



May 21, 2001

Ms. Mary D. Marquez
Assistant to Chief Counsel
Capitol Metropolitan Transportation Authority
2910 East Fifth Street
Austin, Texas 78702

OR2001-2087

Dear Ms. Marquez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 147490.

The Capitol Metropolitan Transportation Authority (the "authority") received requests for all documents related to RFP No. 2405. The authority initially asserted the applicability of sections 552.103, 552.104, 552.106, 552.110, and 552.111 of the Government Code. However, in subsequent correspondence to this office, the authority withdrew the section 552.103, 552.104, and 552.106 assertions and states that except for the information which implicates third party interests and certain documents of the authority, the responsive information will be released. You have submitted one document, marked as Exhibit O, which you represent comprises a representative sample of the documents of the authority that the authority seeks to withhold.¹ You assert that this information is excepted from disclosure under section 552.111 of the Government Code. You also assert that some of the responsive information held by the authority that was submitted by a third party may be excepted from disclosure under section 552.110 of the Government Code. Pursuant to section 552.305 of the Government Code, the authority notified the third parties whose information is at issue.

¹We assume that the "representative sample" contained in Exhibit O is truly representative of the documents of the authority as a whole that the authority seeks to withhold under section 552.111. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not consider the applicability of section 552.111 to any other requested records to the extent that those records contain substantially different types of information than that submitted to this office and contained in Exhibit O.

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 that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). The following third parties submitted comment to this office in response to the section 552.305 notices: Austin Area Terminal Railroad, Inc. and Trans-Global Solutions, Inc. (collectively "TGS"), Healey Railroad Corporation ("Healey"), Rio Grande Pacific Corporation ("Rio Grande"), and Rock & Rail, Inc. ("R & R"). In addition, pursuant to section 552.304 of the Government Code, the following third parties submitted comment to this office pertaining to the submitted arguments and asserted exceptions: Blacklands Railroad ("BLR"), Healey, and Rio Grande. We have considered the submitted comments and arguments, the asserted exceptions, and we have reviewed the submitted information.

Initially, we must address a procedural matter. With regard to the information responsive to the requests that the authority obtained from third parties, you have submitted for our review as Exhibit N only information that Healey provided to the authority. You claim that Healey's information comprises a representative sample of the information provided to the authority by the remaining third parties. See Gov't Code § 552.301(e)(1)(D) (requiring governmental body to submit to this office the specific information requested, or representative samples if the information is voluminous). You do not explain, however, the basis upon which the authority determined that Healey's information is truly representative of the information the authority obtained from the other third parties. Especially where, as here, information the authority obtained from multiple third parties is claimed to be the proprietary information of each third party, we fail to see how one third party's information could be truly representative of the information of the other third parties. Thus, with respect to the third party information, section 552.301(e)(1)(D) required the authority to submit to this office for review either all of the information at issue, or if the information is voluminous and repetitive, a representative sample *from each third party* whose information is at issue. The authority therefore did not properly comply with section 552.301(e)(1)(D) because the authority failed to submit to this office any of the responsive information that the authority obtained from the remaining third parties.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public "and must be released unless there is a compelling reason to withhold the information." See also *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 Gov't Code § 552.302); Open Records Decision No. 319 (1982). Generally, a compelling reason sufficient to overcome the section 552.302 presumption of openness is demonstrated only where the information is confidential by law or its release implicates third party interests. See, e.g., Open Records Decision No. 150 (1977). Section 552.110 protects

the interests of third parties by excepting from disclosure two types of information: (1) trade secrets, and (2) certain commercial or financial information. *See* Gov't Code § 552.110(a), (b). However, in the absence of any of the remaining third party information, we are unable to evaluate the merits of the section 552.110 assertion and arguments made by third parties other than Healey. Pursuant to section 552.302, we therefore have no choice but to order the release of the responsive third party information that was not submitted to this office.² We next address Healey's information which, as noted above, was submitted to this office in accordance with section 552.301(e)(1)(D).

Healey's comments assert sections 552.101, 552.104, 552.110, and 552.128 of the Government Code in support of the withholding of "financial statements submitted [by Healey] in connection with its proposal."

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Healey makes no arguments in support of this exception, nor are we aware of any provision of law that makes confidential the financial statements at issue. We therefore conclude this information is not excepted from disclosure under section 552.101.

Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Section 552.104, however, protects the interests of governmental bodies, not third parties. Open Records Decision No. 592 (1991). As the authority withdrew its section 552.104 assertion, we find that section 552.104 is not applicable to the financial statements at issue. *Id.* (Gov't Code § 552.104 may be waived by governmental body). Therefore, the financial statements at issue may not be withheld under section 552.104.

Section 552.128 applies to information "submitted by a potential vendor or contractor to a governmental body in connection with an application for certification as a historically underutilized or disadvantaged business under a local, state, or federal certification program[.]" Gov't Code § 552.128(a). We have no indication that any of the information at issue was submitted to the authority in connection with such a program. Healey quotes language in section 552.128(c), but fails to note that this provision states in pertinent part that information submitted "in connection with a specific proposed contractual relationship . . . is subject to required disclosure, excepted from required disclosure, or confidential in accordance with other law." Thus, the information at issue may not be withheld under section 552.128.

²We note that section 552.352 of the Government Code prohibits the authority from releasing confidential information. *See* Gov't Code § 552.352. However, because the information at issue was not submitted to this office, we have no basis for finding it confidential. If the authority believes the information is confidential and cannot lawfully be released, the authority must challenge this decision in court as outlined below.

As noted above, section 552.110 protects the interests of third parties by excepting from disclosure two types of information: (1) trade secrets, and (2) certain commercial or financial information. *See* Gov't Code § 552.110(a), (b). As to the trade secret prong of section 552.110, this office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). However, Healey provided no comments in support of trade secret, and thus has not established a *prima facie* case for this exception. To prevent disclosure of commercial or financial information pursuant to section 552.110(b), the party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure. However, Healey's comments amount to no more than conclusory or generalized allegations and, thus, do not demonstrate the applicability of section 552.110(b) to the information at issue. Accordingly, the information at issue may not be withheld under section 552.110. Accordingly, we conclude that none of Healey's information is excepted from disclosure and this information must therefore be released, to the extent it is responsive to each request.³

Finally, we address the authority's section 552.111 assertion for its information.⁴ Section 552.111 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." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, No. 03-00-00219-CV, 2001 WL 23169, at * 5 (Tex. App.--Jan. 11, 2001, no pet. h.). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.* at * 6-7; ORD 615 at 4-5. You do not explain how the document contained in Exhibit O relates to any policymaking by the authority. Upon review of the information at issue, we find that it is not excepted from disclosure by section 552.111. Accordingly, this information must be released.

³We note that Healey alleges that BLR does not seek disclosure of Healey's financial statements.

⁴As noted above, you advise the submitted Exhibit O is a representative sample of the authority's information.

In summary, pursuant to section 552.302, the authority must release the responsive third party information that was not submitted to this office for review. Because the submitted third party information of Healey has not been demonstrated to be excepted from disclosure, this information must also be released to the extent it is responsive to each request. Finally, as the authority has not demonstrated that any of its information is excepted from disclosure under section 552.111, the authority's information must also be released to the extent it is responsive to each request.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

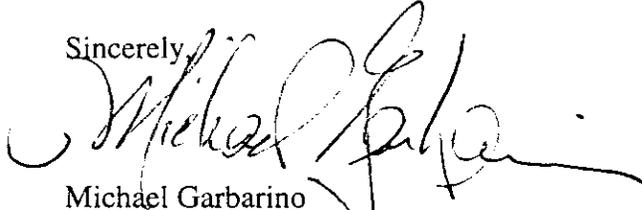
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Garbarino". The signature is fluid and cursive, with a large initial "M" and a long, sweeping underline.

Michael Garbarino
Assistant Attorney General
Open Records Division

MG/seg

Ref: ID# 147490

Encl: Submitted documents

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