



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 18, 2015

Ms. Jordan Hale
Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2015-24249

Dear Ms. Hale:

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# 587770 (OOG ID# 15-366).

The Office of the Governor (the "governor's office") received a request for the governor's schedule during a specified time period. You state the governor's office is releasing some of the requested information. You claim some of the remaining requested information is excepted from disclosure under sections 552.104 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, you inform us some of the requested information was the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2015-23804 (2015), 2015-23802 (2015), 2015-09398 (2015), and 2015-06315 (2015). In Open Records Letter No. 2015-23804, we determined the governor's office (1) must continue to rely on Open Records Letter No. 2015-22210 (2015) as a previous determination and withhold or release the identical information in accordance with that ruling; (2) must

¹We 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 that those records contain substantially different types of information than that submitted to this office.

withhold certain information under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code and section 418.181 of the Government Code; (3) may withhold certain information under sections 552.104 and 552.111 of the Government Code; and (4) must release the remaining information at issue. In Open Records Letter No. 2015-23802, we determined the governor's office (1) must continue to rely on Open Records Letter No. 2015-22210 as a previous determination and withhold or release the identical information at issue in accordance with that ruling; (2) may withhold the certain information under section 552.104 of the Government Code; and (3) must release the remaining information at issue. In Open Records Letter No. 2015-09398, we determined the governor's office (1) must withhold certain information under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code and section 418.181 of the Government Code; (2) must withhold certain information under section 552.101 in conjunction with common-law privacy; (3) may withhold certain information under sections 552.104 and 552.111 of the Government Code; and (4) must release the remaining information at issue. In Open Records Letter No. 2015-09398, we determined the governor's office may withhold certain information under section 552.104 of the Government Code and must release the remaining information at issue. We have no indication the law, facts, or circumstances on which the prior rulings were based have changed. Accordingly, for the requested information that is identical to the information previously requested and ruled upon by this office, we conclude the governor's office must continue to rely on Open Records Letter Nos. 2015-23804, 2015-23802, 2015-09398, and 2015-06315 as previous determinations and withhold or release the identical information in accordance with those rulings. *See* Open Records Decision No. 673 at 6-7 (2001) (discussing criteria for first type of previous determination).

Section 552.104(a) of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." 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). The governor's office argues expansion and recruitment of businesses to the State of Texas is a competitive process and the governor's office informs us it "works tirelessly to promote Texas, in part by providing state resources to encourage business growth within the state." The governor's office states "Texas devotes substantial resources to programs designed primarily to attract new businesses to the state or assist with the substantial expansion of an existing business as part of competitive recruitment." The governor's office explains it is currently negotiating potential approvals or contracts with the entity at issue, and contracts with this entity have not been executed. The governor's office argues release of this information, before contracts are signed or final approval given, would disadvantage Texas by permitting other states to directly approach this entity with competing incentives. Based on the governor's office's representations and our review, we find the governor's office has demonstrated it has specific marketplace interests and may be considered a "competitor" for purposes of section 552.104. We also find the governor's office has demonstrated release of the information it has marked

would give advantage to a competitor or bidder. Accordingly, the governor's office may withhold the information it has marked under section 552.104 of the Government Code.

Section 552.107(1) of the Government Code protects information subject to 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)(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).

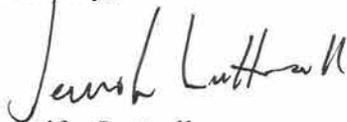
You state the information you have marked consists of or reveals communications between governor's office attorneys, officials, and employees that were made for the purpose of facilitating the rendition of professional legal services to the governor's office. You also state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the governor's office may withhold the information you have marked under section 552.107(1) of the Government Code.

In summary, for the requested information that is identical to the information previously requested and ruled upon by this office, we conclude the governor's office must continue to rely on Open Records Letter Nos. 2015-23804, 2015-23802, 2015-09398, and 2015-06315 as previous determinations and withhold or release the identical information in accordance with those rulings. The governor's office may withhold the information you have marked under sections 552.104 and 552.107(1) 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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/akg

Ref: ID# 587770

Enc. Submitted documents

c: Requestor
(w/o enclosures)