



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 18, 2014

Ms. Elaine Nicholson
Assistant City Attorney
Law Department
City of Austin
P.O. Box 1088
Austin, Texas 78767-8828

OR2014-10377

Dear Ms. Nicholson:

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# 527036.

The City of Austin (the "city") received a request for communications, drafts, and inquiries related to any proposed economic incentives under consideration by the city.¹ You state the city will release some information to the requestor. You claim portions of the submitted information are excepted from disclosure under sections 552.104, 552.107, and 552.131 of the Government Code. You further state release of some of the submitted information may implicate the proprietary interests of Gibson, Hillside, and Otto Bock HealthCare LP ("Otto

¹We note the requestor clarified his request for information. See Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for public information, the ten-business-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

Bock”).² Accordingly, you state, and provide documentation showing, you notified these third parties 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 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 Gibson and Hillside. We have considered the submitted arguments and reviewed the submitted information, a portion of which constitutes a representative sample.³

Initially, we note Hillside argues against disclosure of information not submitted to this office for review. This ruling does not address information beyond what the city has submitted to us for our review. *See* Gov’t Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit a copy of specific information requested). Accordingly, this ruling is limited to the information the city submitted as responsive to the request for information.

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 id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Otto Bock explaining why the submitted information should not be released. Therefore, we have no basis to conclude Otto Bock has 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 information is trade secret), 542 at 3. Accordingly, the city may not withhold any portion of the submitted information on the basis of any proprietary interest Otto Bock may have in the information.

Section 552.104 of the Government Code excepts from required public disclosure “information which, if released, would give advantage to competitors or bidders.” Gov’t Code § 552.104(a). This exception protects a governmental body’s interests in connection with competitive bidding and in certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). This office

²We note Gibson and Hillside are pseudonyms for companies engaged in negotiations related to the economic incentives at issue used in the documents and briefing submitted to this office. Accordingly, we use these pseudonyms for the purposes of this ruling.

³We 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.

has held a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the “competitive advantage” aspect of this exception if it can satisfy two criteria. *See id.* First, the governmental body must demonstrate it has specific marketplace interests. *See id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *See id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body’s legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body’s demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *See id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

You state the submitted information pertains to economic proposals made to various companies in an attempt to bring jobs related to these companies or industries to the city. You state the city competes for these jobs with other cities throughout the country who may be proposing their own economic incentive packages to these companies. You assert the release of the information you have marked would place the city at a disadvantage relative to these other cities, because it would allow other cities to offer slightly more favorable incentives to the companies. You also inform us no contracts arising from the proposed incentives have yet been awarded. Based on your representations and our review, we find you have demonstrated the city has a specific marketplace interest and may be considered a “competitor” for purposes of section 552.104. Further, we find you have demonstrated that release of the information you have marked would cause specific harm to the city’s marketplace interests. Accordingly, the city may withhold the information you have marked under section 552.104 of the Government Code.⁴

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

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

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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. See 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 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, orig. proceeding). 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 state the information you have marked consists of confidential communications between assistant city attorneys and city staff members. You state these communications were made for the purpose of facilitating the rendition of professional legal services and the confidentiality of these communications has been maintained. Based on these representations and our review, we agree the city may withhold the information you have marked under section 552.107(1) of the Government Code.

You assert some of the remaining information is excepted from disclosure under section 552.131(b) of the Government Code, which provides the following:

Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure]

Gov't Code § 552.131(b). Section 552.131(b) of the Government Code protects information about a financial or other incentive that is being offered to a business prospect by a governmental body or another person. You inform us the information you have marked consists of communications about a financial or other incentive offered to a business prospect in order for the business prospect to locate, stay, or expand in the city. Specifically, you argue the information at issue “contains detailed economic incentive information being offered, discussions regarding the details of the offer, and proposed conditions of the offer.” You state the negotiations did not result in an agreement between the city and the business prospect. Based on your representations and our review of the submitted information, we agree portions of the remaining information consist of information about financial or other incentives being offered to business prospects. Accordingly, the city may withhold the

information we have marked under section 552.131(b) of the Government Code. However, we conclude it has not been demonstrated how any of the remaining information at issue consists of information about a financial or other incentive being offered to a business prospect. Consequently, none of the remaining information may be withheld under section 552.131(b) of the Government Code.

Hillside asserts some of the remaining information is excepted from disclosure under section 552.110(b) of the Government Code. Section 552.110(b) excepts from disclosure “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.” Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, substantial competitive injury would likely result from release of the requested information. *See* ORD 661 at 5-6 (business enterprise must show by specific factual evidence release of information would cause it substantial competitive harm). Upon review, we find Hillside has not demonstrated release of the remaining information would cause it substantial competitive injury. Therefore, the city may not withhold any of the remaining information pursuant to section 552.110(b) of the Government Code.

Hillside asserts some of the remaining information is excepted from disclosure under section 552.131(a)(2) of the Government Code, which reads as follows:

(a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

...

(2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

Gov’t Code § 552.131(a)(2). Thus, in excepting from disclosure only “commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained,” section 552.131(a)(2) provides the same protection as section 552.110(b). *See id.* § 552.110(b); ORD 661. Therefore, as we have already determined section 552.110(b) of the Government Code is not applicable to any of the remaining information, the city may not withhold any of the remaining information under section 552.131(a)(2) of the Government Code.

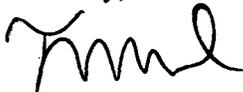
Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c).⁵ Gov’t Code § 552.137(a)-(c). The submitted information contains a personal e-mail address that is not of a type excluded by subsection (c). Therefore, the city must withhold the personal e-mail address we have marked under section 552.137 of the Government Code unless the owner affirmatively consents to its disclosure.

In summary, the city may withhold the information you have marked under section 552.104 of the Government Code. The city may withhold the information you have marked under section 552.107(1) of the Government Code. The city may withhold the information we have marked under section 552.131(b) of the Government Code. The city must withhold the personal e-mail address we have marked under section 552.137 of the Government Code unless the owner affirmatively consents to its disclosure. The city 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 http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Tim Neal
Assistant Attorney General
Open Records Division

TN/bhf

⁵The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Ref: ID# 527036

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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