



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 14, 2020

Mr. Jonathan Miles
Open Records Attorney

Mr. Carey E. Smith
Senior Counsel
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711

OR2020-01280

Dear Mr. Miles and Mr. Smith:

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# 806049 (ORR Nos. 20134, 20149, 20159, 20223, and 20572).

The Texas Health and Human Services Commission (the "commission") received five requests from five different requestors for certain information pertaining to two specified solicitations.¹ The commission states it will release some of the requested information. The commission claims some of the submitted information is excepted from disclosure under section 552.107 of the Government Code.² Additionally, the commission states release of

¹ The commission states, and provides documentation demonstrating, it sought and received clarification pertaining to one of the requests for information. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purposes of clarifying or narrowing request); *see also* *City of Dallas v. Abbott*, 304 S. W.3d 380, 387 (Tex. 2010) (holding that when governmental entity, acting in good faith, requests clarification or narrowing of unclear or overbroad request for public information, ten-day period to request attorney general ruling is measured from date request is clarified or narrowed).

² We note the commission did not comply with the requirements of section 552.301 of the Government Code in requesting a ruling from this office pertaining to some of the requested information. *See* Gov't Code § 552.301(b), (e). Nonetheless, because section 552.107 of the Government Code and third-party interests can provide compelling reasons to overcome the presumption of openness, we will consider the commission's argument under section 552.107 and whether the information at issue is excepted from disclosure under the

the submitted information may implicate the proprietary interests of the following third parties: Delta Dental; DentaQuest, LLC; The Guardian Life Insurance Company of America (“Guardian”); Liberty Dental Insurance Company (“Liberty”); MCNA Insurance Company (“MCNA”); and UnitedHealthcare Dental (“United”). Accordingly, the commission states, and provides documentation showing, it notified these interested third parties of the request for information and of their right to submit arguments to this office. *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 Guardian, Liberty, MCNA, and United. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note in a letter dated December 13, 2019, the commission informs us the requestor in request number 20159 withdrew the portion of her request seeking Liberty’s proposal. Accordingly, Liberty’s proposal is not responsive to request number 20159. Additionally, we note some of the submitted information, which we indicated, is not responsive to the instant request because it does not consist of information pertaining to the two specified solicitations. This ruling does not address the public availability of any information that is not responsive to the requests, and the commission is not required to release such information in response to these requests.

Next, the commission informs us some of the requested information was the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2019-29256 (2019) and 2019-24286 (2019). In those rulings, we determined the commission may withhold the information at issue under section 552.104 of the Government Code. We have no indication the law, facts, or circumstances on which the previous rulings were based have changed. Accordingly, the commission may continue to rely on Open Records Letter Nos. 2019-29256 and 2019-24286 as previous determinations and withhold the information at issue in accordance with those rulings.³ *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). We will consider the submitted arguments against disclosure of the remaining information at issue.

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) 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 only received comments from Guardian, Liberty, MCNA, and United

Act based on third-party interests, notwithstanding the commission’s violation of section 552.301 in requesting this ruling. *See id.* §§ 552.007, .302; Open Records Decision No. 150 at 2 (1977).

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

explaining why the information at issue should not be released. Thus, 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, 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. Therefore, the commission may not withhold the information at issue on the basis of any proprietary interest the remaining third parties may have in the information.

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). 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. Guardian, Liberty, MCNA, and United state they have competitors. In addition, Guardian, Liberty, MCNA, and United explain release of the information they indicated would give their competitors an advantage. After review of the information at issue and consideration of the arguments, we find Guardian, Liberty, MCNA, and United have established the release of the information at issue would give an advantage to a competitor or bidder. Accordingly, we conclude the commission may withhold all of Liberty’s information and the information pertaining to Guardian, MCNA, and United, which we indicated, and under section 552.104(a) of the Government Code.⁴

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. *See* 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 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

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

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. *See 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 commission claims the information it marked under section 552.107 of the Government Code consists of communications between attorneys for the commission, commission employees, and commission officials that were made in order to provide legal advice to the commission. The commission asserts these communications were not intended to be disclosed and have not been disclosed to non-privileged parties. Upon review, we find the commission has demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the commission may withhold the information it marked under section 552.107(1) of the Government Code.

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”⁵ Gov’t Code § 552.101. This exception encompasses information protected by other statutes, such as section 6103(a) of title 26 of the United States Code. Prior decisions of this office have held section 6103(a) of title 26 of the United States Code renders federal tax return information confidential. *See* Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Section 6103(b) defines the term “return information” as “a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Treasury] with respect to a return or with respect to the determination of the existence, or possible existence, of liability . . . for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense[.]” *See* 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term “return information” expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer’s liability under

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).

title 26 of the United States Code. *See* *Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *aff'd in part*, 993 F.2d 1111 (4th Cir. 1993). Accordingly, the commission must withhold the 990 form, with respective attachments, we marked pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

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”). Accordingly, the commission must withhold the bank account numbers and bank routing numbers within the remaining responsive information under section 552.136 of the Government Code.

We note some of the remaining information 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 commission may continue to rely on Open Records Letter Nos. 2019-29256 and 2019-24286 as previous determinations and withhold the information at issue in accordance with those rulings. The commission may withhold all of Liberty’s information and the information pertaining to Guardian, MCNA, and United we indicated under section 552.104(a) of the Government Code. The commission may withhold the information it marked under section 552.107(1) of the Government Code. The commission must withhold the 990 form, with respective attachments, we marked pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code. The commission must withhold all bank account numbers and bank routing numbers within the remaining responsive information under section 552.136 of the Government Code. The commission must release the remaining responsive information; however, any information subject to copyright may only be released 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,



James M. Graham
Assistant Attorney General
Open Records Division

JMG/mo

Ref: ID# 806049

Enc. Submitted documents

c: Requestor
(w/o enclosures)

10 Third Parties
(w/o enclosures)