



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 15, 2012

Ms. Kerri L. Butcher
Interim Chief Counsel
Capital Metropolitan Transportation Authority
2910 East Fifth Street
Austin, Texas 78702

OR2012-07229

Dear Ms. Butcher:

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# 453682.

Capital Metropolitan Transportation Authority (the "authority") received a request for any reports or documents between the authority and IMG Consulting ("IMG") relating to the recent feasibility project. You state you have released some of the requested information. You claim portions of the submitted information are excepted from disclosure under sections 552.104, 552.110, and 552.111 of the Government Code. You state release of the submitted information may implicate IMG's interests. Accordingly, you have notified IMG of the request and of its right to submit arguments to this office as to why the requested 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 note a portion of the submitted information constitutes a completed report subject to section 552.022 of the Government Code, which provides, in pertinent part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108 [of the Government Code.]

Gov't Code § 552.022(a)(1). Thus, this information must be released unless it is either excepted under 552.108 of the Government Code or is confidential under the Act or other law. You do not claim section 552.108. Although you assert some of this information is excepted from disclosure under section 552.111, this section is discretionary and does not make information confidential under the Act. *See* Gov't Code § 552.111; Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, §§ 3-21, 23-26, 28-37, 2012 Tex. Gen. Laws 1229 (providing for "confidentiality" of information under specified exceptions); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 470 at 7 (1987) (governmental body may waive statutory predecessor to section 552.111 deliberative process). Therefore, the authority may not withhold any of the information we have marked that is subject to section 552.022 under section 552.111. However, we will consider your arguments for the information not subject to section 552.022.

Section 552.104 of the Government Code protects 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 state the authority has marked information, provided by IMG, used to establish values for public assets. You state the information was created from IMG's proprietary information and could be used by IMG's competitors to afford them an advantage in future bidding opportunities. However, you do not explain how release of the information you have marked would harm the authority in a particular competitive situation. Accordingly, we find you have failed to demonstrate the applicability of section 552.104 to any of the information at issue, and the authority may not withhold the information you have marked under section 552.104 of the Government Code.

We now address your argument under section 552.111 of the Government Code for the information you have marked that is not subject to section 552.022. Section 552.111 of the

Government Code excepts from disclosure “[a]n 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. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *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).

Section 552.111 also can encompass communications between a governmental body and a third-party, including a consultant or other party with a privity of interest. *See* Open Records Decision Nos. 631 at 2 (1995) (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). For 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.

You state portions of the remaining information constitute correspondence between the authority and IMG, the authority's contractor, relating to the authority's policymaking matters. Based on your representation and our review of the information, we agree the information we have marked consists of advice, opinion, and recommendations regarding the authority's policymaking matters. Therefore, the authority may withhold the information we have marked under section 552.111 of the Government Code. However, we find the remaining information at issue is factual or you have not demonstrated it constitutes advice, opinion, or recommendations on a policymaking matter. Accordingly, the authority may not withhold any of the remaining information at issue under section 552.111 of the Government Code on basis of the deliberative process privilege.

Although the authority argues portions of the submitted information are excepted under section 552.110 of the Government Code, that exception is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address the authority's argument under section 552.110. We note an interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 of the Government Code to submit its reasons, if any, as to why information relating to the party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from IMG. Thus, because IMG has not demonstrated the information relating to it is proprietary for purposes of the Act, the authority may not withhold any of the information on the basis of any interest IMG may have in the information. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

We note section 552.136(b) of the Government Code provides "[n]otwithstanding any other provision of [the Act], 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."¹ Gov't Code § 552.136(b); *see id.* 552.136(a) (defining "access device"). This office has concluded insurance policy numbers constitute access device numbers for purposes of section 552.136. Thus, the authority must withhold the information we have marked pursuant to section 552.136 of the Government Code.

In summary, the authority may withhold the information we have marked under section 552.111 of the Government Code. The authority must withhold the information we have marked under section 552.136 of the Government Code. The remaining information must be released.

¹The 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).

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,



Charles Galindo Jr.
Assistant Attorney General
Open Records Division

CG/em

Ref: ID# 453682

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Jay Kinney
IMG Consulting
304 Park Avenue South
New York, New York 10010
(w/o enclosures)