



CITY OF HOUSTON

Legal Department

Sylvester Turner

Mayor

January 13, 2017

The Honorable Ken Paxton
Texas Attorney General
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Attention: Open Records Division

Re: Public Information Act request received December 20, 2016, from Wayne Dolcefino, for document detailing the investors of White Oak Music Hall and detailing the investors of White Oak Music Hall and detailed cell phone records of the Mayor since January 1, 2016. **GC No. 24006; and**

Public Information Act request received December 20, 2016, from Wayne Dolcefino, for all e-mail and cell phone records information. **GC No. 24002;**

Dear Attorney General Paxton:

This is a follow-up to my letters dated January 3, 2017 (**Exhibits 1B and 1C**). The City of Houston (the "City") received the above-referenced requests on December 20, 2016, (**Exhibits 1 and 1A**). The City notes that Friday, December 23, 2016, Monday, December 26, 2016, and Monday, January 2, 2017, were observed as City holidays. **By copy of this letter**, the City is informing the requestor that the City believes the responsive information is excepted from public disclosure under sections 552.103, 552.107, 552.108, and 552.111 of the Texas Government Code. The City has enclosed a representative sample (**Exhibits 2, 3, and 4**) for your consideration. The City has no other responsive information related to this request.

Section 552.103 of the Government Code

Section 552.103 (the "Litigation Exception") provides, in pertinent part, that:

(a) Information is excepted from the requirements of Section 552.021 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 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 requester applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The City seeks to protect **Exhibits 2, 3, and 4** from public disclosure under section 552.103(a). In order to satisfy the burden of proving section 552.103 is applicable to the present case, the City has provided you with the relevant facts set out below and the attached exhibits. The test for meeting this burden has two prongs. The City must prove that (1) litigation is either pending or is reasonably anticipated, and (2) the information requested is related to that litigation. See *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); Tex. Att'y Gen. OR99-1840 (1999) at 1. In other words, the City must provide concrete evidence proving its claim that litigation may ensue is more than mere conjecture. See Tex. Att'y Gen. ORD-452 at 4 (1986).

The responsive materials (**Exhibits 2, 3, and 4**) consist of documents and communications pertaining to a pending lawsuit styled: *Theresa Cavin, et al.* The complaint was filed on December 14, 2016 in District clerk, Harris County, Texas. See **Exhibit 5**, which is not a part of the responsive information. The requests were subsequently received on December 20, 2016 See **Exhibit 1**, which is not a part of the responsive information. The first of the two prongs is fulfilled, as there is pending litigation in this instance.

On December 14, 2016, a lawsuit was filed against several entities, including WOIH Partners, LLC ("WOIH"). See **Exhibit 5**, which does not contain responsive information. The City has entered an economic development agreement with WOIH and issued a conditional permit to WOIH related to the facility at issue. See **Exhibit 6** and **Exhibit 7** which do not contain responsive information. In their petition, plaintiffs referenced WOIH's relationship with the City and requested relief which would prevent WOIH from performing conditions included in their permit from the City. See **Exhibit 1** which does not contain responsive information.

Before the lawsuit was filed, citizens spoke frequently about their concerns with WOIH's project and called upon the City to take action. See **Exhibit 6** which does not contain responsive information. City Hall has since become a forum for citizens alleging misdeeds by WOIH and the City. See **Exhibit 7** which does not contain responsive information.

Additionally, the responsive information (**Exhibits 2, 3, and 4**) fulfills the second prong of section 552.103 because it directly relates to the subject matter of the pending lawsuit. See **Exhibit 5**, which is not responsive information. **Exhibits 2, 3, and 4** contain information related to the development and operation of White Oak Music Hall, which is at issue in the active lawsuit. For these reasons, the City seeks to withhold **Exhibits 2, 3, and 4** under section 552.103 of the Government Code in order to protect its position in the pending litigation.

Section 552.107 of the Government Code

The City believes that **Exhibit 4** may be withheld under section 552.107(1) of the Government Code, which protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. Tex. R. Evid. 503(b)(1). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. Tex. R. Evid. 503(b)(1). Lastly, the attorney-client privilege applies only to a

confidential communication, meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” Tex. R. Evid. 503(a)(5).

Exhibit 4 contain correspondence sent to, from, and among City attorneys and City employees in their capacity as clients. The communications at issue were made in furtherance of the rendition of professional legal services to the City. The communications in **Exhibit 4** were not intended for third parties, and the confidentiality of the communications has been maintained. *See Exhibit 4A*, which is not a responsive document, for a list of City personnel and their respective departments. Furthermore, the City has not waived its attorney-client privilege in this instance. For these reasons, **Exhibit 4** may be withheld from public disclosure under section 552.107 of the Government Code.

Section 552.111 of the Government Code

Section 552.111 excepts from public disclosure “an interagency or interagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. *See* Open Records Decision No. 615 at 2 (1993). Section 552.111 encompasses the deliberative process privilege. The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990). Additionally, section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD No. 615 at 5. Furthermore, Section 552.111 protects drafts of a document and any comments or other notations on the drafts because they necessarily represent advice, opinion, and recommendation of the drafter as to the form and content of the final document. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor).

The responsive information contains communications consisting of advice, opinions, and recommendations regarding matters of broad scope that affect governmental policy. Specifically, the information submitted for your review contains communications between City employees regarding the economic impact of the White Oak Music Hall and other economic development concerns with the area surrounding the music venue. Because the responsive information consists of advice, opinions, and recommendations regarding matters of broad scope, rather than routine administrative or personnel matters, the City believes the responsive information may be withheld from public disclosure pursuant to section 552.111 of the Government Code.

The City respectfully requests a ruling on this matter. Please do not hesitate to contact me at 832-393-6491 if you need additional information. Please include **GC Nos. 24002 and 24006** in any future correspondence concerning this request.

Sincerely,



Joseph R. Crawford
Assistant City Attorney

The Honorable Ken Paxton
January 13, 2017
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JRC/naj

Enclosure(s)

cc: Wayne Dolcefino
Sent via electronic mail to: research@dolcefino.com
(w/o Exhibits)

Darian Ward, MYR
(w/o Exhibits)

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