



September 11, 2000

Ms. Rochel Lemler
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8122 Datapoint Drive, Ste 328
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OR2000-3479

Dear Ms. Lemler:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 139067.

The Alamo Workforce Development Council (the "council"), which you represent, received a request for information related to the "Kelly DCA contract proposals." You relate that you do not seek to withhold the proposals received from Lockheed Martin Corp and Project SER, or object to providing details of the process used in evaluating the proposals or the scores. We assume that this responsive information has been released to this requestor. However, you seek to withhold the identities of the individual evaluators. Your argument that these identities are excepted from public disclosure raises sections 552.103, 552.104, and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.²

We first note that the written request is made in a letter printed on Texas House of Representatives letterhead stationary, and authored by State Representative John A. Longoria. This request implicates section 552.008 of the Government Code, which provides:

- (a) This chapter does not grant authority to withhold information from individual members, agencies, or committees of the legislature to use for legislative purposes.

¹You invoke sections 3(a)(4) and 3(a)(11) of the Open Records Act. These provisions are now codified as sections 552.104 and 552.111 of the Public Information Act.

²We note that the submitted materials include social security numbers. As the request does not encompass this information we conclude that the social security numbers are not responsive to this request and may be withheld.

(b) A governmental body on request by an individual member, agency, or committee of the legislature shall provide public information, including confidential information, to the requesting member, agency, or committee for inspection or duplication in accordance with this chapter *if the requesting member, agency or committee states that the public information is requested under this chapter for legislative purposes*. A governmental body, by providing public information under this section that is confidential or otherwise excepted from required disclosure under law, does not waive or affect the confidentiality of the information for purposes of state or federal law or waive the right to assert exceptions to required disclosure of the information in the future. The governmental body may require the requesting individual member of the legislature, the requesting legislative agency or committee, or the members or employees of the requesting entity who will view or handle information that is received under this section and that is confidential under law to sign a confidentiality agreement that covers the information and requires that:

- (1) the information not be disclosed outside the requesting entity, or within the requesting entity for purposes other than the purpose for which it was received;
- (2) the information be labeled as confidential;
- (3) the information be kept securely; or
- (4) the number of copies made of the information or the notes taken from the information that implicate the confidential nature of the information be controlled, with all copies or notes that are not destroyed or returned to the governmental body remaining confidential and subject to the confidentiality agreement.

(c) This section does not affect:

- (1) the right of an individual member, agency, or committee of the legislature to obtain information from a governmental body under other law, including under the rules of either house of the legislature;
- (2) the procedures under which the information is obtained under other law;
or
- (3) the use that may be made of the information obtained under other law.

Gov't Code § 552.008 (emphasis added).

The requestor asks, "please accept this letter as a personal request." He does not state that the information is requested for legislative purposes. Should the requestor make such a

statement, the responsive information must be released to him. However, such a release would not constitute a release to the public, and therefore would not implicate the selective disclosure prohibitions of Government Code section 552.223. As release of the responsive information is not compelled by section 552.008 in response to this request as phrased, we address the exceptions that you have raised.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. To secure the protection of section 552.103(a), a governmental body has the burden of providing relevant facts and documents to show that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.). Further, to be excepted under section 552.103, the information must relate to litigation that is pending or reasonably anticipated on the date that the information was requested. Gov't Code § 552.103(c).

To demonstrate that litigation is reasonably anticipated, the governmental body must furnish *concrete* evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture; the mere chance of litigation will not establish the litigation exception. Open Records Decision No. 452 at 4 (1986) Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* This office has concluded that litigation was reasonably anticipated when the following facts have been alleged or shown: the potential adversary filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); the potential adversary hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); the governmental body received a claim letter that it represents to this office to be in compliance with notice requirements of Texas Tort Claims Act, Civ. Prac. & Rem. Code ch. 101, or applicable municipal ordinance, *see* Open Records Decision No. 288 (1981) and Open Records Decision No. 638 (1996).

You base your contention that litigation related to the responsive information is reasonably anticipated on statements made in a letter from one bidder. The bidder asserts that a "serious violation of the procurement process" has occurred and that his letter is "notice to AWD that San Antonio SER intends to challenge any award arising from the DCA procurement process other than the award to SER." This letter is dated May 25, 2000. You do not indicate that any concrete steps toward litigation have been taken by any potential adverse party in litigation. We conclude that you have not demonstrated that litigation related to the responsive information was reasonably anticipated on the date that the request for information was received. Therefore, no information may be withheld under section 552.103 of the Government Code.

Section 552.104 of the Government Code excepts from disclosure information that, if released, would give advantage to a competitor or bidder. The purpose of this exception is

to protect the interests of a governmental body in competitive bidding situations. *See* Open Records Decision No. 592 (1991). This exception protects information from public disclosure if the governmental body demonstrates potential specific harm to its interests in a particular competitive situation. *See* Open Records Decision Nos. 593 at 2 (1991), 463 (1987), 453 at 3 (1986). A general allegation or a remote possibility of an advantage being gained is not enough to invoke the protection of section 552.104. Open Records Decision Nos. 541 at 4 (1990), 520 at 4 (1989), 463 at 2 (1987).

In your comments in support of this exception, you do not allege that release of this information would give advantage to a bidder. Elsewhere, you contend that release of the evaluator's identities would hinder future recruitment of evaluators. You also contend that release of these identities subjects the evaluators to harassment which would result in evaluators being difficult to retain. We are of the opinion that these considerations are not interests which section 552.104 is intended to protect. We conclude that you have not demonstrated that release of the subject information would give an advantage to a bidder. Therefore, no information may be withheld under section 552.104 of the Government Code.

Section 552.111 of the Government Code excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the *policymaking* processes of the governmental body. An agency's policymaking functions do not encompass internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. Open Records Decision No. 613 (1993); *see also* *City of Garland v. Dallas Morning News*, 969 S.W.2d 548 (Tex. App. -- Dallas 1998), *aff'd*, 2000 WL 21029 (Tex. 2000), *pet. filed*, (Feb. 01, 2000)(personnel communications not relating to agency's policymaking not excepted from public disclosure pursuant to section 552.111). An agency's policymaking functions do include, however, administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 (1995). In addition, section 552.111 does not protect facts and written observation of facts and events that are severable from advice, opinions, and recommendation. Open Records Decision No. 615.

We consider the evaluations of proposals to be an administrative matter that does not implicate the policymaking function of the council. Further, only facts, *i.e.* the identities of the evaluators, are at issue. We conclude that the subject information is not excepted from public disclosure by section 552.111 of the Government Code.

As no exception to disclosure has been demonstrated to apply to the responsive information, it must be released. This letter ruling is limited to the particular records 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 records or any other circumstances.

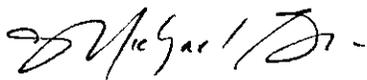
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael Jay Burns
Assistant Attorney General
Open Records Division

MJB/er

Ref: ID# 139067

Encl Submitted documents

cc: The Honorable John A. Longoria
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(w/o enclosures)