



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 8, 2012

Mr. Warren M.S. Ernst
Chief of the General Counsel Division
City of Dallas
1500 Marilla Street, Room 7DN
Dallas, Texas 75201

OR2012-12458

Dear Mr. Ernst:

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# 461361.

The City of Dallas (the "city") received a request for seven categories of information. You state the requestor will be provided with the opportunity to inspect some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.103, 552.104, 552.107, and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Section 552.103 of the Government Code provides, in part, 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

¹Although you also assert the attorney-client privilege under Texas Rule of Evidence 503 and the attorney work-product privilege under Texas Rule of Civil Procedure 192.5, we note none of the information for which you claim these privileges is subject to section 552.022 of the Government Code. Thus, sections 552.107 and 552.111 of the Government Code are the proper exceptions to raise, respectively, for your attorney-client and work-product privilege claims in this instance. *See generally* Open Records Decision No. 676 (2002).

²We 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.

employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(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 that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

You state, prior to the date the city received the present request for information, a lawsuit styled *Christopher Bryan Fears v. Sheffield Kadane, et al.*, Cause No. 12-04834, was pending in the District Court of Dallas County. You state Exhibit C relates to this lawsuit. Based on your representation and our review of the information at issue, we find Exhibit C relates to litigation involving the city that was pending prior to the date the city received the request for information. *See Gov't Code 552.103(c)* (litigation must be pending or reasonably anticipated at time governmental body receives request for information). Thus, the city may withhold Exhibit C under section 552.103 of the Government Code.³

We note, however, once the information at issue has been obtained by all parties to the pending litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See Open Records Decision Nos. 349 (1982), 320 (1982).* Thus, any information obtained from or provided to all other parties in the pending litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer reasonably anticipated. *See Attorney General Opinion MW-575 (1982); see also Open Records Decision No. 350 (1982).*

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(a). The

³As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Moreover, section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). This office has long held that section 552.104 does not except information relating to competitive bidding situations once a contract is in effect. *See, e.g.*, Open Records Decision Nos. 541, 514 (1988), 306 (1982), 184 (1978), 75 (1975).

You state Exhibit D relates to bid proposals that are still being evaluated by the city. You explain the contract arising from that process has not yet been awarded or executed. You argue until the agreement is finally executed, negotiations with the selected bidder may fail, and thus release of the information at this time could compromise the city's negotiating position if a new bidding process must be conducted. Based on your representations and our review, we conclude you have demonstrated the applicability of section 552.104 to Exhibit D. Accordingly, the city may withhold Exhibit D under section 552.104 of the Government Code until such time as a contract has been executed. *See* Open Records Decision No. 170 at 2 (1977) (release of bids while negotiation of proposed contract is in progress would necessarily result in an advantage to certain bidders at expense of others and could be detrimental to public interest in contract under negotiation).

In summary, the city may withhold Exhibit C under section 552.103 of the Government Code and Exhibit D under section 552.104 of the Government Code until such time as a contract has been executed.

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.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Nneka Kanu
Assistant Attorney General
Open Records Division

NK/bhf

Ref: ID# 461361

Enc. Submitted documents

c: Requestor
(w/o enclosures)