



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 27, 2010

Ms. Lori Fixley Winland  
Locke, Lord, Bissell & Liddell, L.L.P.  
Attorney for Central Texas Regional Mobility Authority  
100 Congress Avenue, Suite 300  
Austin, Texas 78701-2748

OR2010-01268

Dear Ms. Winland:

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# 368493.

The Central Texas Regional Mobility Authority (the "authority"), which you represent, received two requests from the same requestor for several categories of information related to a specified contract. You state that the authority will release some of the responsive information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.104 and 552.111 of the Government Code. Additionally, you state that release of the submitted information may implicate the proprietary interests of LLBL, Aaron Concrete Contractors, L.P., Austin Engineering Co., Inc., The Barr Company, A.I.A., Chasco Contractors, Ltd., FT Woods Construction Services, Inc., Joe Bland Construction, L.P., and RGM Constructors, L.P.; (collectively, the "third parties"). Accordingly, you inform us, and provide documentation showing, that you notified the third parties of the request and of their right to submit arguments to this office as to why their information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have considered the exceptions you claim and reviewed the submitted information. We have also received

and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note the requestor excluded from his request any information that is excepted under the attorney-client privilege. Therefore, this type of information is not responsive to the instant request, and it need not be released to the requestor.

The authority seeks to withhold Exhibits B, C, and D under section 552.104 of the Government Code. Section 552.104 excepts from public disclosure "information that, if released, would give advantage to a competitor or bidder." *Id.* § 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. *See* Open Records Decision No. 541 at 4 (1990). Section 552.104 does not protect information relating to competitive bidding situations once a contract has been awarded and is in effect. *See* Open Records Decision Nos. 306 (1982), 184 (1978).

You state that the authority rejected all bids for the project to which the information at issue pertains and did not award or make a recommendation to award a contract for the project. You also state that the authority's board of directors has determined that it would be in the best interest of the authority to re-advertise the project and seek new bids. You claim that if the information at issue is released, "firms responding to the new invitation for bids for the [p]roject could use that information to their advantage and to the disadvantage of the [authority]." Based on your representations and our review of the submitted information, we conclude that the authority has shown that release of the information at issue will bring about specific harm to the authority's interests in this particular competitive bidding situation. Accordingly, the authority may withhold Exhibits B, C, and D under section 552.104 of the Government Code.<sup>1</sup>

Next, you claim that the remaining information, Exhibit E, is 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." Gov't Code § 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, opinions, and recommendations 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).

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<sup>1</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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, opinions, or recommendations 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).

We note that section 552.111 can encompass communications between a governmental body and a third party. *See* Open Records Decision Nos. 631 at 2 (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body's consultants). When determining if an interagency memorandum is excepted under section 552.111, we must also consider whether the agencies between which the memorandum is passed share a privity of interest or common deliberative process with regard to the policy matter at issue. *See* Open Records Decision No. 561 at 9 (1990). For section 552.111 to apply in such instances, the governmental body must identify the third party and explain the nature of its relationship with the governmental body.

You state the remaining information consists of an intraagency communication that reflects the advice, opinions, and recommendations of authority employees and authority consultants involving authority policymaking matters. Therefore, the authority may withhold Exhibit E under section 552.111 of the Government Code.

In summary, the authority may withhold Exhibits B, C, and D under section 552.104 of the Government Code. The authority may withhold Exhibit E 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](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,



Tamara Wilcox  
Assistant Attorney General  
Open Records Division

TW/rl

Ref: ID# 368493

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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