



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 20, 2017

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

OR2017-26592

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# 685423.

The Houston First Corporation (the "corporation") received a request for information pertaining to the current contract between the corporation and Andy Frain Services ("Andy Frain"), including evaluation documents. Although you take no position as to whether the submitted information is excepted under the Act, you state release of this information may implicate the proprietary interests of Andy Frain. Accordingly, you state, and provide documentation showing, you notified the third party 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 received comments from Andy Frain. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the corporation has only submitted the current contract, the request for proposals, and Andy Frain's proposal. To the extent any other responsive information existed on the date the corporation received the request, we assume you have released it. *See* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions

apply to requested information, it must release information as soon as possible). If you have not released any such information, you must do so at this time. See Gov't Code §§ 552.301(a), .302.

Andy Frain asserts its information is protected under section 552.104 of the Government Code. Section 552.104(a) excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” *Id.* § 552.104(a). In considering whether a private third party may assert this exception, the supreme court reasoned because section 552.305(a) of the Government Code includes section 552.104 as an example of an exception that involves a third party’s property interest, 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. Andy Frain states it has competitors. In addition, Andy Frain states release of the submitted contract and its proposal would give its competitors an advantage. For many years, this office concluded the terms of a contract and especially the pricing of a winning bidder are public and generally not excepted from disclosure. Gov’t Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision Nos. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency), 514 (1988) (public has interest in knowing prices charged by government contractors), 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). See generally Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). However, now, pursuant to *Boeing*, section 552.104 is not limited to only ongoing competitive situations, and a third party need only show release of its competitively sensitive information would give an advantage to a competitor even after a contract is executed. *Boeing*, 466 S.W.3d at 831 at 1, 8. After review of the information at issue and consideration of the arguments, we find Andy Frain 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 submitted contract and Andy Frain’s proposal under section 552.104(a) of the Government Code.¹ The corporation must release the 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.

¹As our ruling is dispositive, we need not address Andy Frain’s remaining arguments against disclosure of this information.

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# 685423

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)