



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 29, 2016

Ms. Halfreda Anderson-Nelson
Public Information Officer
Dallas Area Rapid Transit
P.O. Box 660163
Dallas, Texas 75266-0163

OR2016-28634

Dear Ms. Anderson-Nelson:

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# 639725 (ORR Nos. W001141-100716, W001142-100716, and W001143-100716).

Dallas Area Rapid Transit ("DART") received three requests from the same requestor for (1) all documents and communications to and from the Federal Transit Administration and DART's current financial advisors regarding certain topics during a specified time period, (2) all documents and communications to and from the Federal Transit Administration and any DART member cities and staff regarding certain topics during a specified time period, and (3) all documents and communications from a named individual, including any open records requests during a specified time period, and all documents and communications provided by DART to the named individual or *The Dallas Morning News* in response to certain open records requests made during a specified time period.¹ You state DART released some information. You claim the submitted information is excepted from

¹You inform us DART sent the requestor an estimate of charges pursuant to section 552.2615 of the Government Code. *See* Gov't Code § 552.2615. The estimate of charges required the requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. *See id.* § 552.263(a). You inform us DART received the required deposit on November 1, 2016. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date governmental body receives bond or deposit).

disclosure under sections 552.107 and 552.111 of the Government Code.² You also state release of this information may implicate the proprietary interests of Citigroup Global Markets, Inc. (“Citigroup”) and Morgan Stanley. Accordingly, you have notified these third parties of the request and of their right to submit arguments to this office as to why their information should not be released. *See* Gov’t Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have received comments from Citigroup. We have considered the submitted arguments and reviewed the submitted representative sample of information.³

Initially, you inform us some of the requested information was the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2016-23857 (2016), 2016-23942 (2016), and 2016-24050 (2016). As we have no indication the law, facts, and circumstances on which the prior rulings were based have changed, DART may continue to rely on those rulings as previous determinations and withhold or release the submitted information in accordance with Open Records Letter Nos. 2016-23857, 2016-23942, and 2016-24050. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the requested information is not encompassed by the previous rulings, we will address your arguments against its release.

We next note some of the submitted attachments were previously released to another requestor in response to an earlier request for information under the Act. Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law. *See* Gov’t Code 552.007; Open Records Decision Nos. 518 at 3 (1989), 400 at 2 (1983). Section 552.107 is a discretionary exception to disclosure that protects a governmental body’s interests. *See* Open Records Decision No. 676 at 12 (2002) (attorney-client privilege under section 552.107 or Texas Rule of Evidence 503 constitutes compelling reason to withhold

²Although you also raise Texas Rule of Evidence 503, we note the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107 of the Government Code. *See* Open Records Decision No. 676 at 1-2 (2002).

³We 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 that those records contain substantially different types of information than that submitted to this office.

information under section 552.302 only if information's release would harm third party); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). As such, this exception neither prohibits public disclosure of information nor makes information confidential under law. Therefore, DART may not withhold any portion of the previously released information, which we have marked, under section 552.107 but, instead, must release it.

Next, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Morgan Stanley explaining why any of the submitted information should not be released. Therefore, we have no basis to conclude Morgan Stanley has protected proprietary interests in the information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Consequently, DART may not withhold any of the submitted information on the basis of any proprietary interests Morgan Stanley may have in the information.

Citigroup claims section 552.104 of the Government Code for some of its information. Section 552.104(a) excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). 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. Citigroup states it has competitors. In addition, Citigroup states release of the information at issue would give a competitive advantage to its competitors. After review of the information at issue and consideration of the arguments, we find Citigroup has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude DART may withhold the information we have marked under section 552.104(a) of the Government Code.⁴

Section 552.107(1) of the Government Code 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. ORD 676 at 6-7. First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "to facilitate the rendition of professional

⁴As our ruling is dispositive, we need not address Citigroup's remaining argument against disclosure of its information.

legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state the information you have indicated consists of communications between DART attorneys, DART employees and officials, bond counsel to DART, and financial advisors and underwriters for DART that were made for the purpose of providing legal services to DART. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find most of the information at issue consists of privileged attorney-client communications. Accordingly, with the exception of the information we have marked for release, DART may withhold the information you have indicated under section 552.107(1) of the Government Code. However, we find the remaining information consists of communications with a non-privileged party or has been seen by a non-privileged party. Thus, you have failed demonstrate the applicability of the attorney-client privilege to this information, which we have marked for release. Accordingly, DART may not withhold this information under section 552.107(1) of the Government Code.

You assert the information you have indicated is excepted from disclosure under section 552.111 of the Government Code, which excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]” Gov’t Code § 552.111. This exception encompasses the

deliberative process privilege. See Open Records Decision No. 615 at 2 (1993). 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, orig. proceeding); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, orig. proceeding). We determined 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. ORD 615 at 5; see also *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. See Open Records Decision No. 631 at 3 (1995). However, a governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. ORD 615 at 5-6; see also *Dallas Morning News*, 22 S.W.3d at 364 (section 552.111 not applicable to personnel-related communications that did not involve policymaking).

Further, section 552.111 does not generally except from disclosure facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 157; ORD 615 at 5. But, if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. See Open Records Decision No. 313 at 3 (1982).

Section 552.111 can also encompass communications between a governmental body and a third party, including a consultant or other party with a privity of interest. See Open Records Decision Nos. 631 at 2 (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body's consultants). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. See ORD 561 at 9.

This office has also concluded a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

You state the information you have indicated consists of communications between DART board members, employees, underwriters, bond counsels, financial advisors, and a consultant for DART. You state the communications pertain to policy issues regarding DART's financial plan for two specified projects and DART's debt service structure. You also state the information at issue contains draft documents that will be released to the public in final form. Upon review, we find DART may withhold the information you have indicated under section 552.111 of the Government Code.


We note that some of the remaining information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. *See* Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See id.*; *see also* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, DART may continue to rely on Open Records Letter Nos. 2016-23857, 2016-23942, and 2016-24050 as previous determinations and withhold or release the submitted information in accordance with those rulings. DART may withhold the information we have marked under section 552.104(a) of the Government Code. With the exception of the information we have marked for release, DART may withhold the information you have indicated under section 552.107(1) of the Government Code. DART may withhold the information you have indicated under section 552.111 of the Government Code. DART must release the remaining information, but any information protected by copyright may only be released in accordance with copyright law.

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,


Britni Ramirez
Assistant Attorney General
Open Records Division

BR/bhf

Ref: ID# 639725

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Parties
(w/o enclosures)