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ATTORNEY GENERAL OF TEXAS

August 23, 2022

Ms. Mary Dougherty
Open Records Attorney
Texas Department of Insurance
P.O. Box 12030
Austin, Texas 78711-2548

OR2022-25524

Dear Ms. Dougherty:

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# 964627 (TDI# R015574).

The Texas Department of Insurance (the "department") received a request for eight categories of information pertaining to a specified situation. The department states it has released some information to the requestor. The department claims some of the submitted information is excepted from disclosure under section 552.107 of the Government Code and privileged under Texas Rule of Evidence 503. Additionally, the department states release of the submitted information may implicate the proprietary interests of Mandiant, Inc. ("Mandiant"). Accordingly, the department states, and provides documentation showing, it notified Mandiant 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 § 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 considered the submitted arguments and reviewed the submitted information.

Initially, the department informs us it sought clarification of a portion of the request for information. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). The department also informs us it has not yet received a response to the request for clarification. We note a governmental body

has a duty to make a good-faith effort to relate a request for information to information the governmental body holds. Open Records Decision No. 561 (1990). In this instance, the department has submitted information it believes is responsive to the request and made arguments against disclosure of this information. Thus, we assume the department has made a good-faith effort to relate the request to information it holds, and we will address the applicability of the arguments to the information. However, the department has no obligation at this time to release any additional responsive information for which it has not received clarification. If the requestor responds to the request for clarification, the department must seek a ruling from this office before withholding any additional responsive information from the requestor. See Gov't Code § 552.222(b); *City of Dallas*, 304 S.W.3d at 387.

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) 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 not received comments from Mandiant explaining why the submitted information should not be released. Therefore, we have no basis to conclude Mandiant has a protected proprietary interest in the submitted information, and the department may not withhold any portion of it on that basis. See, e.g., *id.* § 552.110 (requiring the provision of specific factual evidence demonstrating the applicability of the exception).

Next, we note the submitted information is subject to section 552.022(a) of the Government Code, which provides, in relevant part:

[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[.]

Id. § 552.022(a)(3). The submitted information consists of contracts that are subject to section 552.022(a)(3) of the Government Code. The information subject to section 552.022 must be released unless it is made confidential under the Act or other law. See *id.* The department seeks to withhold the information subject to section 552.022(a)(3) under section 552.107 of the Government Code. However, section 552.107 is discretionary in nature and does not make information confidential under the Act. See Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the department may not withhold the information subject to section 552.022(a)(3) under section 552.107 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" for the purposes of section 552.022. See *In re City of Georgetown*, 53 S.W.3d 328, 337 (Tex. 2001). Thus, we will consider the department's

claim under Texas Rule of Evidence 503 for the information subject to section 552.022(a)(3) of the Government Code.

Next, we note the information at issue 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 contracts at issue are between the department, a state agency, and a private vendor for the purchase of goods or services. *See id.* §§ 2261.002(2) (“state agency” has meaning assigned by Gov’t Code § 2151.002), 2151.002(3) (“state agency” includes system university or institution of higher education as defined by Educ. Code § 61.003). We note the contracts have not expired nor been completed. The department raises Texas Rule of Evidence 503 for the contracts at issue. 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. *Id.* § 2261.253(e)(1)-(2). 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 contracts at issue are subject to the amendments; therefore, we

will consider the department's argument under Texas Rule of Evidence 503 for the information at issue.

Texas Rule of Evidence 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

(A) between the client or the client's representative and the client's lawyer or the lawyer's representative;

(B) between the client's lawyer and the lawyer's representative;

(C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;

(D) between the client's representatives or between the client and the client's representative; or

(E) among lawyers and their representatives representing the same client.

Tex. R. Evid. 503(b)(1). A communication is "confidential" if it is not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. *See* ORD 676. Upon a demonstration of all three factors, the entire communication is confidential under rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding). We note communications with third parties with whom a governmental entity shares a privity of interest are protected. Open Records Decision Nos. 464 (1987), 429 (1985).

The department states the contract at issue documents a communication between outside counsel and counsel representatives for the department and the department in its capacity as a client and reveals confidential matters for which the department sought the assistance

of outside counsel. The department also states this communication was made for the purpose of rendering professional legal services to the department and this communication was intended to be and has remained confidential.

The department seeks to withhold the entirety of the contract at issue under rule 503. However, subsection 2261.253(e) states, in relevant part, “[a] state agency that *posts a contract on its Internet website as required under* [section 2261.253] shall redact [information the attorney general determines is excepted from public disclosure] *from the posted contract[.]*” *See* Gov’t Code § 2261.253(e) (emphasis added). Interpreting subsection 2261.253(e) to allow a state agency to withhold the entirety of a contract that the legislature, in the same section, expressly requires the state agency to post on its internet website is absurd and not consistent with the unambiguous language used by the legislature. Pursuant to the plain language of this subsection, a state agency may not withhold the entirety of a contract subject to section 2261.253. *See Hernandez v. Ebrum*, 289 S.W.3d 316, 318 (Tex. 2009) (unambiguous statutory language is interpreted according to its plain language unless such an interpretation would lead to absurd results); Attorney General Opinion GA-0876 (2011). *See also* Sen. Comm. on Finance, Bill Analysis, Tex. S.B. 20, 84th Leg., R.S. (2015) (“The purpose of this bill is to reform state agency contracting by clarifying accountability, increasing transparency, and ensuring a fair competitive process.”). Accordingly, the department may not withhold the entirety of the contract at issue under rule 503.

However, after review of the contract at issue, we find the department has established the information we have marked constitutes a privileged attorney-client communication under rule 503. Thus, we conclude the department may withhold the information we have marked under rule 503 of the Texas Rules of Evidence. The department may not withhold any of the remaining information at issue on that basis. Accordingly, the department 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,

Gerald A. Arismendez
Assistant Attorney General
Open Records Division

GAA/eb

Ref: ID# 964627

Enc. Submitted documents

c: Requestor
(w/o enclosures)