sheriff's Office (the "sheriff's office") received a request for information relating to the "solicitation, acquisition, and use of face recognition technology and related software services" during a specified time period. The sheriff's office states it will release most of the responsive information to the requestor upon payment of costs. The sheriff's office also states it is withholding certain information pursuant to Open Records Decision Nos. 670 (2001) and 684 (2009).<sup>1</sup> The sheriff's office claims some of the submitted information is excepted from disclosure under section 552.107 of the Government Code. Additionally, the sheriff's office states release of some of the submitted information may implicate the proprietary interests of NEC Corporation of America ("NEC"). Accordingly, the sheriff's office states, and provides documentation showing, it notified NEC of the request for information and of its right to submit arguments to this office as to why the submitted information should not be released. *See Gov't Code*

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<sup>1</sup> Open Records Decision No. 670 is a previous determination authorizing all governmental bodies that are subject to the Act to withhold home addresses and telephone numbers, personal cellular telephone numbers, personal pager numbers, social security numbers, and family member information of peace officers without the necessity of requesting an attorney general decision under section 552.117(a)(2) of the Government Code. Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

§ 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 NEC. We have reviewed the submitted information and the submitted arguments.

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 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 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.*, 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. 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).

The sheriff's office states Exhibit E consists of communications involving an attorney for the sheriff's office and sheriff's office employees that were made in furtherance of the rendition of professional legal services to the sheriff's office. The sheriff's office states these communications were intended to be, and have remained, confidential. Based on the sheriff's office's representations and our review, we find the sheriff's office has demonstrated the applicability of the attorney-client privilege to the information at issue.

Accordingly, the sheriff's office may withhold Exhibit E under section 552.107(1) of the Government Code.

NEC asserts portions of Exhibit D are protected under section 552.104 of the Government Code.<sup>2</sup> 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). 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. We understand NEC has competitors. In addition, NEC indicates release of the information at issue would provide an advantage to its competitors. After review of the information at issue and consideration of the arguments, we find NEC has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the sheriff's office may withhold the information we have indicated under section 552.104(a) of the Government Code.<sup>3</sup>

Lastly, NEC informs us it inadvertently disclosed a portion of Exhibit D to the sheriff's office. NEC claims this information is protected by the attorney-client privilege, the elements of which we previously discussed, enacted by Texas Rule of Evidence 503. *See* TEX. R. EVID. 503. NEC states this information consists of a communication between an attorney for NEC and NEC employees. NEC indicates the communication was made in confidence for the purpose of facilitating the rendition of professional legal services to NEC and this communication has remained confidential. Based on NEC's representations and our review, we find NEC has demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the sheriff's office may withhold the information we have indicated under rule 503 of the Texas Rules of Evidence. *See* TEX. R. CIV. P. 193.3(d) ("snap-back" provision regarding inadvertent disclosure of privileged information and return of said documents).

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.

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<sup>2</sup> Although NEC does not cite to section 552.104 of the Government Code in its brief, we understand NEC to raise this section based on the substance of its argument.

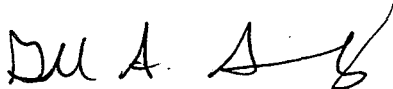
<sup>3</sup> As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

In summary, the sheriff's office may withhold Exhibit E under section 552.107(1) of the Government Code. The sheriff's office may withhold the information we have indicated under section 552.104(a) of the Government Code. The sheriff's office may withhold the information we have indicated under rule 503 of the Texas Rules of Evidence. The sheriff's office must release the remaining information; however, any information that is subject to copyright may be released only 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 <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,



Gerald Arismendez  
Assistant Attorney General  
Open Records Division

GAA/be

Ref: ID# 792988

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

1 Third Party  
(w/o enclosures)