



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

OR2017-24927

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# 682519 (GC No. 24562).

The City of Houston (the "city") received a request for all emails sent or received by a named individual during a specified time period. You state you are releasing some of the information. You claim the submitted information is excepted from disclosure under sections 552.103, 552.104, and 552.107 of the Government Code. Additionally, you inform us release of some of this information may implicate the proprietary interests of Formento de Construcciones y Contratas, Inc.; Independent Texas Recyclers; Friedman Recycling Companies; and Waste Management of Texas, Inc. Accordingly, you notified these parties of the request for information and of their right 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 the exceptions you claim and reviewed the submitted representative sample of information.¹

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.² 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.

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). The city states Exhibits 2 and 5 relate to an ongoing competition or bidding for services. You explain "release of the responsive information would present a clear threat of harm to the [c]ity's ability to obtain the lowest price possible in the current or any future related bidding process." After review of Exhibits 2 and 5 and consideration of the arguments, we find the city has established release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the city may withhold Exhibits 2 and 5 under section 552.104(a).³

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.

...

¹We 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 those records contain substantially different types of information than that submitted to this office.

²As we are able to make this determination, we need not address the submitted argument against disclosure of this information.

³As our ruling is dispositive, we need not address your remaining arguments 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 3 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 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 Exhibit 3 under section 552.103(a) of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the current and former home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code.⁴ Gov't Code § 552.117(a)(1). Section 552.117(a)(1) also applies to the personal cellular telephone number of a current or former official or employee of a governmental body, provided the cellular telephone service

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).


is not paid by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, a governmental body must withhold information under section 552.117(a)(1) on behalf of a current or former employee only if the individual made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, to the extent the individual whose information is at issue timely requested confidentiality under section 552.024, the city must withhold the cellular telephone number we have marked under section 552.117(a)(1) of the Government Code if the cellular telephone service is not paid for by a governmental body. The city may not withhold the marked cellular telephone number under section 552.117(a)(1) if the individual did not make a timely election to keep the information confidential or if a governmental body pays for the cellular telephone service.

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. To the extent the submitted information is not at issue in the pending lawsuit, (1) the city may withhold Exhibits 2 and 5 under section 552.104(a) of the Government Code; (2) to the extent the individual whose information is at issue timely requested confidentiality under section 552.024, the city must withhold the cellular telephone number we have marked under section 552.117(a)(1) of the Government Code if the cellular telephone service is not paid for by a governmental body; and (3) 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,



Emily Buchanan
Attorney
Open Records Division

EB/som

Ref: ID# 682519

Enc. Submitted documents

c: Requestor
(w/o enclosures)

4 Third Parties
(w/o enclosures)