



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 21, 2020

Ms. Hadassah Schloss
Director, Open Government
Texas General Land Office
P.O. Box 12873
Austin, Texas 78711-2873

OR2020-32018

Dear Ms. Schloss:

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# 859108 (PIR# 21-0068).

The General Land Office (the "GLO") received a request for certain information regarding a specified request for proposals. The GLO states it released some information to the requestor. The GLO claims portions of the submitted information are excepted from disclosure under section 552.111 of the Government Code. Additionally, the GLO states release of the information at issue may implicate the proprietary interests of the following third parties: AECOM Technical Services, Inc. ("AECOM"); Dannenbaum Engineering Corporation; Freese and Nichols, Inc. ("F&N"); GEI Consultants, Inc.; Halff Associates, Inc. ("Halff"); Pape-Dawson Consulting Engineers, Inc.; Stantec Consulting Services, Inc.; The University of Texas at San Antonio; and Wood Environment & Infrastructure Solutions, Inc. Accordingly, the GLO states, and provides documentation showing, it notified these interested third parties of the request for information and of their right to submit arguments to this office. *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 AECOM, F&N, and Halff.¹ 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) of the Government Code to submit its reasons, if any, as to why information relating to that party should be

¹ Although F&N raises section 552.021 of the Government Code, we note this provision is not an exception to disclosure under the Act. *See* Gov't Code § 552.021 (providing public information is available during normal business hours).

withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have only received comments from AECOM, F&N, and Halff explaining why the information at issue should not be released. Thus, we have no basis to conclude the remaining third parties have a protected proprietary interest in the information at issue. *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, 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. Therefore, the GLO may not withhold the information at issue on the basis of any proprietary interest the remaining third parties may have in the information.

Next, we understand Halff to assert its information at issue is not responsive to the present request for information. However, we note the Act requires a governmental body to make a good-faith effort to relate a request for information to information the governmental body holds or to which it has access. *See* Open Records Decision Nos. 563 (1990), 561 at 8-9 (1990), 555 at 1-2 (1990), 534 at 2-3 (1989). Because the GLO has submitted the information at issue for our review, we find the GLO has made a good-faith effort to relate the present request to information within its possession or control and submit information to this office that is responsive to the request. Accordingly, we will consider whether information at issue is excepted from disclosure under the Act.

AECOM and F&N raise section 552.104 of the Government Code for their information at issue. Section 552.104 excepts from disclosure information “if a governmental body demonstrates that release of the information 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) (emphasis added). In *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015), the Texas Supreme Court held section 552.104 does not preclude third parties from raising section 552.104 as an exception to disclosure. *See Boeing*, 466 S.W.3d at 842. However, the Eighty-sixth Legislature has amended section 552.104 since the issuance of *Boeing*. *See* Act of May 25, 2019, 86th Leg., R.S., S.B. 943, § 3. Section 552.104 now expressly limits the protections of section 552.104 to governmental bodies. Gov't Code § 552.104(a). Therefore, we do not address the arguments of AECOM and F&N under section 552.104.

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; see also *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). 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). However, 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. ORD 615 at 5-6; see also *Dallas Morning News*, 22 S.W.3d at 364 (section 552.111 not applicable to personnel-related communications that did not involve policymaking).

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.*, 37 S.W.3d at 157; 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).

The GLO states the information it marked in Attachment D consists of advice, opinions, and recommendations of employees of the GLO concerning evaluations of bid proposals. Based upon this representation and our review, we find the information at issue consists of advice, opinions, or recommendations on the policymaking matters of the GLO. Accordingly, the GLO may withhold the information it marked in Attachment D under section 552.111 of the Government Code.

Section 552.110(b) of the Government Code states, “[e]xcept as provided by [s]ection 552.0222, 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 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 states:

- (c) Except as provided by Section 552.0222, 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 is [excepted from required disclosure].

Id. § 552.110(c). Section 552.1101 of the Government Code provides, in relevant part:

(a) Except as provided by Section 552.0222, information 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). Additionally, we note section 552.0222(b) lists certain types of information to which sections 552.110 and 552.1101 do not apply. *See id.* § 552.0222(b). AECOM and F&N argue their information at issue consists of commercial or financial information subject to section 552.110(c).² Upon review, we find AECOM has demonstrated portions of the information at issue constitute commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, the GLO must withhold the information we marked under section 552.110(c) of the Government Code; however, to the extent the customer information we marked is publicly available on AECOM's website, it may not be withheld under section 552.110(c).³ Nonetheless, we find some of the remaining information at issue is subject to section 552.0222(b), and may not be withheld on the basis of section 552.110(c). Additionally, we find AECOM and F&N have failed to provide specific factual evidence demonstrating the remaining information at issue constitutes commercial or financial information, the release

² Although F&N does not cite to section 552.110(c) of the Government Code in its brief, we understand it to raise this exception based on the substance of its arguments.

³ As our ruling is dispositive, we need not address AECOM's remaining argument against disclosure of this information.

of which would result in substantial competitive harm. Therefore, the GLO may not withhold any of the remaining information at issue under section 552.110(c).

F&N also argues its information at issue consists of trade secrets subject to section 552.110(b).⁴ Upon review, however, we find F&N has failed to provide specific factual evidence demonstrating any portion of its information at issue is a trade secret. Therefore, the GLO may not withhold any of the remaining information at issue under section 552.110(b).

AECOM, F&N, and Halff assert disclosure of their information at issue would reveal an individual approach to work, organizational structure, staffing, internal operations, and processes and give advantage to a competitor. Upon review, we find Halff has demonstrated the applicability of section 552.1101(a) to some of the information at issue. Accordingly, the GLO must withhold the information we marked under section 552.1101 of the Government Code; however, to the extent the customer information we marked is publicly available on Halff's website, it may not be withheld under section 552.1101. Nonetheless, we find some of the remaining information at issue consists of information subject to section 552.0222(b) and may not be withheld on the basis of section 552.1101(a). *See id.* § 552.0222(b). Additionally, we find AECOM, F&N, and Halff have failed to provide specific factual evidence demonstrating any portion of the rest of the remaining information at issue is subject to section 552.1101(a). Therefore, the GLO may not withhold any of the remaining information at issue under section 552.1101(a).

Section 552.130 of the Government Code excepts from public disclosure information relating to a motor vehicle operator's or driver's license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country.⁵ *See id.* § 552.130. Accordingly, we find the GLO must withhold all visible license plates within the remaining information under section 552.130 of the Government Code.

F&N asserts, and we agree, some of its information may be protected by copyright. Additionally, we note some of the remaining information 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.

⁴ Although F&N does not cite to section 552.110(b) of the Government Code in its brief, we understand it to raise this exception based on the substance of its arguments.

⁵ The 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).

In summary, the GLO may withhold the information it marked in Attachment D under section 552.111 of the Government Code. The GLO must withhold the information we marked under section 552.110(c) of the Government Code; however, to the extent the customer information we marked is publicly available on AECOM's website, it may not be withheld under section 552.110(c). The GLO must withhold the information we marked under section 552.1101 of the Government Code; however, to the extent the customer information we marked is publicly available on Halff's website, it may not be withheld under section 552.1101. The GLO must withhold all visible license plates within the remaining information under section 552.130 of the Government Code. The GLO must release the remaining information; however, any information subject to copyright may only be released in accordance with copyright law.⁶

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,

James M. Graham
Assistant Attorney General
Open Records Division

JMG/rm

Ref: ID# 859108

Enc. Submitted documents

c: Requestor
(w/o enclosures)

cc: 8 Third Parties
(w/o enclosures)

⁶ We note the information being released may contain social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office. *See* Gov't Code § 552.147(b).