



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 1, 2017

Ms. Tiffany N. Evans
Assistant City Attorney
Legal Department
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2017-24926

Dear Ms. Evans:

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# 682521 (ORR# 24564).

The City of Houston (the "city") received a request for all e-mails involving two named individuals during a specified time period. The city states it will make some of the requested information available. The city claims some of the submitted information is excepted from disclosure under section 552.103 of the Government Code. Additionally, the city states release of the submitted information may implicate the proprietary interests of WCA-Waste Management ("WCA"). Accordingly, the city states, and provides documentation showing, it notified WCA of the request for information and of the 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 reviewed the submitted information and the submitted argument.

Initially, we note some of the submitted information may have been responsive to prior requests for information, in response to which this office issued Open Records Letter No. 2017-06605 (2017). Following that ruling, the requestor filed a Petition for Writ of Mandamus against the city. *See EcoHub, L.L.C., v. City of Houston*, Cause No. 2017-50825, (11th Dist. Ct., Harris County, Tex.). Accordingly, with regard to any submitted information

that was at issue in Open Records Letter No. 2017-06605 and that is subject to the pending lawsuit, we will allow the trial court to decide whether that information must be released to the public.¹ However, we will address the city's argument against disclosure for any information that was not at issue in Open Records Letter No. 2017-06605 and that is not the subject of the pending litigation.

Next, we note some of the remaining 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:

...

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate[.]

Gov't Code § 552.022(a)(5). The submitted information includes working papers used to estimate the need for or expenditure of public funds or taxes that are subject to section 552.022(a)(5). This information must be released unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(5). The city seeks to withhold the information subject to section 552.022(a)(5) under section 552.103 of the Government Code. However, 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 have marked, under section 552.103 of the Government Code.

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.

...

¹As we are able to make this determination, we need not address the submitted argument against disclosure of this information.

(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 the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (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).

As noted above, the city states, and provides documentation showing, a lawsuit was pending in the 11th Judicial District Court of Harris County, Texas, when the city received the instant request for information. *See EcoHub, L.L.C.* The city contends the remaining information submitted as Exhibit 2 is related to the pending lawsuit because the subject matter of the submitted information is related to the subject matter of the previous requests for information. As noted above, the pending litigation is a mandamus action pertaining to the previous requests for public information. Although the city generally asserts the remaining information will be used by the opposing party to litigation, we find the city has not demonstrated, nor do the submitted documents reveal, any of the remaining information is related to the pending litigation for purposes of section 552.103 of the Government Code. *See* Gov't Code § 552.301(e)(1) (requiring governmental body to explain applicability of raised exception); *see also* Open Records Decision Nos. 551 at 5 (attorney general will determine whether governmental body has reasonably established information at issue is related to litigation), 511 at 2 (1988) (information “relates” to litigation under statutory predecessor if its release would impair governmental body's litigation interests). Therefore, the city may not withhold any of the remaining information in Exhibit 2 under section 552.103(a) of the Government Code.

Next, 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 WCA explaining why the information submitted as Exhibit 3 should not be released. Therefore, we have no basis to conclude WCA has a protected proprietary interest in the information at issue. *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, 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 city may not withhold Exhibit 3 on the basis of any proprietary interest WCA may have in the information.

In summary, with regard to any submitted information that was at issue in Open Records Letter No. 2017-06605 and is at issue in the pending lawsuit, we will allow the trial court to decide whether that information must be released to the public. The city must release any 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, 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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/som

Ref: ID# 682521

Enc. Submitted documents

c: Requestor
(w/o enclosures)