



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 12, 2019

Ms. Tangerla Williams
Temporary Senior Assistant General Counsel
Dallas Area Rapid Transit
P.O. Box 660163
Dallas, Texas 75266-0163

OR2019-15803

Dear Ms. Williams:

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# 767636 (DART ORR# W003714-031119).

The Dallas Area Rapid Transit ("DART") received a request for specified proposals and evaluations related to the Cotton Belt Regional Rail Design-Build Project, Solicitation No. P-2033270. You state DART is relying on Open Records Letter No. 2018-30682 (2018) to withhold some of the requested information.¹ You claim some of the submitted information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code.² You also state release of some of the submitted information may implicate the proprietary interests of a third party. Accordingly, you state, and provide documentation showing, you notified Archer Western Herzog 4.0 JV ("AWH") of the request for information and of its right to submit arguments to this office as to why the submitted information should not be

¹See 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).

²We asked DART to provide additional information pursuant to section 552.303 of the Government Code. See Gov't Code § 552.303(c)-(d) (if attorney general determines information in addition to that required by section 552.301 is necessary to render decision, written notice of that fact shall be given to governmental body and requestor, and governmental body shall submit necessary additional information to attorney general not later than seventh calendar day after date of receipt of notice). We have received and considered correspondence sent by DART pursuant to that request.

released.³ *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 AWH. We have considered the submitted arguments and reviewed the submitted information.

Section 552.101 of the Government Code exempts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov't Code § 552.101. This section encompasses information that is made confidential by other statutes. You raise section 552.101 in conjunction with section 418.181 of the Homeland Security Act (the “HSA”). Sections 418.176 through 418.182 were added to chapter 418 of the Government Code as part of the HSA. Section 418.181 provides “[t]hose documents or portions of documents in the possession of a governmental entity are confidential if they identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism.” *Id.* § 418.181. The fact that information may relate to a governmental body's security concerns does not make the information *per se* confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any confidentiality provision, a governmental body asserting one of the confidentiality provisions of the HSA must adequately explain how the responsive information falls within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You state the information at issue pertains to the Cotton Belt Corridor Regional Rail Project (the “rail project”), a proposed commuter rail project spanning twenty-six miles. You assert, and we agree, the rail project is critical infrastructure for purposes of section 418.181. *See generally id.* § 421.001 (defining “critical infrastructure” to include “all public or private assets, systems, and functions vital to the security, governance, public health and safety, economy, or morale of the state or the nation”). We note AWH is the winning bidder to build the rail project. You state the submitted information “includes the location and structural details of bridges, traffic intersections, and rail information.” You assert release of this information may affect the safety and security of DART riders, employees, and the general public. Based on your representations and our review, we find you have demonstrated the release of portions of the information at issue, which we marked and indicated, would identify the technical details or particular vulnerabilities of DART's critical

³We note that in Open Records Letter No. 2018-30682, this office ruled DART must release the submitted proposals because DART failed to submit the proposals at issue for our review. However, DART has informed this office that after the issuance of Open Records Letter No. 2018-30682 but prior to DART's release of the submitted proposals, the requestors at issue in that ruling withdrew their requests for information. Because third party interests can provide a compelling reason against disclosure, we will consider whether the submitted proposals may be withheld based on the interests of AWH. *See* Gov't Code § 552.007; Open Records Decision No. 150 at 2 (1977).

infrastructure to an act of terrorism. Accordingly, DART must withhold the information we marked and indicated under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code.⁴ However, upon review, we find you have failed to demonstrate the remaining information at issue identifies the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. Therefore, the remaining information at issue is not confidential under section 418.181, and DART may not withhold it under section 552.101 on that basis.

Section 552.104(a) of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” *Id.* § 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. AWH states it has competitors. In addition, AWH states release of the remaining information it seeks to withhold would give advantage to its competitors. After review of the information at issue and consideration of the arguments, we find AWH 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 indicated under section 552.104(a) of the Government Code.

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 include

⁴As our ruling on this information is dispositive, we need not address the remaining arguments against disclosure of this information.

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. *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).


DART informs us Exhibit C consists of evaluation committee materials regarding the solicitation at issue. DART asserts this information is excepted from disclosure under section 552.111 because it reveals guidelines for evaluating bidders, scoring recommendations, and opinions of evaluators regarding bids. Upon review, we find DART has established the deliberative process privilege is applicable to this information. Therefore, DART may withhold Exhibit C under section 552.111 of the Government Code.

In summary, DART must withhold the information we marked and indicated under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code. DART may withhold the information we indicated under section 552.104 of the Government Code. DART may withhold Exhibit C under section 552.111 of the Government Code. DART must release the remaining information.

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,



Jennifer Copeland
Assistant Attorney General
Open Records Division

JC/gw

Ref: ID# 767636

Enc. Submitted documents

c: Requestor
(w/o enclosures)

c: Third Party
(w/o enclosures)