



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 25, 2014

Mr. Chris Sterner  
Assistant General Counsel  
Office of the Governor  
P.O. Box 12428  
Austin, Texas 78711

OR2014-21463

Dear Mr. Sterner:

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# 547571 (OOG ID# 312-14).

The Office of the Governor (the "governor's office") received a request for the Governor's schedule for a specified time period. The governor's office states it is releasing some of the requested information. The governor's office claims some of the submitted information is excepted from disclosure under sections 552.104 and 552.107 of the Government Code. We have considered the exceptions the governor's office claims and reviewed the submitted representative sample of information.<sup>1</sup>

The governor's office states some of the requested information was the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2014-13119 (2014) and 2014-15956 (2014). In Open Records Letter No. 2014-13119, we determined the governor's office may withhold certain information under section 552.104 of the Government Code, and in Open Records Letter No. 2014-15956, we determined the governor's office may withhold certain information under sections 552.104 and 552.107 of the Government Code. The governor's office states the law, facts, or circumstances on which the prior rulings were based have not changed. Accordingly, the governor's office

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<sup>1</sup>We 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.

may continue to rely on Open Records Letter Nos. 2014-13119 and 2014-15956 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). We will address the governor's office's arguments against release of the submitted information that is not encompassed by Open Records Letter Nos. 2014-13119 and 2014-15956.

Section 552.104 of the Government Code exempts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. 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 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).

The governor's office contends it has specific marketplace interests in the information it has marked because the governor's office is competing against other states attempting to recruit businesses to relocate or expand their businesses in their respective states. The governor's office states the information at issue identifies entities and representatives of entities considering expansion or relocation to Texas, and those that have been chosen as potential economic development incentive recipients. The governor's office explains it is currently negotiating potential approvals or contracts with the entities at issue, and contracts with these entities have not been executed. The governor's office argues release of this information, before contracts are signed or final approval is given, would seriously disadvantage Texas by permitting other states to directly approach these entities with competing incentives. Based on these 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. Further, we find the governor's office has demonstrated release of the information at issue would cause specific harm to the governor's office's marketplace interests in a particular competitive situation. Accordingly, the governor's office may withhold the information it has marked under section 552.104.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. *See* 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. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must

demonstrate 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. *See* 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. *See 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 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, 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. Finally, the attorney-client privilege applies only to a confidential communication, 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. *See 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 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. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

The governor’s office states the information it has marked documents communications between governor’s office attorneys, representatives, and other staff, and attorneys and other representatives of the Governor. The governor’s office also informs us some of the information at issue concerns pending criminal litigation against the Governor. The governor’s office states the governor’s office and the Governor in his personal capacity share a common legal interest in the pending criminal litigation with respect to the information at issue. The governor’s office states the communications were made for the purpose of facilitating the rendition of professional legal services to the governor’s office and these communications have remained confidential. Upon review, we find the governor’s office has demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the governor’s office may withhold the information it has marked under section 552.107(1) of the Government Code.

In summary, the governor’s office may continue to rely on Open Records Letter Nos. 2014-13119 and 2014-15956 as previous determinations and withhold or release the identical information in accordance with those rulings. The governor’s office may withhold

the information it has marked under sections 552.104 and 552.107(1) of the Government Code. The governor's office 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](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,



David L. Wheelus  
Assistant Attorney General  
Open Records Division

DLW/bhf

Ref: ID# 547571

Enc. Submitted documents

c: Requestor  
(w/o enclosures)