



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 13, 2005

Mr. John T. Patterson
Assistant City Attorney
City of Waco
P.O. Box 2570
Waco, Texas 76702-2570

OR2005-00425

Dear Mr. Patterson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 216855.

The City of Waco (the "city") received a request for all information related to request for qualifications ("RFQ") #2004-072. You claim that some of the requested information is excepted from disclosure under section 552.107 of the Government Code. You have notified the following interested third parties of the city's receipt of this request for information pursuant to section 552.305 of the Government Code: Group & Pension Administrators, Inc. ("Group & Pension"); Scott & White Health Plan and Insurance Company ("Scott & White Health"); Scott & White Prescription Services ("Scott & White Prescription"); SHA, L.L.C., d/b/a Firstcare ("Firstcare"); MaxorPlus; Humana; Insurors of Texas ("Insurors"); and United Healthcare ("United"). See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act ("Act") in certain circumstances). We have received correspondence from MaxorPlus. We have considered all submitted arguments and reviewed the submitted information.

Initially, we address the city's claim that the information in Exhibits 3 and 4 is excepted from public disclosure under section 552.107 of the Government Code as information protected by the attorney-client privilege. Section 552.107(1) 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 “for the purpose of facilitating 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 Texas 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)(A), (B), (C), (D), (E). 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.* 503(b)(1), meaning it was “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). 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, no writ). Moreover, because the client may 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). Upon review, we agree that the documents you seek to withhold under the attorney-client privilege consist of confidential communications made by an attorney for the purpose of facilitating the rendition of professional legal services to the client governmental body. Thus, the city may withhold the information in Exhibits 3 and 4 under section 552.107(1) of the Government Code.

Next, we address the remaining information. 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, Group & Pension, Scott & White Health, Scott & White Prescription, Firstcare, Humana, Insurors, and United have not submitted to this office any reasons explaining why their information should not be released. Therefore, these parties have provided us with no basis to conclude that they have a protected proprietary interest in any of the submitted information. *See, e.g., Gov’t Code* § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not

conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Accordingly, the submitted information relating to Group & Pension, Scott & White Health, Scott & White Prescription, Firstcare, Humana, Insurors, and United is not excepted from disclosure under section 552.110 of the Government Code, and it must be released.

We now turn to MaxorPlus's arguments against disclosure for the information in Exhibit 8. Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that is considered to be confidential under other constitutional, statutory, or decisional law. *See* Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common law privacy). MaxorPlus has not asserted any law, and this office is not otherwise aware of any law, under which the information in Exhibit 8 is deemed to be confidential for purposes of section 552.101. Therefore, the city may not withhold any of the submitted information under section 552.101 of the Government Code.

Next, we address MaxorPlus's argument that its information is excepted from disclosure under section 552.104 of the Government Code. Section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the city does not raise section 552.104, this section does not apply to the requested information. *See* Open Records Decision No. 592 (1991) (governmental body may waive section 552.104). Therefore, the city may not withhold any of the information at issue under section 552.104 of the Government Code.

MaxorPlus also asserts that its information is excepted from disclosure under section 552.110(b) of the Government Code, which protects commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(b). An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. *Cf. National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). An interested third party raising section 552.110(b) must provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of the requested information. *See* Open Records Decision No. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure).

Having considered MaxorPlus's arguments and reviewed the information at issue, we find that MaxorPlus has made only conclusory allegations that release of its information would cause the company substantial competitive injury and has provided no specific factual or evidentiary showing to support such allegations. Thus, the information in Exhibit 8 may not be withheld pursuant to section 552.110. Accordingly, this information must be released to the requestor.

In summary, the city may withhold Exhibits 3 and 4 under section 552.107(1) of the Government Code. The remainder of the submitted information must be released to the requestor.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Caroline E. Cho
Assistant Attorney General
Open Records Division

CEC/sdk

Ref: ID# 216855

Enc. Submitted documents

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