



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 16, 2014

Mr. Ray Rodriguez
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P.O. Box 839966
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OR2014-22849

Dear Mr. Rodriguez:

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# 545156 (COSA File Nos. W031456-083114 & W032053-091114 & W034054-101014).

The City of San Antonio (the "city") received three requests for information related to the bid package the city submitted to Tesla Motors ("Tesla"). You state you will provide some information to the requestors. You claim the remaining requested information is excepted from disclosure under sections 552.105, 552.106, 552.111, and 552.131 of the Government Code. You also state you notified the City Public Service Board d/b/a CPS Energy ("CPS") of the requests and of its right to submit arguments to this office explaining why its information should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have received arguments from CPS. We have considered the submitted arguments and reviewed the submitted representative sample of information.¹

Section 552.104 of the Government Code excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. This exception protects a governmental body's interests in connection with

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

competitive bidding and in certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). This office has held that a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the “competitive advantage” aspect of this exception if it can satisfy two criteria. *See id.* First, the governmental body must demonstrate that it has specific marketplace interests. *See id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *See id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body’s legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body’s demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *See id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988). Furthermore, section 552.104 generally is not applicable once a competitive bidding situation has concluded and a contract has been executed. *See* Open Records Decision No. 541 (1990).

CPS asserts it has a specific marketplace interest in the procurement of clean energy and clean energy related products and services. CPS states the information at issue involves negotiations involved in attracting a clean energy company to the San Antonio area in an effort to continue CPS’s journey of becoming a leader in the clean energy field. CPS asserts in this case, the city and CPS were competing against other cities and states in an attempt to partner with clean energy projects. Based on its representations, we find CPS has demonstrated it has specific marketplace interests. *See* ORD 593 at 3.

CPS states the information at issue consists of confidential information, which CPS asserts its competitors can use to undermine its efforts to compete in attracting clean energy companies to the city. CPS explains release of the information at issue would give competitors an unfair advantage because the information would reveal its negotiating strategies and pricing information, thus allowing CPS’s competitors to offer more favorable incentives and terms. Upon review, we conclude CPS has shown that release of its information would cause specific harm to CPS’s marketplace interests. *See id.* Therefore, we conclude the city may withhold CPS’s information, which we have marked, under section 552.104 of the Government Code.

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).

Section 552.111 can also encompass communications between a governmental body and a third party, including a consultant or other party, with which the governmental body establishes it has a privity of interest or common deliberative process. See Open Records Decision No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). 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.

The city argues the requested information consists of communications that are excepted from disclosure under the deliberative process privilege. You state the requested documents include discussions and draft documents that reveal the advice, opinions, and recommendations supporting the city's policymaking process. The city contends the requested information pertains to strategies developed to attract Tesla to the city, and to presentations made to the city's governing board in relation to the pursuit of the Tesla contract. Based on your representations and our review, we find the city has demonstrated the applicability of the deliberative process privilege to portions of the submitted information, which we have marked. Thus, the city may withhold the information we

marked under section 552.111 of the Government Code.² However, we find some of the remaining information is purely factual information. Further, some of the remaining information was communicated with individuals or third parties with whom you have not demonstrated the city shares a privity of interest or common deliberative process. Thus, we find you have failed to demonstrate how the remaining information is excepted under section 552.111. Accordingly, the city may not withhold any of the remaining information under section 552.111 of the Government Code.

Section 552.106 of the Government Code excepts from disclosure “[a] draft or working paper involved in the preparation of proposed legislation.” Gov’t Code § 552.106(a). Section 552.106 of the Government Code resembles section 552.111 in that both exceptions protect advice, opinion, and recommendation on policy matters in order to encourage frank discussion during the policymaking process. *See* Open Records Decision No. 460 at 2 (1987). However, section 552.106 applies specifically to the legislative process and is narrower than section 552.111. *Id.* Therefore, section 552.106 is applicable only to the policy judgments, recommendations, and proposals of persons who are involved in the preparation of proposed legislation and who have an official responsibility to provide such information to members of the legislative body. *Id.* Section 552.106 does not protect purely factual information from public disclosure. *See id.*; *see also* Open Records Decision No. 344 at 3-4 (1982) (for purposes of statutory predecessor, factual information prepared by State Property Tax Board did not reflect policy judgments, recommendations, or proposals concerning drafting of legislation). Upon review of your arguments, we find you have not demonstrated the remaining information consists of policy judgments, recommendations, or proposals pertaining to the preparation of proposed legislation. Accordingly, the city may not withhold the remaining information under section 552.106 of the Government Code.

Section 552.105 of the Government Code excepts from disclosure information relating to “appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.” Gov’t Code § 552.105(2). Section 552.105 is designed to protect a governmental body’s planning and negotiating position with respect to particular transactions. Open Records Decision Nos. 564 at 2 (1990), 357 (1982), 310 (1982). Information that is excepted from disclosure under section 552.105 that pertains to such negotiations may be excepted from disclosure so long as the transaction relating to that information is not complete. *See* ORD 310. But the protection offered by section 552.105 is not limited solely to transactions not yet finalized. This office has concluded that information about specific parcels of land obtained in advance of other parcels to be acquired for the same project may be withheld where release of the information would harm the governmental body’s negotiating position with respect to the remaining parcels. *See* ORD 564 at 2. A governmental body may withhold information “which, if released, would impair or tend to impair [its] ‘planning and negotiating position in regard to particular transactions.’” ORD 357 at 3 (quoting Open Records Decision No. 222 (1979)). The

²As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

question of whether specific information, if publicly released, would impair a governmental body's planning and negotiating position with regard to particular transactions is a question of fact. Accordingly, this office will accept a governmental body's good-faith determination in this regard, unless the contrary is clearly shown as a matter of law. *See* ORD 564.

The city states the information at issue relates to real property that was selected due to its meeting the criteria for Tesla's giga-factory. The city further states the location of the property has never been publicly disclosed, and that it has made a good-faith determination that the release of this information would harm the city's planning and negotiating position to secure the property for a public purpose. Based on these representations and our review, we conclude the city may withhold the information we have marked under section 552.105 of the Government Code.³ However, we find no portion of the remaining information pertains to the location, appraisal, or purchase price of real or personal property for a public purpose. Accordingly, the city may not withhold any of the remaining information under section 552.105 of the Government Code.

Section 552.131 of the Government Code provides:

(a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

(1) a trade secret of the business prospect; or

(2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].

Gov't Code § 552.131(a), (b). Section 552.131(a) only protects the proprietary interests of third parties that have provided information to governmental bodies, not the interests of governmental bodies themselves. In this instance, no third party has made a demonstration that any of the remaining information constitutes a trade secret or that release of any of the remaining information would cause a third party substantial competitive harm. *See generally*

³As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

Open Records Decision Nos. 661 at 5–6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm), 552 at 5 (1990) (attorney general will accept private person’s claim under section 552.110(a) if person establishes *prima facie* case for trade secret exception, and no one submits argument that rebuts claim as matter of law). Accordingly, we conclude the city may not withhold any of the remaining information under section 552.131(a) of the Government Code.

Section 552.131(b) protects information about a financial or other incentive that is being offered to a business prospect by a governmental body or another person. Gov’t Code § 552.131(b). The city states the information at issue relates to negotiations between the city, other local governmental entities, and Tesla in regard to incentives to be rendered in connection with the development of a factory within city limits. You state the city has not reached an agreement with Tesla. Upon review, we find the city has demonstrated the applicability of section 552.131(b) to some of the information at issue, which we have marked. The city may withhold the information we marked under section 552.131(b). However, upon review, we find you have not demonstrated how any portion of the remaining information reveals financial or other incentives that are being offered to a business prospect. Thus, we conclude the city may not withhold any of the remaining information under section 552.131(b) of the Government Code.

Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c).⁴ *Id.* § 552.137(a)-(c). The e-mail address at issue is not excluded by subsection (c). Therefore, the city must withhold the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner consents to its release.

We note some of the remaining information appears to 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, the city may withhold the information we have marked under section 552.104 of the Government Code. The city may withhold the information we have marked under

⁴The 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).

section 552.111 of the Government Code. The city may withhold the information we have marked under section 552.105 of the Government Code. The city may withhold the information we have marked under section 552.131(b) of the Government Code. The city must withhold the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner consents to its release. The city must release the remaining information; however, the city may release any information subject to copyright only 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,



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Open Records Division

RA/dls

Ref: ID# 545156

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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