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ATTORNEY GENERAL OF TEXAS

September 1, 2020

Ms. Andrea Hope J. Steel
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Ward Redevelopment Authority
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OR2020-22043

Dear Ms. Steel:

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# 847215.

The City of Houston Tax Increment Reinvestment Zone No. 18 and the Fifth Ward Redevelopment Authority (collectively, the "authority"), which you represent, received a request for e-mails and text messages between specified entities and named authority employees. You state the authority does not have information responsive to portions of the present request.¹ You claim some of the submitted information is excepted from disclosure under sections 552.111 and 552.131 of the Government Code.² Additionally, you state release of the information at issue may implicate the proprietary interests of East River Property Owners' Association, Inc. ("ERPO") and KBRN, LP ("KBRN"). Accordingly, you state, and provide documentation demonstrating, the authority notified counsel for these interested third parties of the request for information and of the right to submit arguments to this office as to why the submitted information should not be released. *See*

¹ The Act does not require a governmental body to release information that did not exist when it received a request, create responsive information, or obtain information that is not held by the governmental body or on its behalf. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

² Although you do not cite to section 552.111 of the Government Code in your brief, we understand you to raise this exception based on the substance of your arguments. Additionally, although you also raise sections 552.101, 552.104, 552.110, 552.1101, and 552.113 of the Government Code, you make no arguments to support these exceptions. Therefore, we assume you have withdrawn your claim that these exceptions apply to the information at issue. *See Gov't Code §§ 552.301, .302.*

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 submitted on behalf of ERPO and KBRN. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note ERPO and KBRN argue against the release of information the authority has not submitted to this office for our review. This ruling does not address information that was not submitted by the authority and is limited to the information the authority has submitted for our review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested).

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[.]” *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 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 id.* We note a governmental body does not have a privity of interest or common deliberative process with a private party with which the governmental body is engaged in contract negotiations. *See id.* (section 552.111 not applicable to communication with entity with which governmental body has no privity of interest or common deliberative process).

You assert portions of the submitted information consist of advice, opinions, and recommendations pertaining to a specified project that were communicated between authority staff and representatives of third parties with whom the authority shares a privity of interest regarding the authority's policymaking pertaining to the project. You state some of the information at issue also reflects draft documents pertaining to the policymaking function at issue. You further state the draft documents at issue pertain to agreements that will be released to the public in their final forms. 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 authority. Accordingly, the authority may withhold the information you marked under section 552.111 of the Government Code.³

ERPO and KBRN raise section 552.110 of the Government Code for the remaining information at issue. Section 552.110(b) states, "information is [excepted from required disclosure] if it is demonstrated based on specific factual evidence that the information is a trade secret." *See* Gov't Code § 552.110(b). Section 552.110(a) defines a trade secret as all forms and types of information if:

- (1) the owner of the trade secret has taken reasonable measures under the circumstances to keep the information secret; and
- (2) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable

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

through proper means by, another person who can obtain economic value from the disclosure or use of the information.

Id. § 552.110(a). Section 552.110(c) of the Government Code excepts from disclosure “commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” *Id.* § 552.110(c). Upon review, we find ERPO and KBRN have failed to provide specific factual evidence demonstrating any portion of the remaining information at issue is a trade secret. Further, we find ERPO and KBRN have failed to provide specific factual evidence demonstrating any portion of the remaining information at issue constitutes commercial or financial information, the release of which would result in substantial competitive harm. Therefore, the authority may not withhold any portion of the remaining information at issue under section 552.110 of the Government Code.

ERPO and KBRN raise section 552.1101 of the Government Code for the remaining information at issue. Section 552.1101 of the Government Code provides, in relevant part:

(a) . . . [I]nformation submitted to a governmental body by a vendor, contractor, potential vendor, or potential contractor in response to a request for a bid, proposal, or qualification is excepted from the requirements of Section 552.021 if the vendor, contractor, potential vendor, or potential contractor that the information relates to demonstrates based on specific factual evidence that disclosure of the information would:

(1) reveal an individual approach to:

(A) work;

(B) organizational structure;

(C) staffing;

(D) internal operations;

(E) processes; or

(F) discounts, pricing methodology, pricing per kilowatt hour, cost data, or other pricing information that will be used in future solicitation or bid documents; and

(2) give advantage to a competitor.

Id. § 552.1101(a). ERPO and KBRN assert disclosure of the remaining information would reveal an individual approach to work, processes, discounts, and pricing methodology and give advantage to a competitor. Upon review, we find ERPO and KBRN have failed to provide the specific factual evidence necessary to withhold any of the remaining

information at issue under section 552.1101(a). Therefore, the authority may not withhold any portion of the remaining information under section 552.1101(a) of the Government Code.

Section 552.137 of the Government Code provides, “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act],” unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c).⁴ *Id.* § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address maintained by a governmental entity for one of its officials or employees, or a personal e-mail address belonging to an authority employee or official used to conduct official government business. *See id.* § 552.137(c); *Austin Bulldog v. Leffingwell*, 490 S.W.3d 240 (Tex. App.—Austin 2016, no pet.) (holding personal e-mail addresses of government officials used to conduct official government business are not e-mail addresses of “members of the public” for purposes of Gov’t Code § 552.137(a)). Accordingly, to the extent the e-mail addresses within the remaining information belong to members of the public and are not excluded by subsection 552.137(c) of the Government Code, the authority must withhold such e-mail addresses under section 552.137 of the Government Code, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release. *See* Gov’t Code § 552.137(b). However, to the extent an e-mail address within the remaining information is excluded by subsection 552.137(c) or belongs to an authority employee or official, the authority may not withhold that e-mail address under section 552.137 of the Government Code.

In summary, the authority may withhold the information you marked under section 552.111 of the Government Code. To the extent the e-mail addresses within the remaining information belong to members of the public and are not excluded by subsection 552.137(c) of the Government Code, the authority must withhold such e-mail addresses under section 552.137 of the Government Code, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release. The authority 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 <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

⁴ The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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/be

Ref: ID# 847215

Enc. Submitted documents

c: Requestor
(w/o enclosures)

1 Third Party
(w/o enclosures)