



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 28, 2011

Mr. Phil Steven Kosub
Water Resources Counsel
San Antonio Water System
P.O. Box 2449
San Antonio, Texas 78298-2449

OR2011-19082

Dear Mr. Kosub:

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# 440634.

The San Antonio Water System (the "system") received a request for any and all documents related to V. V. Water Company, LLC's ("V. V. Water") submission of a proposal to market groundwater to the system, and any leases or agreements for the conveyance of groundwater with landowners in Gonzales County.¹ You state the system has provided the requestor with some of the requested information, including the leases and agreements requested in part two of the request. You claim the remaining requested information is excepted from disclosure under sections 552.101, 552.104, 552.105, 552.111, and 552.113 of the Government Code. Additionally, you believe release of the requested information may implicate the interests of V. V. Water. Accordingly, you state, and provide documentation demonstrating, the system notified V. V. Water of the request for information and of its right to submit arguments stating why its information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and

¹You state the system sought and received clarification from the requestor regarding the request. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request).

explain applicability of exception in certain circumstances). We have reviewed the submitted information and the submitted arguments.

Initially, you state the requested proposal, which you have submitted as Exhibit F, was the subject of previous requests for information, in response to which this office issued Open Records Letter No. 2011-15390 (2011). In that ruling, we concluded the system may withhold the proposal at issue under section 552.104 of the Government Code until a contract is executed. We are unaware of any change in the law, facts, and circumstances on which the previous ruling is based. Therefore, the system may continue to rely on Open Records Letter No. 2011-15390 as a previous determination and withhold the proposal in Exhibit F in accordance with that ruling.² See Gov't Code § 552.301(f); Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). We will now address the arguments made for the information that was not encompassed by the previous ruling.

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 section 552.104 is to protect the purchasing interests of a governmental body in competitive bidding situations where the governmental body wishes to withhold information in order to obtain more favorable offers. See Open Records Decision No. 592 (1991). Section 552.104 protects information from disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. See Open Records Decision No. 463 (1987). Generally, section 552.104 does not except bids from disclosure after bidding is completed and the contract has been executed. See Open Records Decision No. 541 (1990).

You raise section 552.104 for the documents you have submitted as Exhibit G, stating that these documents are directly related to the system's internal review and technical evaluation of the V. V. Water proposal and other proposals received in response to the Request for Competitive Sealed Proposals ("RFCSP"). You explain the system is currently evaluating the bids for the RFCSP at issue and no contract has been awarded. You further explain the system anticipates interviews and discussion with the bidders, which will require the revision of the proposals and further negotiations. Thus, you contend disclosure of the documents in Exhibit G at this time would allow each bidder an advantage that would cause harm to the system. Based on your representations and our review, we conclude the system has demonstrated how release of the documents in Exhibits G(a) - G(g) would harm its interests in a competitive situation. Accordingly, the system may withhold the documents in Exhibits G(a) - G(g) under section 552.104 of the Government Code until a contract is

²As our ruling is dispositive, we need not address the system's or V. V. Water's arguments against the disclosure of this information.

executed.³ However, the remaining three documents in Exhibits G(h) - G(j) consist of V. V. Water's response to the system and the Office of the Attorney General regarding Public Information Act requests for its proposal. We find the system has not demonstrated how release of this information would give advantage to a competitor or bidder. Accordingly, the system may not withhold the documents in Exhibits G(h) - G(j) under section 552.104.

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." 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, 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, 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).

We note section 552.111 can encompass a governmental body's communications with a third-party, including a consultant or other party with which the governmental body shares a common deliberative process or privity of interest. See Open Records Decision No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). In order for

³As our ruling is dispositive, we need not address your remaining arguments against the disclosure of this information.

section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See* ORD 561 at 9. We note that a governmental body does not have a privity of interest or common deliberative process with a private party with which the governmental body is engaged in contract negotiations. *See id.* (section 552.111 not applicable to communication with entity with which governmental body has no privity of interest or common deliberative process).

You also raise section 552.111 for the documents in Exhibits G(h) - G(j). However, as previously noted, these documents consist of communications between V. V. Water and the system, and V. V. Water and the Office of the Attorney General. Accordingly, there is not a privity of interest or common deliberative process with regard to this information. Consequently, the documents in Exhibits G(h) - G(j) are not excepted under the deliberative process privilege and may not be withheld under section 552.111 of the Government Code.

In summary, the system may continue to rely on Open Records Letter No. 2011-15390 as a previous determination and withhold the proposal in Exhibit F in accordance with that ruling. The system may withhold the documents in Exhibits G(a) - G(g) under section 552.104 of the Government Code until a contract is executed. The documents in Exhibits G(h) - G(j) must be released.

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,



Lauren E. Kleine
Assistant Attorney General
Open Records Division

LEK/sdk

Ref: ID# 440634

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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