



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 9, 2016

Ms. Hadassah Schloss
Director
Open Government
Texas General Land Office
P.O. Box 12873
Austin, Texas 78711-2873

OR2016-23159A

Dear Ms. Schloss:

This office issued Open Records Letter No. 2016-23159 (2016) on October 14, 2016. The Texas General Land Office (the "GLO") now informs this office some of the information in that ruling was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2016-21444 (2016). Therefore, we have determined Open Records Letter No. 2016-23159 should be corrected. *See* Gov't Code §§ 552.306, .352. Accordingly, we hereby withdraw the prior ruling. This decision is substituted for Open Records Letter No. 2016-23159 and serves as the correct ruling. *See generally id.* § 552.011 (Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act (the "Act"), chapter 552 of the Government Code). This ruling was assigned ID# 640471.

The GLO received three requests from the two requestors for the itemized bid results for two specified solicitations.¹ The GLO states it is withholding or releasing information pertaining to Apollo Environmental Strategies, Inc., Bertucci Contracting Co., and Shoreline

¹The GLO sought and received clarification from the second requestor of the information he requested. *See* Gov't Code § 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).

Foundation, Inc. in accordance with Open Records Letter No. 2016-21444.² The GLO claims some of the submitted information is excepted from disclosure under sections 552.104 and 552.111 of the Government Code. The GLO does not take a position as to whether the remaining information is excepted from disclosure under the Act. However, the GLO states, and provides documentation showing, it notified Derrick Construction Company, Inc. (“Derrick”) of the GLO’s receipt of the requests for information and of its right to submit arguments to this office as to why the requested information should not be released.³ See Gov’t Code § 552.305(d); see also Open Records Decision No. 542 at 3 (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 Derrick objecting to the release of some of the information at issue under section 552.104 of the Government Code. We have considered the claimed exceptions and reviewed the submitted information.

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). In considering whether a private third party may assert this exception, the supreme court reasoned because section 552.305(a) of the Government Code includes section 552.104 as an example of an exception that involves a third party’s property interest, the court concluded a private third party may invoke this exception. *Boeing Co. v. Paxton*, 466 S.W.3d 831, 841 (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.* Derrick states it has competitors. In addition, Derrick states release of its information, which is located in Attachments C and D, would cause it substantial competitive harm and seeks to withhold the terms of a contract. For many years, this office concluded the terms of a contract and especially the pricing of a winning bidder are public and generally not excepted from disclosure. Gov’t Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision Nos. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency), 514 (1988) (public has interest in knowing prices charged by government contractors), 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). See generally Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). However, now, pursuant to the *Boeing* decision, section 552.104 is not limited to only ongoing competitive

²See 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).

³We note the GLO does not inform us the information pertaining to Derrick was at issue in Open Records Letter No. 2016-21444.

situations, and a third party need only show release of its competitively sensitive information would give an advantage to a competitor even after a contract is executed. *Boeing*, 466 S.W.3d at 831, 839. After review of the information at issue and consideration of the arguments, we find Derrick has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the GLO may withhold Attachments C and D under section 552.104(a) of the Government Code.⁴

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, 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 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).

The GLO asserts the information it has marked under section 552.111 consists of advice, opinions, and recommendations of the GLO relating to the re-bid of a particular project. Upon review, we find the GLO has established the deliberative process privilege is

⁴As our ruling is dispositive, we do not address the arguments of the GLO to withhold this information.

applicable to this information. Therefore, the GLO may withhold the information it has marked under section 552.111 of the Government Code.

To conclude, the GLO may continue to rely on Open Records Letter No. 2016-21444 as a previous determination and withhold or release the information pertaining to Apollo Environmental Strategies, Inc., Bertucci Contracting Co., and Shoreline Foundation, Inc. in accordance with that ruling. The GLO may withhold Attachments C and D under section 552.104(a) of the Government Code. The GLO may also withhold the information it has marked under section 552.111 of the Government Code. The GLO must release the remaining information at issue.

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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/bw

Ref: ID# 640471

c: 2 Requestors
(w/o enclosures)

4 Third Parties
(w/o enclosures)

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