



KEN PAXTON  
ATTORNEY GENERAL OF TEXAS

January 5, 2017

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

OR2017-00377

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# 640705.

The Houston First Corporation (the "corporation") received a request for information and e-mails on a specified subject or containing specified terms. You claim the submitted information is excepted from disclosure under sections 552.104 and 552.107 of the Government Code.<sup>1</sup> You also state release of the submitted information may implicate the proprietary interests of the Greater Houston Convention and Visitors Bureau (the "bureau") and East Wind Code, Ltd. ("East Wind Code"). Accordingly, you state, and provide documentation showing, you notified the bureau and East Wind Code of the request for information and of their right to submit arguments to this office as to why the submitted information 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 a representative of the bureau. We have considered the arguments and reviewed the submitted information.

Initially, we note some of the requested information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2016-27878

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<sup>1</sup>Although you raise section 552.110 of the Government Code, we note that exception is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address the corporation's assertion of section 552.110, but we will consider a third party's assertion of that exception.

(2016). In that ruling we determined, (1) to the extent any additional information responsive to the request existed, we assume the corporation has released it and if the corporation has not released any such information, it must do so at this time; and (2) the corporation may withhold the submitted information under section 552.104 of the Government Code. We have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, to the extent the submitted information is identical to the information previously requested and ruled upon by this office, we conclude the corporation may rely on Open Records Letter No. 2016-27878 as a previous determination and withhold and release the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the submitted information is not subject to Open Records Letter No. 2016-27878, we will consider the arguments against disclosure.

Next, we note some of the submitted information, which we have marked, is not responsive to the instant request because it was created after the date the request was received. This ruling does not address the public availability of any information that is not responsive to the request and the corporation is not required to release such information in response to this request.

We note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this ruling, we have not received comments from East Wind Code. Thus, we have no basis to conclude East Wind Code has a protected proprietary interest in the submitted information. *See id.* § 552.110(a)-(b); 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, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the corporation may not withhold any of the submitted information on the basis of any proprietary interest East Wind Code may have in the information.

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. *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 "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 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. *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 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 assert the information in Exhibit C consists of communications between corporation attorneys, corporation employees, and outside counsel. The corporation states the communications were made for the purpose of facilitating the rendition of professional legal services to the corporation and these communications have remained confidential. Upon review, we find the corporation has demonstrated the applicability of the attorney-client privilege to some of the information at issue. Thus, the corporation may generally withhold the information in Exhibit C under section 552.107. We note, however, some of the e-mail strings include e-mails received from and sent to a private entity. During the time these communications were made, the corporation and private entity were engaged in contract negotiations; thus, their interests were adverse, and these communications, when standing alone, are not privileged for purposes of section 552.107. Furthermore, if the non-privileged e-mails are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, if these non-privileged e-mails, which we marked, are maintained by the corporation separate and apart from the otherwise privileged e-mail strings in which they appear, then the corporation may not withhold these non-privileged e-mails under section 552.107(1) 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). A private third party may invoke this exception. *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 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 841. The bureau states it has competitors. In addition, the bureau states release of the information at issue would harm ongoing negotiations, as the “[corporation and bureau’s] competitors could obtain details of the negotiations and use them to undermine [the negotiations].” The bureau states releasing Exhibit D would “harm and disadvantage [the corporation and bureau] by allowing other states to see what the [bureau] is offering business to promote and create events for Houston.” After review of the information at issue and consideration of the arguments, we find the bureau has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the corporation may withhold the information at issue in Exhibit D under section 552.104(a) of the Government Code on behalf of the bureau.<sup>2</sup>

In summary, the corporation may rely on Open Records Letter No. 2016-27878 as a previous determination and withhold and release the identical information in accordance with that ruling. The corporation may generally withhold the information in Exhibit C under section 552.107(1) of the Government Code; however, the corporation may not withhold the marked non-privileged e-mails if they are maintained separate and apart from the otherwise privileged e-mail strings in which they appear. The corporation may withhold Exhibit D under section 552.104(a) of the Government Code on behalf of the bureau.

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,



Erin Groff  
Assistant Attorney General  
Open Records Division

EMG/som

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<sup>2</sup>As our ruling is dispositive, we do not address the remaining arguments against disclosure of this information.

Ref: ID# 640705

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

2 Third Parties  
(w/o enclosures)