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ATTORNEY GENERAL OF TEXAS

December 30, 2020

Mr. Mitchell G. Page
Counsel for the San Jacinto River Authority
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1300 Post Oak Boulevard, Suite 1400
Houston, Texas 77056

OR2020-32298

Dear Mr. Page:

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# 859576.

The San Jacinto River Authority (the "authority"), which you represent, received two requests from different requestors for information pertaining to a particular request for proposals. You state the authority will release some information. You claim some of the submitted information is excepted from disclosure under section 552.111 of the Government Code. You also state you notified APSI Construction Management ("APSI"); Arcadis U.S., Inc. ("Arcadis"); CSRS, Inc.; ProSource Technologies, LLC ("ProSource"); Tidal Basic Government Consulting; LLC; Tetra Tech, Inc. ("Tetra Tech"); and Traylor Associates Incorporated 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 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 APSI, Arcadis, ProSource, and Tetra Tech.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

¹ Although APSI also raises section 552.101 of the Government Code, it has not provided any arguments to support this exception. Therefore, we assume APSI has withdrawn its claim this section applies to the submitted information. *See Gov't Code* §§ 552.301, .302.

Code 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 any of the remaining third parties explaining why the submitted information should not be released. Therefore, we have no basis to conclude any remaining third party has a protected proprietary interest in the submitted information. *See, e.g., id.* § 552.110 (requiring the provision of specific factual evidence demonstrating the applicability of the exception). Accordingly, the authority may not withhold the submitted information on the basis of any proprietary interest the remaining third parties may have in the information.

Next, we note Arcadis objects to disclosure of information the authority has not submitted to this office for 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 id.* § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

APSI raises section 552.104 of the Government Code for some of its information. 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.” *Id.* § 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 APSI's arguments 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. 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).

You state the information submitted as Item 3 consists of advice, opinions, and recommendations of employees of the authority regarding policymaking matters. Upon review, we find the authority may withhold Item 3 under section 552.111 of the Government Code.²

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[.]” Gov't Code § 552.110(c). APSI and Arcadis argue some of their information consists of commercial or financial information subject to section 552.110(c). Upon review, we find APSI and Arcadis have demonstrated portions of the information at issue constitute commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, the authority must withhold the information we have marked, and, to the extent APSI's customer information is not publicly available on APSI's website, the authority must withhold APSI's customer information under section 552.110(c) of the Government Code.³ However, we find APSI and Arcadis have failed to provide specific factual evidence demonstrating 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 of the remaining information at issue under section 552.110(c) of the Government Code.

Section 552.110(b) of the Government Code states, “information is [excepted from required disclosure] if it is demonstrated based on specific factual evidence that the information is a trade secret.” *Id.* § 552.110(b). Section 552.110(a) defines a trade secret as all forms and types of information if:

² As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

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

(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). APSI, Arcadis, and ProSource argue some of their remaining information consists of trade secrets subject to section 552.110(b). Upon review, we find Prosource has demonstrated its information at issue constitutes commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, the authority must withhold the information we have marked under section 552.110(b) of the Government Code. However, we find APSI and Arcadis failed to provide specific factual evidence demonstrating any portion of the rest of the remaining information at issue is a trade secret. Therefore, the authority may not withhold any of the remaining information at issue under section 552.110(b) of the Government Code.

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). Additionally, we note section 552.0222(b) lists certain types of information to which section 552.1101(a) does not apply. *See id.* § 552.0222(b). APSI, Arcadis, and Tetra Tech assert disclosure of some of their remaining information would reveal individual approaches to work, organizational structure, staffing, internal operations; processes, discounts, pricing methodology, cost data, and other pricing information and give advantage to a competitor. Upon review, we find Arcadis has demonstrated the applicability of section 552.1101(a) to some of the information at issue. Accordingly, the authority must withhold the information we have marked under section 552.1101 of the Government Code. However, we find some of Arcadis' remaining information is subject to section 552.0222(b) and may not be withheld on the basis of section 552.1101(a). *See id.* § 552.0222(b) (listing certain types of information not excepted under section 552.1101). Additionally, upon review, we find APSI, Arcadis, and Tetra Tech have failed to provide the specific factual evidence necessary to withhold any of the remaining information at issue under section 552.1101(a), and the authority may not withhold it on that basis.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”⁴ *See id.* § 552.101. Section 552.101 encompasses the doctrine of common-law privacy. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Under the common-law right of privacy, an individual has a right to be free from the publicizing of private affairs in which the public has no legitimate concern. *Id.* at 682. The Third Court of Appeals has concluded public citizens' dates of birth are protected by common-law privacy pursuant to section 552.101. *Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at *3 (Tex. App.—Austin May 22, 2015, pet. denied) (mem. op.). Thus, the authority must withhold all public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.136(b) of the Government Code provides, “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). This office has concluded insurance policy numbers constitute access device numbers for purposes of section 552.136. *See Open Records Decision No. 684* (2009). Accordingly, the authority must withhold the partial bank account and routing numbers we have marked and the insurance policy numbers in the remaining information under section 552.136 of the Government Code.

In summary, the authority may withhold Item 3 under section 552.111 of the Government Code. The authority must withhold the information we have marked and APSI's customer information, to the extent its customer information is not publicly available on APSI's website, under section 552.110(c) of the Government Code. The authority must withhold the information we have marked under section 552.110(b) of the Government Code. The

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).

authority must withhold the information we have marked under section 552.1101 of the Government Code. The authority must withhold all public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy. The authority must withhold the partial bank account and routing numbers we have marked and the insurance policy numbers in the remaining information under section 552.136 of the Government Code. 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 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,

Erin Groff
Assistant Attorney General
Open Records Division

EMG/mo

Ref: ID# 859576

Enc. Submitted documents

c: Requestor
(w/o enclosures)