



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 27, 2017

Ms. Carah-Beth Bass
Counsel for Ector County
Allison, Bass & Magee, LLP
402 West 12th Street
Austin, Texas 78701

OR2017-14349

Dear Ms. Bass:

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# 663563.

Ector County (the "county"), which you represent, received a request for information regarding the winning bid and bid tabulations related to a specified solicitation. You claim the submitted information is excepted from disclosure under sections 552.104, 552.110, and 552.111 of the Government Code.¹ You also state release of the submitted information may implicate the proprietary interests of Bob Barker Company, Inc. ("BBC"). Accordingly, you state, and provide documentation showing, you notified the specified third party 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 received comments from BBC. We have considered the submitted arguments and reviewed the submitted information.

Section 552.104(a) 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). A

¹Although you also raise section 552.101 of the Government Code, you have not provided any arguments to support this exception. Therefore, we assume you have withdrawn your claim this section applies to the submitted information. *See* Gov't Code §§ 552.301, .302.

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. BBC states it has competitors. In addition, BBC states release of its information would provide a competitive advantage to its competitors and seeks to withhold the terms of the contract. 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 third party 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 831, 139. After review of the information at issue and consideration of the arguments, we find BBC has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the county may withhold the information we marked under section 552.104(a) of the Government Code.²

Section 552.111 of the Government Code 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, no writ); 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, no writ). 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. *See* ORD 615 at 5. 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. *Id.*; *see also City of Garland v. Dallas Morning*

²As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

News, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). 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).

You assert the remaining information is excepted from disclosure pursuant to section 552.111 of the Government Code. You inform us the information at issue consists of an intraagency memorandum created by county employees for the purpose of evaluating the submitted bids for a specified request for proposals. You represent this information consists of advice, opinions, and recommendations regarding policymaking functions of the county. Based on your representations and our review of the information at issue, we find you have demonstrated the information at issue consist of advice, opinions, or recommendations on the policymaking matters of the county. Thus, the county may withhold the remaining information under section 552.111 of the Government Code.³

In summary, the county may withhold the information we marked under section 552.104 of the Government Code. The county may withhold the remaining information under section 552.111 of the Government Code.

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,



Ian Lancaster
Assistant Attorney General
Open Records Division

IML/tdw

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

Ref: ID# 663563

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)