



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

April 27, 2017

Ms. Akilah Mance  
Counsel for the City of Waller  
Olson & Olson, L.L.P.  
2727 Allen Parkway, Suite 600  
Houston, Texas 77019-2133

OR2017-09019

Dear Ms. Mance:

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# 654774.

The City of Waller (the "city"), which you represent, received a request for specified bids. You claim the requested information is exempted from disclosure under sections 552.103 and 552.104 of the Government Code. You also state release of this information may implicate the proprietary interests of a third party. Accordingly, you state, and provide documentation showing, you notified Garrett Construction of the request for information and of its 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 considered the submitted arguments and reviewed the submitted representative sample of information.<sup>1</sup> We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

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

Initially, we address the requestor's assertion that the city did not meet its procedural obligations under section 552.301 of the Government Code. Section 552.301 prescribes the procedures a governmental body must follow in asking this office to determine whether information is excepted from public disclosure under the Act. *See id.* § 552.301(a). Pursuant to section 552.301(b), within ten business days of receipt of the request, the governmental body must ask for a decision from this office and state which exceptions apply to the requested information. *Id.* § 552.301(b). The requestor asserts the city did not comply with the requirement that a governmental body must request a decision from this office within ten business days from receipt of a request. We note the city received the present request for information on January 27, 2017. We note the city sought clarification of this request on January 30, 2017. *See id.* § 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). The requestor asserts the city received the requestor's verbal clarification on January 30, 2017. However, the city states it did not receive any verbal clarification. The city also states, and provides documentation showing, the city received the requestor's written clarification on February 7, 2017. The determination of the date the city received the request for information is a question of fact. This office cannot resolve factual disputes in the opinion process. *See Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986)*. Where a fact issue is not resolvable as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our decision, or upon those facts that are discernible from the documents submitted for our inspection. *See ORD 552 at 4*. Thus, based on the city's representations and the submitted information, we conclude the city received clarification on February 7, 2017. Accordingly, city's ten-business-day deadline was February 21, 2017. The city submitted its request for a ruling on February 21, 2017. Therefore, we conclude the city complied with the requirements of section 552.301(b) of the Government Code. Accordingly, we will address the city's arguments against disclosure.

Next, we note the submitted information contains documents that are subject to section 552.022(a) of the Government Code, which provides, in part, the following:

Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

(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)(3). We note the submitted information contains contracts, vouchers, and other information relating to the expenditure of funds by the city subject to section 552.022(a)(3) of the Government Code. *Id.* Although you assert this information is excepted from release under section 552.103 of the Government Code, section 552.103 is discretionary in nature and does not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the city may not withhold the information subject to section 552.022, which we marked, under section 552.103. However, you claim some of this information is subject to section 552.104 of the Government Code. We note information encompassed by section 552.022(a)(3) 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)). Therefore, we will consider your argument under section 552.104 of the Government Code for the information you have marked, including some of the information subject to section 552.022. Further, we will consider the applicability of section 552.103 for the information not subject to section 552.022(a)(3) of the Government Code. However, as you raise no further exceptions to disclosure, the remaining information subject to section 552.022(a)(3) must be released.

Section 552.103 of the Government Code provides 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). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a

particular situation. The test for meeting this burden is a showing that (1) litigation was pending or 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

The city states, and provides documentation showing, a lawsuit styled *Al Whitelaw v. Michael Williams, Individually and as Chief of Police For the City of Waller*, Case No. 2017-CV-B-0205, was pending in the United States District Court for the Southern District of Texas, Houston Division, when the city received the instant request for information. Therefore, we agree litigation to which the city is a party was pending when the city received the request. However, upon review, we find the city has not demonstrated the remaining information, which is not subject to section 552.022(a)(3), pertains to the pending litigation. Thus, we conclude the city has failed to demonstrate the information at issue is related to litigation to which the city was a party when it received the request for information. Therefore, the city may not withhold the information that is not subject to section 552.022(a)(3) under section 552.103(a) of the Government Code.

Section 552.104(a) of the Government Code for the submitted information, which 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). You represent the information you have marked pertains to a competitive bidding situation. You state the city solicits bids for the same or similar services and goods on a recurring basis. Moreover, you inform us release of the information at issue would harm the city’s ability to obtain the lowest bid possible in the current or future related bidding process. Upon review of your arguments, we find the city may withhold the information you have marked under section 552.104(a) of the Government Code.

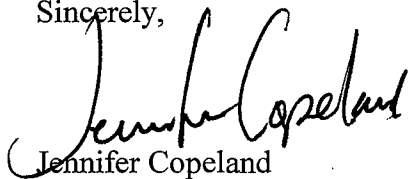
In summary, the city may withhold the information it marked under section 552.104(a) of the Government Code. The remaining information must be released.

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 Copeland  
Assistant Attorney General  
Open Records Division

JC/sb

Ref: ID# 654774

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

1 Third Party  
(w/o enclosures)