



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

September 3, 2009

Ms. Jakki A. Hansen
Assistant General Counsel
Metropolitan Transit Authority
P.O. Box 61429
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OR2009-12480

Dear Ms. Hansen:

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# 354279.

The Metropolitan Transit Authority of Harris County (the "authority") received a request for information related to request for proposal number 0900014, including the bid summaries, evaluations, and proposals submitted. You claim that the requested information is excepted from disclosure under sections 552.104 and 552.111 of the Government Code. You also state that some of the submitted information may contain proprietary information subject to exception under the Act. Accordingly, you state, and provide documentation showing, that you have notified the interested third parties of the request for information and their right to submit arguments to this office as to why the requested information should not be released.¹ 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 six interested third parties. We have considered the submitted arguments and reviewed the submitted information.

¹The third parties that received notice pursuant to section 552.305 are the following: Accretive Solutions-Houston, L.P.; Bluware, Inc.; Clifton Gunderson, L.L.P.; Protiviti; Securance; Weaver and Tidwell, L.L.P.; Adams Harris; Aporia Solutions; Dell Marketing, L.P.; Deloitte & Touche, L.L.P.; Idea Integration; MFR, P.C.; RNR Consulting; Sogeti USA, L.L.C.; and UHY Advisors Texas, L.L.C.

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 section 552.104 is to protect a governmental body's interests in competitive bidding situations. See Open Records Decision No. 592 (1991). Moreover, 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. Open Records Decision No. 541 at 4 (1990). Section 552.104 does not except information relating to competitive bidding situations once a contract has been awarded. Open Records Decision Nos. 306 (1982), 184 (1978). You state that no contract has been awarded or executed. You further state that release of the bid proposals prior to awarding a contract would give a competitive advantage to a competitor or other bidder, and argue there is a clear threat of harm to the authority's ability to obtain the lowest price and most favorable terms commercially possible. Based on your arguments and our review of the information at issue, we find that release of the proposals would harm the interests of the authority in a particular competitive situation. We therefore conclude that the authority may withhold the submitted proposals at this time pursuant to section 552.104 of the Government Code. However, we note that the authority may no longer withhold these proposals under this exception to disclosure once a contract has been executed and is in effect. See ORD 541 at 5.

You assert that the bid summaries and evaluation team scoring notes are excepted from disclosure under section 552.111 of the Government Code. Section 552.111 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." 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, 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, 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 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).

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

In summary, the authority may withhold the submitted proposals at this time pursuant to section 552.104 of the Government Code and the bid summaries and evaluation team scoring notes under section 552.111 of the Government Code. As our ruling is dispositive, we do not address the remaining arguments.

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, toll free, at (888) 672-6787.

Sincerely,



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Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 354279

Enc. Submitted documents

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