



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 14, 2015

Ms. Lisa Hargrove
General Counsel
Houston First Corporation
1001 Avenida de Las Americas
Houston, Texas 77010

OR2015-21598

Dear Ms. Hargrove:

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# 583129.

Houston First Corporation (the "corporation") received a request for nine categories of information, including e-mails sent or received by named individuals during a specified period of time, documents detailing funding and incentives provided by the corporation to third parties during a specified period of time, documents detailing specified contracts, and specified conflict of interest and financial disclosure statements. You claim some of the submitted information is excepted from disclosure under sections 552.103, 552.104, 552.105, 552.107, and 552.131 of the Government Code.¹ You also state release of portions of the submitted information may implicate the proprietary interests of the Greater Houston Convention and Visitors Bureau (the "bureau") and Hilton Hotels ("Hilton"). Accordingly, you state you notified these parties of the request for information and of their rights 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 considered

¹Although you claim sections 552.102 and 552.111 of the Government Code, you make no arguments concerning these exceptions as required by section 552.301 of the Government Code. *See* Gov't Code §§ 552.301(e)(1)(A), .302. Accordingly, this ruling does not address these sections.

the exceptions you claim and reviewed the submitted information, portions of which contain representative samples.²

Initially, 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* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from the bureau or Hilton explaining why the submitted information should not be released. Therefore, we have no basis to conclude these third parties have 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 corporation may not withhold the submitted information on the basis of any proprietary interest the bureau or Hilton may have in the information.

The corporation claims portions of Exhibit E are excepted from disclosure under section 552.103 of the Government Code. Section 552.103 of the Government Code provides, in relevant part, as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or

²We assume that 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.

reasonably anticipated on the date the governmental body received the request for information and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

The corporation provides documentation showing, a lawsuit styled *Houston Municipal Employees Pension System v. City of Houston et al.*, was pending against the corporation in the 333rd Judicial District Court of Harris County, Texas, when it received the request for information. Therefore, we agree litigation was pending when the corporation received the request. We also find the submitted information is related to the pending litigation for purposes of section 552.103(a). Therefore, we agree section 552.103(a) is applicable to the submitted information.

However, once information has been obtained by all parties to the pending litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. See Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the pending litigation is not excepted from disclosure under section 552.103(a). We note the opposing party to the pending litigation has seen or had access to some of the information contained in Exhibit E. Therefore, the corporation may not withhold this information, which we have marked, under section 552.103(a). However, we agree the corporation may withhold the remaining information you have marked in Exhibit E under section 552.103(a). We note the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision No. 350 (1982).

The corporation claims Exhibit B is excepted from disclosure under section 552.104 of the Government Code. 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*, No. 12-1007, 2015 WL 3854264, at *9 (Tex. June 19, 2015). The corporation states it has specific marketplace interests in the information at issue because the corporation is competing with other hotels and convention center facilities for guests and for event hosting. Additionally, the corporation states release of Exhibit B would reveal the costs of hosting events and charges to specific customers, which would provide an advantage to competitors and potential tenants. After review of the information at issue and consideration of the arguments, we find the corporation has established the release of Exhibit B would give advantage to a competitor or bidder. Thus, we conclude the corporation may withhold Exhibit B under section 552.104(a).

Section 552.105 of the Government Code excepts from disclosure information relating to “appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.” Gov’t Code § 552.105(2). Section 552.105 is designed to protect a governmental body’s planning and negotiating position with respect to particular transactions. Open Records Decision Nos. 564 at 2 (1990), 357 (1982), 310 (1982). Information that is excepted from disclosure under section 552.105 that pertains to such negotiations may be excepted from disclosure so long as the transaction relating to that information is not complete. *See* ORD 310. But the protection offered by section 552.105 is not limited solely to transactions not yet finalized. This office has concluded that information about specific parcels of land obtained in advance of other parcels to be acquired for the same project may be withheld where release of the information would harm the governmental body’s negotiating position with respect to the remaining parcels. *See* ORD 564 at 2. A governmental body may withhold information “which, if released, would impair or tend to impair [its] ‘planning and negotiating position in regard to particular transactions.’” ORD 357 at 3 (quoting Open Records Decision No. 222 (1979)). The question of whether specific information, if publicly released, would impair a governmental body’s planning and negotiating position with regard to particular transactions is a question of fact. Accordingly, this office will accept a governmental body’s good-faith determination in this regard, unless the contrary is clearly shown as a matter of law. *See* ORD 564.

The corporation states the submitted information relates to ongoing negotiations for the purchase of real and personal property it intends to purchase. The corporation explains release of this information would harm its negotiating position with respect to the acquisition of these properties. Based on these representations and our review, we conclude the corporation may withhold Exhibit F under section 552.105 of the Government Code.

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 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 corporation states the information in Exhibit G consists of a communication involving corporation attorneys and the corporations’ chairman of the board of directors. The corporation states the communication was made for the purpose of facilitating the rendition of professional legal services to the client and this communication has remained confidential. Upon review, we find the corporation has demonstrated the applicability of the attorney-client privilege to the information it has marked. Thus, the corporation may withhold the information it has marked under section 552.107(1) of the Government Code.

Section 552.131 of the Government Code relates to economic development information and provides, in part:

(b) 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. *Id.* § 552.131(b). You state the information you have marked under section 552.131 relates to ongoing negotiations between the corporation and the Harris County Sports & Convention Corporation for financial and other incentives regarding a proposed business transaction. However, upon review, we find you have not demonstrated any of the information at issue consists of information about a financial or other incentive being offered to a business prospect. Consequently, none of the information you have marked may be withheld under section 552.131(b) of the Government Code.

In summary, with the exception of the information we have marked for release, we agree the corporation may withhold the information you have marked in Exhibit E under section 552.103(a). The corporation may withhold Exhibit B under section 552.104(a) of the Government Code. The corporation may withhold Exhibit F under section 552.105 of the

Government Code. The corporation may withhold the information it has marked under section 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,

A handwritten signature in black ink that reads "Katelyn Blackburn-Rader". The signature is written in a cursive, flowing style.

Katelyn Blackburn-Rader
Assistant Attorney General
Open Records Division

KB-R/akg

Ref: ID# 583129

Enc. Submitted documents

c: Requestor
(w/o enclosures)