



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 12, 2017

Mr. Andrew Wipke
Assistant District Attorney
Lubbock County
PO Box 10536
Lubbock, Texas 79408-3536

OR2017-15489

Dear Mr. Wipke:

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# 665716 (ORR Nos. 298, 311, 319, 347, and 360).

Lubbock County (the "county") received five requests from different requestors for information related to request for proposals number 170304. The county claims some of the submitted information is excepted from disclosure under section 552.111 of the Government Code. Additionally, the county states release of some of the submitted information may implicate the proprietary interests of Correct Solutions Group ("CSG"); Custom TeleConnect, Inc. ("Custom"); Global Tel*Link, Corp. ("Global"); ICSolutions; Keefe Commissary Network, L.L.C. ("Keefe"); NCIC Inmate Communications ("NCICIC"); Securus Technologies ("Securus"); and Telmate. Accordingly, the county states, and provides documentation showing, it notified CSG, Custom, Global, ICSolutions, Keefe, NCICIC, Securus, and Telmate of the requests for information and of the 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 Telmate. We have also received and considered comments from a representative of one of the requestors. *See* Gov't Code § 552.304 (interested party may

submit comments stating why information should or should not be released). We have reviewed the submitted arguments and the submitted information.

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

(17) information that is also contained in a public court record[.]

Id. § 552.022(a)(17). The submitted information includes court-filed documents that are subject to section 552.022(a)(17). This information must be released unless it is made confidential under the Act or other law. *See id.* The county seeks to withhold the information subject to section 552.022(a)(17) under section 552.111 of the Government Code. However, section 552.111 is discretionary in nature and does not make information confidential under the Act. *See Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver).* Therefore, the county may not withhold the information subject to section 552.022(a)(17) under section 552.111 of the Government Code. As no other exceptions to disclosure have been raised, the court-filed documents must be released pursuant to section 552.022(a)(17) of the Government Code. However, we will consider the county's argument under this exception for the remaining information at issue.

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, writ ref’d n.r.e.); *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 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).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); see 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 No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). 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. We note a governmental body does not share a privity of interest with a third party when the governmental body and the third party are involved in contract negotiations, as the parties' interests are adverse.

The county argues its evaluation matrices and communications with third party bidders are protected by section 552.111 of the Government Code. The county states the information at issue consists of advice, opinion, and recommendations related to its policymaking matters. The county further states the matrices relate to communications between county employees reflecting the deliberative and policymaking processes in ranking responsive bid proposals. The county also contends the submitted communications between the county and the third-party vendors regarding the request for proposals consist of communications between parties who shared a privity of interest or common deliberative process.

Based on these representations and our review of the information at issue, we find the county has demonstrated its evaluation matrices consist of advice, opinions, or recommendations on the policymaking matters of the county. Thus, the county may withhold its evaluation matrices under section 552.111 of the Government Code. However, we find because the parties were involved in contract negotiations and had not executed a contract at the time the communications were made, the county's interests were adverse to the interests of the third parties with respect to the communications with third-party vendors. Thus, this information was shared with entities with which the county did not share a privity of interest or common

deliberative process at the time the communications were made. Thus, we find the county has not shown the remaining information at issue consists of internal communications containing advice, opinions, or recommendations on the policymaking matters of the county. Accordingly, the county may not withhold the remaining information at issue under section 552.111 of the Government Code

Next, 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, 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 CSG, Custom, Global, ICSolutions, Keefe, NCICIC, or Securus explaining why the remaining information should not be released. Therefore, we have no basis to conclude CSG, Custom, Global, ICSolutions, Keefe, NCICIC, or Securus has a protected proprietary interest in the remaining 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. Accordingly, the county may not withhold the remaining information on the basis of any proprietary interest CSG, Custom, Global, ICSolutions, Keefe, NCICIC, or Securus may have in the 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 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. Telmate states it has competitors. In addition, Telmate states release of portions of its information, which it indicated, would cause substantial competitive harm to Telmate because its competitors could use the information to undercut Telmate's pricing strategies, copy its proprietary products and services, and poach its key personnel. After review of the information at issue and consideration of the arguments, we find Telmate 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 Telmate indicated under section 552.104(a) of the Government Code.¹

Some of the remaining information is subject to section 552.136 of the Government Code.² Section 552.136 provides, "[n]otwithstanding any other provision of [the Act], a credit card,

¹As our ruling is dispositive for this information, we need not address the remaining argument against its disclosure.

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. Accordingly, the county must withhold the insurance policy numbers within the remaining information under section 552.136 of the Government Code.

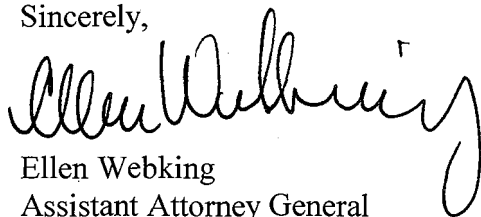
We note some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* 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, the county may withhold its evaluation matrices under section 552.111 of the Government Code. The county may withhold the information Telmate indicated under section 552.104(a) of the Government Code. The county must withhold the insurance policy numbers within the remaining information under section 552.136 of the Government Code. The county must release the remaining information; however, any information that is subject to copyright may be released only 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,



Ellen Webking
Assistant Attorney General
Open Records Division

EW/bw

Ref: ID# 665716

Enc. Submitted documents

c: 4 Requestors
(w/o enclosures)

6 Third Parties
(w/o enclosures)