



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 1, 2019

Mr. Mike Leasor
Mr. Dean Micknal
Counsel for the Abilene Independent School District
Leasor Crass, P.C.
302 West Broad Street
Mansfield, Texas 76063

OR2019-08771

Dear Mr. Leasor and Mr. Micknal:

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# 757015.

The Abilene Independent School District (the "district"), which you represent, received a request for all documents pertaining to a specified entity during a certain time period; communications involving certain district officials regarding a specified subject; and all bids for projects awarded to vendors.¹ You state the district has released some information. You also state the district has withheld information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.² You claim some of the submitted information is excepted from disclosure under sections 552.104 and 552.111 of the Government Code. Additionally, you state release of the submitted

¹You state the district sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that FERPA does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. The DOE has determined that FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <https://www.texasattorneygeneral.gov/sites/default/files/files/divisions/open-government/20060725-USDOE-FERPA.pdf>.

information may implicate the proprietary interests of Huckabee Architects, Inc. (“Huckabee”), Jacob & Martin, LLC (“Jacob”); and Parkhill Smith & Cooper, Inc. (“PSC”). Accordingly, you state, and provide documentation showing, the district notified these third parties of the request for information and of their 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 Huckabee and PSC. We have considered the submitted arguments and reviewed the submitted information.

Initially, 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 Jacob explaining why the submitted information should not be released. Therefore, we have no basis to conclude Jacob has a protected proprietary interest in the submitted 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 district may not withhold any of the submitted information on the basis of any proprietary interest Jacob may have in it.

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). In considering whether a private third party may assert this exception, the supreme court reasoned because section 552.305(a) of the Government Code includes section 552.104 as an example of an exception that involves a third party’s property interest, 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 *9. You inform us the information you indicated pertains to a closed bidding situation regarding construction services for which a contract has been executed. However, you indicate the district will solicit bids for construction projects in the future, and state release of the information at issue would give bidders a decisive advantage in submitting bids for future district projects and substantially undermine the competitive bidding process. After review of the information at issue and consideration of the arguments, we find you have established the release of the information at issue would give advantage to a competitor or bidder. Thus, the district may withhold the information you indicated under section 552.104(a) of the Government Code.³

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

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 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).

This office has also concluded a preliminary draft of a document 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.

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.

You seek to withhold the remaining information under section 552.111 of the Government Code. You state the remaining information consists of advice, opinions, and recommendations regarding certain planning functions of the district that were communicated between district representatives and a third party consultant, with whom you state the district shares a privity of interest regarding the policymaking functions at issue. You also state the information at issue includes draft documents. However, you do not state whether the draft documents will be released to the public in their final forms. Thus, to the extent the district will release the draft documents to the public in their final forms, the district may withhold the draft documents at issue in their entirety under section 552.111 of the Government Code. Nevertheless, based upon your representations and our review, we find portions of the information at issue consist of advice, opinion, or recommendations on policymaking matters of the district. Therefore, the district may withhold most of the remaining information under section 552.111 of the Government Code. However, some of the information at issue consists of either general administrative information that does not relate to policymaking, information that is purely factual in nature, or information that was shared with individuals with whom you have not demonstrated the district shares a privity of interest. Thus, we find you have failed to demonstrate the information at issue, a representative sample of which we marked for release, consists of advice, opinion, or recommendations that reflect deliberative or policymaking processes, and the district may not withhold this information under section 552.111. Therefore, with the exception of the information we marked for release, the district may withhold the remaining information under section 552.111 of the Government Code.⁴

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov’t Code § 552.137(a)-(c). The e-mail addresses at issue are not a type specifically excluded by section 552.137(c) of the Government Code. Accordingly, the district must withhold the e-mail addresses you marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their disclosure.

In summary, the district may withhold the information you indicated under section 552.104(a) of the Government Code. With the exception of the information we marked for release, the district may withhold the remaining information under section 552.111 of the Government Code. The district must withhold the e-mail addresses you marked under

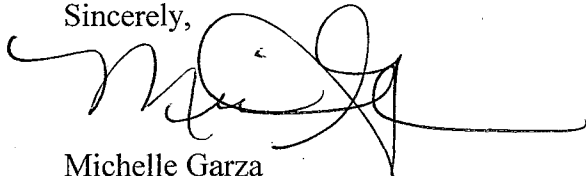
⁴As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their disclosure. The district must release the remaining information.⁵

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,



Michelle Garza
Assistant Attorney General
Open Records Division

MG/jxd

Ref: ID# 757015

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁵We note the information being released contains an e-mail address to which the requestor has a right of access under section 552.137(b) of the Government Code. See Gov't Code § 552.137(b). However, Open Records Decision No. 684 (2009) is a previous determination authorizing all governmental bodies to withhold specific categories of information without the necessity of requesting an attorney general decision, including e-mail addresses of members of the public under section 552.137 of the Government Code. Thus, if the district receives another request for this same information from a person who does not have a right of access to it, Open Records Decision No. 684 authorizes the district to redact the requestor's e-mail address without the necessity of requesting an attorney general decision.