



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 24, 2016

Ms. Cynthia Tynan
Public Information Coordinator
Office of the General Counsel
The University of Texas System
201 West 7th Street, Suite 600
Austin, Texas 78701-2901

OR2016-19111

Dear Ms. Tynan:

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# 623910 (OGC# 169963).

The University of Texas at Arlington (the "university") received two requests from the same requestor for information related to a specified request for proposal. You state you will release some information to the requestor. You claim a portion of the submitted information is excepted from disclosure under section 552.111 of the Government Code. You also state release of some of the information may implicate the proprietary interests of Navetta Design ("Navetta"), The Lowe Group ("Lowe"), and The Wenger Corporation ("Wenger"). Accordingly, you state, and provide documentation showing, you notified these third parties of the request for information and of their right to submit arguments to this office as to why the 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 the Act in certain circumstances). We have received comments from Navetta. We have also received comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted information.

Initially, we must address the university's obligations under section 552.301 of the Government Code, which prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request.

See id. § 552.301(b). Section 552.301(e) requires the governmental body to submit to the attorney general, not later than the fifteenth business day after the date of the receipt of the request: (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples if the information is voluminous. *Id.* § 552.301(e). You state the university received the first request for information pertaining to the specified proposals on April 19, 2016. We note, and the university acknowledges, it did not comply with section 552.301 of the Government Code in requesting this decision for the first request. *See id.* § 552.301(b), (e). A governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption the requested information is public and must be released unless a governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). A compelling reason generally exists when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1983). In this instance, because third party interests are at stake for the information at issue, we will address the submitted arguments against disclosure of this information.

We also note the requestor asserts the university did not comply with the procedural obligations under section 552.301 of the Government Code in requesting a decision from this office for the second request. *See* Gov't Code § 552.301(b), (e). The university states it received the second request for information on May 16, 2016. We note the second request seeks the same information as the first request, but also includes a request for scoring information. The university states, and submits documentation demonstrating, it sought clarification of the request on the same day. The university states, and submits documentation showing, it received clarification from the requestor on June 7, 2016. *See id.* § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (if governmental entity, acting in good faith, requests clarification of unclear or over-broad request, ten-day period to request attorney general ruling is measured from date request is clarified). Accordingly, the university's ten-business-day and fifteen-business day deadlines were June 21, 2016 and June 28, 2016, respectively. The university hand-delivered to our office the information required by sections 552.301(b) and 552.301(e) on June 21, 2016. Therefore, we conclude the university complied with the requirements of section 552.301 of the Government Code in requesting this ruling for the scoring information in the second request for information. Accordingly, we will address the university's argument against disclosure of this information.

Next, we note 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 Lowe or Wenger explaining why the submitted information should not be released. Therefore, we have no basis to conclude these third parties have a protected proprietary interest in the submitted 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, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the university may not withhold any of the information at issue on the basis of any proprietary interest Lowe or Wenger may have in it.

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, writ ref'd n.r.e.); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, 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, 364 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions 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 severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152, 157 (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, section 552.111 protects the factual information. *See* Open Records Decision No. 313 at 3 (1982).

You state some of the submitted information consists of evaluation score sheets that “constitut[e] a communication between employees of the [u]niversity reflecting their deliberative and policymaking processes in ranking the responsive bid proposals.” Additionally, you contend the disclosure of this information “would hinder the decision-making process of the [u]niversity.” Based on your representations and our review of the information at issue, we find you have demonstrated the information at issue consists of

advice, opinions, or recommendations on the policymaking matters of the university. Thus, the university may withhold the information you have marked under section 552.111 of the Government Code.¹

Section 552.104(a) of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). A private third party may invoke this exception. *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). The “test under section 552.104 is whether knowing another bidder’s [or competitor’s information] would be an advantage, not whether it would be a decisive advantage.” *Id.* at 841. Navetta states it has competitors. In addition, Navetta states release of its information would reveal proprietary information to a competitor and cause Navetta substantial competitive harm in future bids. After review of the information at issue and consideration of the arguments, we find Navetta has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the university may withhold Navetta’s information under section 552.104(a) of the Government Code.

In summary, the university may withhold the information you have marked under section 552.111 of the Government Code. The university may withhold Navetta’s information under section 552.104(a). The remaining information 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.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,



Kavid Singh
Assistant Attorney General
Open Records Division

KVS/bhf

¹As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

Ref: ID# 623910

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Parties
(w/o enclosures)