



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 7, 2017

Ms. Patricia A. Rigney
City Attorney
City of Pharr
P.O. Box 1729
Pharr, Texas 75877

OR2017-27832

Dear Ms. Rigney:

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# 686643 (Internal Ref. Nos. R000156-091817 & R000193-100517).

The City of Pharr (the "city") received two requests from two different requestors for all communications, contracts, and agreements between the city, the city's Economic Development Corporation, and Topgolf during a defined time period. You claim the submitted information is excepted from disclosure under sections 552.104, 552.105, 552.107, 552.110, 552.111, and 552.131 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the city contends some of the submitted information is excepted under section 552.110 of the Government Code. However, that exception is designed to protect the interests of third parties, not the interests of a governmental body. *See* Gov't Code § 552.110 (excepting from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision" and "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained"). Thus, we do not address the city's argument under section 552.110.

Next, we must address the city's obligations under section 552.301 of the Government Code, which prescribes the procedural obligations that a governmental body must follow in asking

this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires that a governmental body ask for a decision from this office and state which exceptions apply to the requested information by the tenth business day after receiving the request. *Id.* § 552.301(b). The city received the first request for information on September 18, 2017. This office does not count the date the request was received or holidays for the purpose of calculating a governmental body's deadlines under the Act. You do not state the city was closed for any of the days at issue. Thus, the city's ten-business-day deadline was October 2, 2017. The city did not raise section 552.111 until October 5, 2017, which is after the ten-business-day deadline had passed. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Consequently, we find the city failed to meet the ten-business-day requirement as prescribed by section 552.301(b) of the Government Code in raising section 552.111.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ). As the city failed to comply with section 552.301(b) in raising section 552.111, the city has waived its argument under this section, and may not withhold the information at issue on that basis. Further, we note in waiving its argument under section 552.111 for the first request for information, the city has also waive its argument under this section for the second request for information. However, we will address your timely-raised arguments against disclosure for the submitted information.

We also note some of the submitted information is 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 some of the submitted information consists of a contract subject to section 552.022(a)(3) of the Government Code. *Id.* Although you assert

this information is excepted from release under sections 552.105, 552.107, and 552.131(b) of the Government Code, these exceptions are discretionary in nature and do not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 6 (2002) (attorney-client privilege under section 552.107(1) may be waived), 564 (1990) (statutory predecessor to section 552.105 subject to waiver); *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(a)(3) under sections 552.105, 552.107, and 552.131(b). However, you claim this information is subject to section 552.104 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)). Further, section 552.131(a) of the Government Code makes information confidential under the Act. Therefore, we will consider your argument under section 552.104 and section 552.131(b) for the information subject to section 552.022(a)(3). Additionally, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will consider your assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence for the information that is subject to section 552.022(a)(3). Additionally, we will consider your arguments under sections 552.104, 552.105, 552.107, and 552.131 for the information not subject to section 552.022(a)(3).

Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. 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 state the city competes with other entities to attract and encourage long-term business growth and long-term residency. You assert the city has specific marketplace interests in the submitted information. Further, you inform us the city will be negotiating similar contracts in the near future and release of the submitted information would place the city at a competitive disadvantage in procuring such contracts. 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 governmental body 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, 839. After review of the submitted information and consideration of the arguments, we find the city has established the release of the submitted information would give advantage to a competitor or bidder. Thus, we conclude the city may withhold the submitted information under section 552.104(a) of the Government Code.¹

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,



Cole Hutchison
Assistant Attorney General
Open Records Division

CH/sb

Ref: ID# 686643

c: 2 Requestors

¹As our ruling is dispositive, we need not address your remaining arguments against disclosure of the submitted information.