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ATTORNEY GENERAL OF TEXAS

July 31, 2020

Mr. Kenneth Moreland
Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2020-19236

Dear Mr. Moreland:

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# 837759 (OOG ID Nos. 262-20 and 269-20).

The Office of the Governor (the "governor's office") received two requests from different requestors for communications between certain individuals containing specified terms during stated periods of time.¹ You state the governor's office will release some information to the first requestor. 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 some of the information at issue may implicate the interests of certain third parties, which you state the governor's office notified of the present requests 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 §§ 552.304 (interested party may submit comments stating why information should or should not be released), .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 the Borderplex Alliance; Central Texas Airport Holdings, Inc; the City of Lancaster; the Fort Worth Chamber of Commerce; the Greater Brownsville Incentives Corporation; and the

¹ We note the governor's office sought and received clarification of the information requested with respect to the first requestor. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

Taylor Economic Development Corporation. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note some of the submitted information is not responsive to either of the present requests because it was created after the receipt of the requests by the governor's office. This ruling does not address the public availability of the non-responsive information and the governor's office need not release it in response to the present requests.²

Next, we note the present requests differ in the specific types of communications sought. Thus, the governor's office need not release information to either of the requestors that is not responsive to their respective requests for information.

Section 552.104(a) of the Government Code exempts from disclosure information that a governmental body demonstrates, if released, would "harm its interests by providing an advantage to a competitor or bidder in a particular ongoing competitive situation or in a particular competitive situation where the governmental body establishes the situation at issue is set to reoccur or there is a specific and demonstrable intent to enter into the competitive situation again in the future." Gov't Code § 552.104(a). 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." *Boeing Co. v. Paxton*, 466 S.W.3d 831, 841 (Tex. 2015). You explain the governor's office is tasked by statute with "[facilitating] the location, expansion, and retention of domestic and international business investment to the [S]tate [of Texas (the "state)]" and "[promoting] and [administering] business and community economic development programs and services in the state, including business incentive programs." Gov't Code § 481.022(2)-(3). You also explain the governor's office competes on behalf of the state with other states for the expansion and recruitment of businesses by "providing various incentives and employing strategies to attract new business to the state or assist with the expansion of existing business in the state." Thus, you assert the governor's office has specific marketplace interests in the information at issue because it competes on behalf of the state to recruit and expand businesses within the state. You argue release of the information at issue would provide a competitive advantage to competing states, as well as companies considering relocation or expansion in the state. Based upon your representations and our review, we find you have demonstrated the governor's office has specific marketplace interests and may be considered a "competitor" for purposes of section 552.104. We also find you have demonstrated release of the responsive information you marked would give advantage to a competitor or bidder. Accordingly, the governor's office may withhold the responsive information you marked under section 552.104(a) of the Government Code.³

Section 552.111 of the Government Code exempts 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[.]" *Id.* § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111

² As we are able to make this determination, we need not address the arguments against disclosure of this information.

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

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, 364 (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. *See 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 id.*

You state the information you marked consists of advice, opinions, and recommendations of governor's office employees and third parties with whom the governor's office shares a privity of interest regarding policymaking matters. Based on your representations and our review of the information at issue, we find you have demonstrated the information at issue consists of advice, opinions, or recommendations on the policymaking matters of the governor's office. Accordingly, the governor's office may withhold the information you marked under section 552.111 of the Government Code.

In summary, the governor's office may withhold the information you marked under section 552.104(a) of the Government Code and the information you marked under section 552.111

of the Government Code. The governor's office must release the remaining responsive 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Blake Brennan
Assistant Attorney General
Open Records Division

BBX/jxd

Ref: ID# 837759

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

c: 6 Third Parties
(w/o enclosures)