



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

September 18, 2020

Mr. Marshall Swanson  
Counsel for the Port of Corpus Christi Authority of Nueces County  
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OR2020-23667

Dear Mr. Swanson:

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# 844893 (ID# 070620.001).

The Port of Corpus Christi Authority of Nueces County (the "authority"), which you represent, received a request for six categories of information pertaining to the authority's Harbor Island property. You state the authority does not have information responsive to a portion of the request.<sup>1</sup> You state the authority will withhold or release information in accordance with Open Records Letter No. 2020-01741 (2020). You state the authority has released some information. You claim the submitted information is excepted from disclosure under sections 552.103, 552.104, and 552.107 of the Government Code and privileged under rule 192.5 of the Texas Rules of Civil Procedure and rule 503 of the Texas Rules of Evidence.<sup>2</sup> You also state you notified The Carlyle Group and Lone Star Ports, LLC of the request for information and of their 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

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<sup>1</sup> The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

<sup>2</sup> Although you also raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (permitting interested third party to submit to attorney general reasons why requested information should or should not be released). We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>3</sup>

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 id.* § 552.305(d)(2)(B). As of the date of this ruling, we have not received comments from either of the third parties. Thus, we have no basis to conclude a third party has a protected proprietary interest in the submitted information. *See, e.g., id.* § 552.110 (requiring the provision of specific factual evidence demonstrating the applicability of the exception). Accordingly, the authority may not withhold any of the submitted information on the basis of any proprietary interest a third party may have in the information.

Next, we note the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part, the following:

(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;

...

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

Gov't Code § 552.022(a)(3), (16). The submitted information consists of information in an account, voucher, or contract relating to the receipt or expenditure of funds by a governmental body that is subject to section 552.022(a)(3) and attorney fee bills subject to section 552.022(a)(16). The authority must release this information pursuant to sections 552.022(a)(3) and 552.022(a)(16), unless it is made confidential under the Act or other law. *See id.* The authority seeks to withhold the information subject to section 552.022 under sections 552.103, 552.104, and 552.107 of the Government Code. However, sections 552.103 and 552.107 are discretionary in nature and do not make information confidential

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<sup>3</sup> We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.— Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 676 at 6 (attorney-client privilege under section 552.107 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the authority may not withhold any of the submitted information under section 552.103 or section 552.107. However, the Texas Supreme Court has held the Texas Rules of Civil Procedure and the Texas Rules of Evidence are “other law” that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider the authority’s assertion of the attorney work-product privilege under Texas Rule of Civil Procedure 192.5 and the attorney-client privilege under Texas Rule of Evidence 503. Additionally, as information encompassed by section 552.022 may be withheld under section 552.104, we will consider the authority’s argument under section 552.104 for the information at issue. *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, because section 552.101 of the Government Code makes information confidential for purposes of section 552.022, we will consider the applicability of this exception to the information subject to section 552.022.

Section 552.104(a) of the Government Code excepts from disclosure information that a governmental body demonstrates, if released, would “harm its interests by providing an advantage to a competitor or bidder in a particular ongoing competitive situation or in a particular competitive situation where the governmental body establishes the situation at issue is set to reoccur or there is a specific and demonstrable intent to enter into the competitive situation again in the future.” 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, 841 (Tex. 2015). The authority states it has specific marketplace interests in the information at issue because the authority is competing with other local and governmental competitors for the development of public and private crude oil export terminals, navigation-related business, and long-term business growth. In addition, the authority states release of this information would provide competitors information they could utilize to “undercut [the authority’s] rental rates, minimum throughput requirements, and other commercial terms” providing an unfair advantage in attracting new navigation-related business. Further, the authority argues release of the information at issue would give its competitors “specific knowledge of certain material business terms to expect from [the authority], including economic incentives,” which would allow the competitors “an unfair advantage in assembling their own economic incentive packages[.]” and would negatively impact the authority’s ability to negotiate contractual terms and “impair its ability to effectively compete in the market[.]” Based upon your representations and our review, we find you have demonstrated the authority has specific marketplace interests and may be considered a “competitor” for purposes of section 552.104. We also find you have demonstrated the release of the information at issue would give advantage to a competitor

or bidder. Accordingly, the authority may withhold Exhibit E under section 552.104(a) of the Government Code.<sup>4</sup>

Texas Rule of Civil Procedure 192.5 encompasses the attorney work product privilege. Rule 192.5 defines work product as

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a). A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *Id.*; Open Records Decision No. 677 at 6-8 (2002). In order for this office to conclude the information was made or developed in anticipation of litigation, we must be satisfied that

a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

*Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORR 677 at 7.

You claim Exhibit F constitutes attorney work product that is protected by rule 192.5 of the Texas Rules of Civil Procedure. You state this information was created in support of pending litigation. You further state this information reflects an attorney's mental impressions, conclusions, or legal theories. Based on your representations and our review of the information at issue, we conclude some of Exhibit F constitutes privileged attorney work product for purposes of rule 192.5. Accordingly, the authority may withhold the information we indicated under rule 192.5 of the Texas Rules of Civil Procedure.<sup>5</sup> However, we find you have not demonstrated the remaining information at issue contains the mental impressions, opinions, conclusions, or legal theories of an attorney or the

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<sup>4</sup> As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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attorney's representative that was developed in anticipation of litigation or for trial. Therefore, we conclude the authority may not withhold any portion of the remaining information under rule 192.5. The authority must release the remaining information pursuant to section 552.022(a)(16) of the Government Code.

In summary, the authority may withhold Exhibit E under section 552.104(a) of the Government Code. The authority may withhold the information we indicated under rule 192.5 of the Texas Rules of Civil Procedure. 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 <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,

Kelly McWethy  
Assistant Attorney General  
Open Records Division

KM/be

Ref: ID# 844893

c: Requestor

2 Third Parties