



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 1, 2015

Mr. Jeffrey W. Giles
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2015-25035

Dear Mr. Giles:

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# 590544 (GC No. 22694).

The City of Houston (the "city") received a request for (1) all documents related to a specified project; (2) all communications regarding the specified project and/or the resignation of a named individual sent from anyone in the mayor's office containing any of eight specified terms during a specified time frame; and (3) all communications between two named individuals during a specified time frame.¹ You claim the requested information is excepted from disclosure under sections 552.104, 552.107, and 552.111 of the Government Code, and privileged under Texas Rule of Evidence 503.² We have considered your

¹We note the city received clarification of this request from the requestor. *See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (if governmental entity, acting in good faith, requests clarification of unclear or over-broad request, ten-day period to request attorney general ruling is measured from date request is clarified).

²Although you also raise section 552.108 of the Government Code, you make no arguments to support this exception. Therefore, we assume you have withdrawn your claim this section applies to the requested information. *See* Gov't Code §§ 552.301, .302.

arguments and reviewed the submitted representative sample of information.³ We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit written comments stating why information should or should not be released).

Initially, we note the submitted information includes portions of a notice of request for proposal, which was provided to all vendors that wished to submit bid proposals for the contract at issue. Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law. *See id.* § 552.007; Open Records Decision Nos. 518 at 3 (1989), 400 at 2 (1983). Although you seek to withhold this information under sections 552.104, 552.107, and 552.111, these exceptions are discretionary in nature and serve only to protect a governmental body's interests. Thus, they do not prohibit the release of information or make information confidential. *See* Open Records Decision Nos. 676 at 12 (2002) (attorney-client privilege under section 552.107 subject to waiver), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 592 at 8 (1991) (statutory predecessor to section 552.104 subject to waiver), 470 at 7 (1987) (governmental body may waive statutory predecessor to section 552.111 deliberative process). As you raise no further exceptions to disclosure, the previously released information, which we have marked, must be released.

Next, you note, and we agree, some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108; [and]

...

³We 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.

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1), (3). Portions of the submitted information are part of a completed investigation that is subject to section 552.022(a)(1). The submitted information also includes information relating to the receipt or expenditure of funds subject to section 552.022(a)(3). The city must release the information subject to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or is made confidential under the Act or other law, and must release the information subject to section 552.022(a)(3) unless it is made confidential under the Act or other law. *See id.* Although you raise section 552.111 of the Government Code for the information subject to section 552.022, section 552.111 is discretionary in nature and does not make information confidential under the Act. *See* ORDs 665 at 2 n.5, 663 at 5, 470 at 7. Therefore, the city may not withhold any of the information subject to section 552.022 under section 552.111. However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" that make information expressly confidential for purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Thus, we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503 for the information subject to section 552.022. Additionally, you raise section 552.104 of the Government Code for the information subject to section 552.022. Information subject to section 552.022 may be withheld under section 552.104. *See* Gov't Code § 552.104(b) (information protected by section 552.104 not subject to required public disclosure under section 552.022(a)). Thus, we will consider the applicability of section 552.104 to the information subject to section 552.022. We will also consider your arguments against disclosure of the information not subject to section 552.022.

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 (Tex. 2015). You represent the information pertains to a competitive bidding situation. In addition, you state the contract at issue has not been awarded and, if the submitted information is released, then negotiations between the city and the selected bidder would be negatively impacted. You further state that, if the contract is not awarded to the selected bidder, then release of the submitted information could negatively impact the prices future bidders offer. After review of the information at issue and consideration of the arguments, we find you have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the

city may withhold the submitted information under section 552.104(a) of the Government Code.⁴

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,



Brian E. Berger
Assistant Attorney General
Open Records Division

BB/akg

Ref: ID# 590544

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴As our ruling is dispositive, we do not address your other arguments to withhold this information.