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ATTORNEY GENERAL OF TEXAS

October 2, 2015

Ms. Cynthia Tynan
Attorney & Public Information Coordinator
Office of General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2015-20721

Dear Ms. Tynan:

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# 581560 (OGC# 162865).

The University of Texas System (the "system") received a request for 1) a copy of a specific contract with EPIC Systems Corporation ("EPIC"), 2) "background materials provided in advance to Regents regarding Item #4 ", 3) a copy of the specific contract referenced in Item #60, and 4) "background materials provided in advance to the [s]ystem's Regents regarding Item #60." The system claims some of the submitted information is excepted from disclosure under sections 552.107 and 552.139 of the Government Code. Additionally, the system states release of this information may implicate the proprietary interests of EPIC and Encore Health Resources, LLC ("Encore"). Accordingly, the system states, and provides documentation showing, it notified these third parties of the request for information and of their right to submit arguments to this office as to why the information at issue 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 EPIC. We have considered the submitted arguments and reviewed the submitted information.

Initially, we must address the system's comments about the pending litigation involving Open Records Letter No. 2015-09102 (2015). In this ruling, we determined the University of Texas M.D. Anderson Cancer Center (the "center") must (1) withhold the information it marked under section 552.139 of the Government Code and (2) release the remaining information. After issuance of this ruling, EPIC filed suit against this office and the center, challenging the release of the remaining information. The system now asserts some of the submitted information is the subject of the pending litigation involving Open Records Letter No. 2015-09102, and it must await a determination by the trial court regarding whether the information subject to this pending litigation must be released to the public. We note, however, the instant request was received by the system, not the center, and the information at issue is not subject to Open Records Letter No. 2015-09102. If a previous determination does not apply to information that a governmental body wants to withhold from disclosure, section 552.306 of the Government Code calls for this office to render a decision "not later than the 45th business day after the date [this office] received the request for a decision." Gov't Code § 552.306. Section 552.306 does not authorize this office to refuse to perform the duty to issue an open records ruling simply because the same disclosure question is pending before a Texas Court. Open Records Decision No. 687 at 3 (2011). Under section 552.306, unless this office has already ruled on the precise question to that governmental body, this office is directed in mandatory language to rule whenever a government body seeks an open records ruling. *Id.*; see also *Houston Chronicle Publ'g Co. v. Mattox*, 767 S.W.2d 695, 698 (Tex. 1989) (holding Attorney General may not refuse to fulfill his duty to render open records decision). Accordingly, we will address the applicability of the Act to the information at issue.

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) of the Government Code 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 Encore explaining why the submitted information should not be released. Therefore, we have no basis to conclude Encore 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 system may not withhold the submitted information on the basis of any proprietary interest Encore may have in the information.

Next, we note EPIC seeks to withhold information not submitted to this office by the system. By statute, this office may only rule on the public availability of information submitted by the governmental body requesting the ruling. See Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested). Because this information was not submitted by the system, this

ruling does not address this information and is limited to the information submitted as responsive by the system.

Section 552.104(a) of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” *Id.* § 552.104(a). In considering whether a private third party may assert this exception, the supreme court reasoned because section 552.305(a) of the Government Code includes section 552.104 as an example of an exception that involves a third party’s property interest, a private third party may invoke this exception. *Boeing Co. v. Paxton*, No. 12-1007, 2015 WL 3854264, at *7 (Tex. June 19, 2015). 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.” *Id.* at *9. EPIC states it has competitors. In addition, EPIC seeks to withhold certain terms of the submitted contract, stating disclosure of the information at issue could allow its competitors to use the information to develop their own software to offer features E[PIC] offers, or “to adjust their own implementation, training, support, pricing, payment, or business methods to mimic those that have been developed by Epic over a substantial period of time and at substantial cost.” For many years, this office concluded the terms of a contract and especially the pricing of a winning bidder are public and generally not excepted from disclosure. Gov’t Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision Nos. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency), 514 (1988) (public has interest in knowing prices charged by government contractors), 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). However, now, pursuant to *Boeing*, section 552.104 is not limited to only ongoing competitive situations, and a third party need only show release of its competitively sensitive information would give an advantage to a competitor even after a contract is executed. *Boeing*, 2015 WL 3854264, at *1, *8. After review of the information at issue and consideration of the arguments, we find EPIC has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the system may withhold the information we have indicated under section 552.104(a).¹

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

¹As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

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)(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: (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 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).

The system states the information it has marked consists of confidential communications involving system attorneys, legal staff, and system employees in their capacities as clients. The system states these communications were made in furtherance of the rendition of professional legal services to the system. The system states the confidentiality of these communications has been maintained. Based on these representations and our review, we find the system has demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the system may withhold the information it has marked under section 552.107(1) of the Government Code.

The system raises section 552.139 of the Government Code for the remaining information it has marked. Section 552.139 provides, in part, as follows:

- (a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

...

(2) any other assessment of the extent to which data processing operations, a computer, a computer program, network, system, or system interface, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use[.]

Id. § 552.139(a), (b)(2). Section 2059.055(b) of the Government Code provides the following, in pertinent part:

Network security information is confidential under this section if the information is:

- (1) related to passwords, personal identification numbers, access codes, encryption, or other components of the security system of a state agency;
- (2) collected, assembled, or maintained by or for a governmental entity to prevent, detect, or investigate criminal activity; or
- (3) related to an assessment, made by or for a governmental entity or maintained by a governmental entity, of the vulnerability of a network to criminal activity.

Id. § 2059.055(b). The system states the information at issue provides detailed information regarding requirements and operation of hardware and software, and security systems in place to ensure protection of certain information. The system further asserts the information at issue, if released, would provide a roadmap of the network security that is or will be in place to protect the system's information. Therefore, the system argues release of the information at issue would make the system's data vulnerable to unauthorized access or harm. Based on these representations and our review, we find the remaining information the system has marked relates to computer network security, and the design, operation, or defense of the system's computer network. Accordingly, the system must withhold the remaining information it has marked under section 552.139 of the Government Code.

In summary, the system may withhold the information we have indicated under section 552.104(a) of the Government Code. The system may withhold the information it

has marked under section 552.107(1) of the Government Code. The system must withhold the remaining information it has marked under section 552.139 of the Government Code. The remaining information must be released.

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,



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Assistant Attorney General
Open Records Division

RSH/som

Ref: ID# 581560

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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