



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 15, 2009

Ms. Pauline E. Higgins
Senior Vice President & General Counsel
Metropolitan Transit Authority of Harris County
P.O. Box 61429
Houston, Texas 77208-1429

OR2009-06628

Dear Ms. Higgins:

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# 344163.

The Metropolitan Transit Authority of Harris County ("METRO") received a request for information pertaining to METRO's RFP for high occupancy vehicle lanes to high occupancy toll lanes/managed lanes modification project, particularly (1) all technical proposals submitted in response to this RFP, (2) all price proposals submitted in response to this RFP, and (3) all METRO evaluation team scoring documents and evaluation notes. You claim the submitted information is excepted from disclosure under sections 552.104 and 552.111. Furthermore, you state this information may contain proprietary information subject to exception under the Act. Accordingly, you state and have provided documentation showing you notified Raytheon Company ("Raytheon"), TranScore, and Electronic Transaction Consultants ("ETC") of METRO's receipt of the request for information and of each company's right to submit arguments to this office as to why its information should not be released to the requestor. *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 Raytheon and representatives of ETC. We have considered the submitted arguments and reviewed the submitted information.

You seek to withhold the technical and price proposals, Exhibit 3, under section 552.104 of the Government Code. Section 552.104 excepts from required public disclosure

“information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). The purpose of this exception is to protect a governmental body’s interests in competitive bidding situations. See Open Records Decision No. 592 (1991). Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Furthermore, section 552.104 does not protect information relating to competitive bidding situations once a contract has been awarded. See Open Records Decision No. 541 at 4 (1990).

You state Exhibit 3 consists of bid proposals relating to the RFP at issue. You assert releasing the bid proposals at this time would harm METRO because if the contract is not awarded, METRO will have to issue a new RFP. You state releasing the bid proposals prior to awarding the contract would give a competitive advantage to a competitor or other bidder, and argue there is a clear threat of harm to METRO’s ability to obtain the lowest price and most favorable terms commercially possible. Based on your representations and our review of the information at issue, we conclude METRO may withhold Exhibit 3 under section 552.104 of the Government Code until such time as a contract has been executed.¹ See Open Records Decision No. 170 at 2 (1977) (release of bids while negotiation of proposed contract is in progress would necessarily result in an advantage to certain bidders at expense of others and could be detrimental to public interest in contract under negotiation).

You raise section 552.111 of the Government Code for Exhibit 4, which consists of evaluation team scoring documents and evaluation notes. Section 552.111 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. This section 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 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

¹As this ruling is dispositive, we need not address Raytheon’s or ETC’s argument against disclosure for their submitted proposals.

personnel. *Id.*; see also *City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (Gov't Code § 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). Moreover, 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 may be withheld under section 552.111. See Open Records Decision No. 313 at 3 (1982).

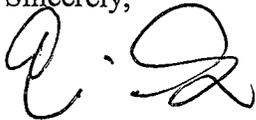
You state Exhibit 4 consists of the evaluation team's scoring documents and evaluation notes. You explain these documents represent METRO's possible decisions on which firm will be awarded the contract, and you argue disclosure of Exhibit 4 would stifle open and frank discussions. Upon review of Exhibit 4, we agree it represents the advice, opinion, and recommendations of METRO concerning matters of policy. Accordingly, we find METRO may withhold Exhibit 4 under section 552.111 of the Government Code.

In summary, METRO may withhold Exhibit 3 under section 552.104 of the Government Code and may withhold Exhibit 4 under section 552.111 of the Government Code.

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 http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Emily Sitton
Assistant Attorney General
Open Records Division

EBS/rl

Ref: ID# 344163

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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