



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 4, 2020

Mr. Jeffrey W. Giles
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2020-27730

Dear Mr. Giles:

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# 852370 (GC No. 26898).

The City of Houston (the "city") received a request for certain records pertaining to a named company. You claim the submitted information is excepted from disclosure under section 552.128 of the Government Code.¹ Additionally, you state release of the submitted information may implicate the proprietary interests of Dickens Delivery Service, Inc. ("Dickens"). Accordingly, you state, and provide documentation showing, the city notified Dickens 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 exception you claim and reviewed the submitted information.

Initially, we note 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,

¹ We note, and the city acknowledges, it did not comply with section 552.301 of the Government Code in requesting a ruling from this office. *See* Gov't Code § 552.301(b). However, because section 552.128 of the Government Code and third-party interests can provide compelling reasons to overcome the presumption of openness caused by a failure to comply with section 552.301, we will consider the applicability of these arguments. *See id.* §§ 552.007, .302, .352.

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 Dickens explaining why the submitted information should not be released. Therefore, we have no basis to conclude Dickens has a protected proprietary interest in the submitted information. *See, e.g., id.* § 552.110 (requiring the provision of specific factual evidence demonstrating the applicability of the exception). Accordingly, the city may not withhold the submitted information on the basis of any proprietary interest Dickens may have in the information.

Section 552.128 of the Government Code provides the following:

(a) Information submitted by a potential vendor or contractor to a governmental body in connection with an application for certification as a historically underutilized or disadvantaged business under a local, state, or federal certification program is excepted from the requirements of Section 552.021, except as provided by this section.

(b) Notwithstanding Section 552.007 and except as provided by Subsection (c) the information may be disclosed only:

(1) to a state or local governmental entity in this state, and the state or local governmental entity may use the information only:

(A) for purposes related to verifying an applicant's status as a historically underutilized or disadvantaged business; or

(B) for the purpose of conducting a study of a public purchasing program established under state law for historically underutilized or disadvantaged businesses; or

(2) with the express written permission of the applicant or the applicant's agent.

(c) Information submitted by a vendor or contractor or potential vendor or contractor to a governmental body in connection with a specific proposed contractual relationship, a specific contract, or an application to be placed on a bidders list, including information that may also have been submitted in connection with an application for certification as a historically underutilized or disadvantaged business, is subject to required disclosure, excepted from required disclosure, or confidential in accordance with other law.

Id. § 552.128. You assert the submitted information was submitted to the city in connection with an application for certification as a Minority Business Enterprise ("MBE") under the city's MBE program. You state, and we agree, that the requestor is not a governmental entity. You further state the city does not have express written permission from Dickens to release the information. We also find Dickens' information was not submitted to the city

in connection with a specific bid or bidder's list or in connection with a specified proposed contractual relationship. Based upon these representations and our review, we find, with the exception of the information we marked for release, the city must withhold the submitted information under section 552.128 of the Government Code. We note, however, that section 552.128 applies only to "[i]nformation *submitted by* a potential vendor or contractor[.]" *Id.* § 552.128(a) (emphasis added). The information we marked for release consists of documents that were not submitted to the city by Dickens. Accordingly, the information we marked for release was not submitted by Dickens for certification as a MBE and may not be withheld under section 552.128 of the Government Code. As no further exceptions to disclosure have been raised, the city 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.

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Kimbell Kesling
Assistant Attorney General
Open Records Division

KK/gw

Ref: ID# 852370

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)