



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 4, 2013

Ms. Halfreda Anderson-Nelson  
Public Information Officer  
Dallas Area Rapid Transit  
P.O. Box 660163  
Dallas, Texas 75266-0163

OR2013-21041

Dear Ms. Anderson-Nelson:

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# 507401 (DART ORR 10229).

Dallas Area Rapid Transit ("DART") received a request for documents, proposals, evaluations, and the executed contract pertaining to a solicitation for the supply of streetcars. You state you are releasing some of the requested information. You claim that some of the submitted information is excepted from disclosure under section 552.111 of the Government Code. Although you take no position as to whether the remaining submitted information is excepted under the Act, you state release of this information may implicate the proprietary interests of Brookville Equipment Corporation ("Brookville"), CAF USA Inc. ("CAF"), and Inekon Group ("Inekon"). Accordingly, you state DART has notified the companies of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released. *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 Act in certain circumstances).* We have received arguments submitted on behalf of Brookville. We have considered the submitted arguments and reviewed the submitted information.

Initially, you inform us some of the submitted information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2012-18476 (2012). In the prior ruling, this office determined DART may withhold the information at issue under section 552.104 of the Government Code. You inform us the facts and circumstances have changed since the issuance of our previous ruling. In the previous request for a ruling, DART asserted, at the time DART received the request, a contract had

not yet been awarded and executed. In response to the present request, you inform us the contract has been executed. Therefore, as relevant facts have changed since the issuance of Open Records Letter Ruling No. 2012-18476, we agree DART may not rely on that ruling as a previous determination. *See* Open Records Decision No. 673 (2001) (describing the four criteria for a “previous determination”).

Next, we note Brookville’s information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2013-08985 (2013). In that ruling, we determined DART must withhold certain information under sections 552.110 and 552.136 of the Government Code and release the remaining information. As we have no indication that there has been any change in the law, facts, or circumstances on which the previous ruling was based, we conclude DART must rely on Open Records Letter No. 2013-08985 as a previous determination and withhold or release Brookville’s information in accordance with that ruling. *See id.* However, as the remaining information is not encompassed by this previous ruling, we will address whether any of the remaining information must be withheld under the Act.

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 this privilege is to protect advice, opinion, and recommendation in the decisional process and 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 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. 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 also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

You state Attachment C consists of DART’s evaluations of the responses to the specified solicitation. You explain evaluation of the responses is an internal function of DART’s

procurement department. You state the evaluation materials provide opinions and recommendations concerning each response and contain information regarding the respondents' strengths and weaknesses. You contend the release of this information would reveal discussions of DART's internal policies, procedures, and procurement process and prevent open discussion of such matters by DART evaluators. Based on your representations and our review, we conclude DART may withhold Attachment C in its entirety under section 552.111 of the Government Code.

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from CAF or Inekon explaining why their submitted information should not be released. Therefore, we have no basis to conclude CAF or Inekon has a protected proprietary interest in the remaining information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case information is trade secret), 542 at 3. Accordingly, DART may not withhold the remaining information on the basis of any proprietary interest CAF or Inekon may have in the information.

We note some of the remaining information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, DART must rely on Open Records Letter No. 2013-08985 as a previous determination and withhold or release Brookville's information in accordance with that ruling. DART may withhold Attachment C in its entirety under section 552.111 of the Government Code. DART must release the remaining information. However, any information subject to copyright law may only be released in accordance with copyright law.

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.texasattorneygeneral.gov/open/>

[orl\\_ruling\\_info.shtml](#), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read 'Sarah Casterline', with a long horizontal line extending to the right.

Sarah Casterline  
Assistant Attorney General  
Open Records Division

SEC/tch

Ref: ID# 507401

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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