



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 23, 2008

Ms. Kerri L. Davidson
Deputy Counsel
Capital Metropolitan Transportation Authority
2910 East Fifth Street
Austin, Texas 78702

OR2008-01085

Dear Ms. Davidson:

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# 300287.

Capital Metropolitan Transportation Authority ("Capital Metro") received a request for "[a]ll information regarding Capital Metro's plans for a Rapid Bus," including several specified categories of information pertaining to the Rapid Bus. You state that you will release some of the requested information to the requestor. You claim that some of the submitted information is excepted from disclosure under sections 552.104, 552.105, and 552.111 of the Government Code. You also indicate that releasing some of the submitted information may implicate the proprietary interests of several third parties. Accordingly, you state that you have notified North American Bus Industries, Inc. ("NABI"), The Wright Group ("Wright"), First Transit, Inc. ("First Transit"), and Veolia Transportation ("Veolia") of the request and of their opportunity to submit arguments to this office. *See Gov't Code* § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 allows a governmental body to rely on an interested third party to raise and explain the applicability of the exception to disclosure in certain circumstances). We have received arguments from NABI, Wright, and Veolia. We have considered the submitted arguments and reviewed the submitted information.¹

¹To the extent the submitted information is a representative sample of the requested information, this letter ruling assumes that the submitted information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes Capital Metro to withhold any information that is substantially different from the submitted information. *See Gov't Code* §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

Initially, we address the requestor's assertion that Capital Metro failed to meet its procedural obligations under section 552.301(b) of the Government Code. Section 552.301 prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires that a governmental body ask for a decision from this office and state which exceptions apply to the requested information by the tenth business day after receiving the request. Gov't Code § 552.301(b). Capital Metro informs us that its appropriate officer for information received the request for information on October 29, 2007. Accordingly, Capital Metro's ten-business-day deadline was November 12, 2007. Capital Metro's request for a ruling was received in this office November 12, 2007. Therefore, we find Capital Metro's request for a ruling was timely. *See* Gov't Code § 552.301(b).

You first claim that the information submitted as Exhibit E is subject to section 552.104(a) of the Government Code, which excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations, including where the governmental body may wish to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 at 8 (1991). Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a bidder will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). However, section 552.104 does not except from disclosure information relating to competitive bidding situations once a contract has been executed. Open Records Decision Nos. 306 (1982), 184 (1978).

You state that the information in Exhibit E relates to competitive bids to purchase buses and bus operation services. You state that request for proposal number 105688 remained open until December 31, 2007, and that request for proposal number 106466 was cancelled after bids were received. You assert that release of the information at issue would give an advantage to a competitor or bidder, and you indicate that a winning bidder has not been selected and a contract has not been awarded for either of the requests for proposals. Upon review, we find that Capital Metro may withhold the information we have marked in Exhibit E pertaining to request for proposal number 105688. However, we find that you have failed to demonstrate how the release of the remaining information in Exhibit E, pertaining to request for proposal number 106466, would affect an ongoing competitive bidding situation. *See* Open Records Decision No. 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative to withhold information under predecessor statute). Thus, we find Capital Metro has failed to demonstrate the applicability of section 552.104 to the remaining information in Exhibit E, and may not, therefore, withhold any of the remaining information under section 552.104 of the Government Code.

You next claim that the information submitted in Exhibit G is subject to section 552.105 of the Government Code. Section 552.105 excepts from disclosure information relating to “appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.” Gov’t Code § 552.105(2). Section 552.105 is designed to protect a governmental body’s planning and negotiating position with regard to particular transactions. *See* Open Records Decision Nos. 564 (1990), 357 (1982), 310 (1982). Information protected by section 552.105 that pertains to such negotiations may be withheld for so long as the transaction is not complete. *See* ORD 310. But the protection offered by section 552.105 is not limited solely to transactions not yet finalized. This office has concluded that information about specific parcels of land obtained in advance of other parcels to be acquired for the same project could be withheld where release of the information would harm the governmental body’s negotiating position with respect to the remaining parcels. *See* ORD 564 at 2. A governmental body may withhold information “which, if released, would impair or tend to impair [its] ‘planning and negotiating position in regard to particular transactions.’” ORD 357 at 3 (quoting Open Records Decision No. 222 (1979)). The question of whether specific information, if publicly released, would impair a governmental body’s planning and negotiating position with regard to particular transactions is a question of fact. Accordingly, this office will accept a governmental body’s good-faith determination in this regard, unless the contrary is clearly shown as a matter of law. *See* ORD 564. In this instance, you state that the bidders under request for proposal number 106466 were required to identify and provide pricing for real property necessary to perform the contract. However, we note that request for proposal number 106466 was cancelled. As such, we find that Capital Metro has failed to demonstrate how release of the information in Exhibit G would impair its negotiating position with regard to a particular transaction. Thus, we conclude that Capital Metro may not withhold the information in Exhibit G under section 552.105 of the Government Code.

Next, we address your argument that the information submitted in Exhibit H is subject to section 552.111 of the Government Code, which excepts from public disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. Section 552.111 encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of this exception 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, no writ); 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 that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, and opinions that reflect 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)*. Furthermore, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *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 also has concluded that a preliminary draft of a document that is 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.

You assert that release of the information in Exhibit H would disclose internal communications and drafts of documents that have not been finalized or presented. Upon review, we agree that some of the information in Exhibit H consists of preliminary drafts that represent the advice, opinions, and recommendations of Capital Metro personnel. You do not inform us, however, whether the information at issue will be released to the public in its final form. Therefore, provided that the draft documents will be released to the public in their final form, Capital Metro may withhold them under section 552.111 of the Government Code. We also find that some of the remaining information in Exhibit H consists of advice, opinions, and recommendations that reflect the policymaking processes of Capital Metro personnel. We have marked the information that is excepted from disclosure under section 552.111. However, we determine that the remaining information in Exhibit H consists of purely factual information that is severable from advice, opinions, and recommendations. Accordingly, this information may not be withheld under section 552.111.

Next, we note that 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) 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 First Transit explaining why the requested information should not be released. Therefore, we have no basis to conclude that this party has a protected proprietary interest in any of the requested information. *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, that 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 (1990). Accordingly, we conclude that Capital Metro may not withhold any portion of the requested information based on the proprietary interests of First Transit.

We next address the information submitted in Exhibit F, which NABI, Wright, and Veolia assert is subject to section 552.110 of the Government Code. Section 552.110 protects: (1) trade secrets, and (2) commercial or financial information, the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See Gov't Code* § 552.110(a), (b). Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See id.* § 552.110(a). A “trade secret”

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* ORD 232. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

Section 552.110(b) protects “[c]ommercial 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(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.* § 552.110(b); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

Veolia asserts that its proposal information, including its approach to work, references, client lists, profit margins, overhead costs, identity of proposed subcontractors, and proposals to provide Rapid Bus vehicles, is excepted from disclosure under section 552.110. Upon review of Veolia’s arguments and the submitted information, we conclude that Veolia has established that release of its client information and pricing information would cause the company substantial competitive harm. Thus, this information, which we have marked, must be withheld under section 552.110(b) of the Government Code. However, Veolia has failed to establish that release of any of its remaining proposal information would result in substantial competitive harm. Thus, section 552.110(b) is not applicable to this remaining

information, and Capital Metro may not withhold it on Veolia's behalf. We further note that NABI and Wright have not established by specific factual evidence that release of any of the remaining information at issue would cause substantial competitive harm. *See* ORD 661 (for information to be withheld under section 552.110(b), business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative), 319 at 3 (1982) (information relating to organization and personnel, market studies, qualifications, and pricing not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, Capital Metro may not withhold any of the submitted information under section 552.110(b) of the Government Code on behalf of NABI or Wright.

After reviewing the remaining arguments and submitted information, we find that NABI, Wright, and Veolia have failed to demonstrate how any portion of the information at issue meets the definition of a trade secret. *See* ORD 552 at 5-6; *see also* RESTATEMENT OF TORTS § 757 cmt. b (1939) (information is generally not trade secret if it is "simply information as to single or ephemeral events in the conduct of the business" rather than "a process or device for continuous use in the operation of the business"). We therefore determine that no portion of the information at issue is excepted from disclosure under section 552.110(a).

We next note that some of the submitted information is subject to section 552.136 of the Government Code, which provides that "[n]otwithstanding any other provision of this chapter, 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."² Gov't Code § 552.136. Thus, Capital Metro must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.

Finally, Wright asserts, and we acknowledge, that some of the submitted information may be protected by copyright. A custodian of public records must comply with copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* 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. *See* Open Records Decision No. 550 (1990).

²The 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, to the extent the draft documents in Exhibit H will be released to the public in their final form, Capital Metro may withhold them, as well as the information we have marked, under section 552.111 of the Government Code. Capital Metro must withhold the information we have marked under sections 552.110(b) and 552.136 of the Government Code. The remaining submitted information must be released, but any copyrighted information may only be released in accordance with copyright law.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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).

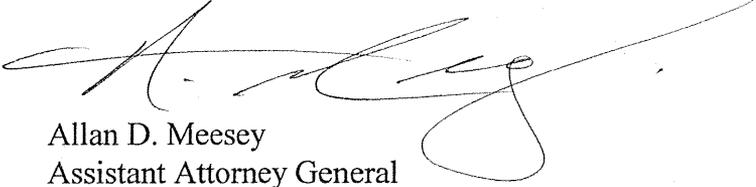
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

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,



Allan D. Meesey
Assistant Attorney General
Open Records Division

ADM/eeg

Ref: ID# 300287

Enc. Submitted documents

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