



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

January 18, 2022

Mr. Frank Garza and Mr. Austin Beck  
Counsel for Brownsville Public Utilities Board  
Davidson, Troilo, Ream & Garza, P.C.  
601 Northwest Loop 410, Suite 100  
San Antonio, Texas 78216-5511

OR2022-01419

Dear Mr. Garza and Mr. Beck:

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# 923014.

The Brownsville Public Utilities Board (the "board") received a request for communications regarding a specified matter involving a third party during a specified time period.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.104, and 552.107 of the Government Code. Additionally, you state you have notified Space Exploration Technologies Corporation ("SpaceX") of the request. *See Gov't Code* § 552.304 (interested third party may submit comments stating why information should or should not be released). We have received comments from SpaceX. We have considered the submitted arguments and reviewed the submitted information.

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

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<sup>1</sup> You state the board sought and received clarification of the request for information and subsequently sent the requestor a cost estimate of charges, in response to which the requestor modified his request for information. *See Gov't Code* § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

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).

You explain the board “conducts business in a highly-competitive industry where multiple utility companies . . . compete to provide services to customers located beyond the established service areas assigned to each public utility.” Therefore, you assert GB has specific marketplace interests in the information at issue. You argue release of Exhibit D would provide a competitive advantage to the board’s competitors by providing them with information that would allow them “to devise offers and information relevant to the procurement process that undercut the [board’s] offers to provide service to potential customers[.]” Based upon your representations and our review, we find you have demonstrated the board has specific marketplace interests and may be considered a “competitor” for purposes of section 552.104. We also find you have demonstrated release of the information at issue would give advantage to a competitor or bidder. Accordingly, the board may withhold Exhibit D under section 552.104(a).<sup>2</sup>

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. 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. 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 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.*, 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

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

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).

You assert Exhibit C consists of communications between attorneys for the board and board employees in their capacity as clients that were made for the purpose of providing legal services to the board. However, upon review, we find the information you seek to withhold has been shared with individuals you have not demonstrated are privileged parties. Therefore, we conclude you have failed to establish Exhibit C constitutes communications between or among privileged parties for the purposes of section 552.107. Thus, the board may not withhold Exhibit C under section 552.107.

In summary, the board may withhold Exhibit D under section 552.104(a) of the Government Code. The board must release Exhibit C.

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,

Lindsay E. Hale  
Assistant Attorney General  
Open Records Division

LEH/jxd

Ref: ID# 923014

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Third Party  
(w/o enclosures)