



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 7, 2015

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

OR2015-25579

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# 589505 (ORR #W000165-091015).

Dallas Area Rapid Transit ("DART") received a request for the winning proposal submitted for a specified request for proposals and scoring documents for each proposal submitted for that request for proposals.¹ You claim some of the submitted information is excepted from disclosure under section 552.111 of the Government Code.² You also state you notified Buck Consultants, LLC ("Buck"); Foster & Foster ("Foster"); Gabriel, Roeder, Smith & Company ("Gabriel"); and Milliman 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 the Act in certain circumstances). We have received comments from Gabriel and Milliman. We have considered the submitted arguments and reviewed the submitted information.

¹You state DART sought and received clarification of the request for information. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

²Although you also raise sections 552.101 through 552.110 and 552.112 through 552.131 of the Government Code, you make no arguments to support these exceptions. Therefore, we assume you have withdrawn your claim that these sections apply to the submitted information. *See* Gov't Code §§ 552.301, .302.

Initially, we note Buck's, Gabriel's, and Milliman's proposals are not responsive to the present request because none of these were the winning proposal for the specified request for proposals. This ruling does not address the public availability of the non-responsive information, which we have marked, and DART need not release it in response to this request.³

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this ruling, we have not received comments from Foster. Thus, we have no basis to conclude Foster has a protected proprietary interest in any of the responsive information. *See id.* § 552.110(a)-(b); 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, DART may not withhold any of the responsive information on the basis of any proprietary interest Foster may have in the information.

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 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).

³As we are able to make this determination, we need not address Gabriel's and Milliman's arguments against disclosure of this information.

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 (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, the factual information also may be withheld under section 552.111. See Open Records Decision No. 313 at 3 (1982).

You seek to withhold the information you have indicated under section 552.111 of the Government Code. You state the information at issue consists of intra-agency communications in DART's Human Resources Department as part of the selection of bidders in the request for proposals at issue. You explain the information at issue consists of source evaluation committee materials that provide bidder evaluations, guidelines, and recommendations for evaluating bidders, scoring recommendations, and opinions by DART evaluators regarding submitted bids. Upon review, we find DART may withhold the information you have indicated under section 552.111 of the Government Code.

In summary, DART may withhold the information you have indicated under section 552.111 of the Government Code. DART must release the remaining responsive information.

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 'Meredith L. Coffman', with a long horizontal line extending to the right.

Meredith L. Coffman
Assistant Attorney General
Open Records Division

MLC/dls

Ref: ID# 589505

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. David Kent
Director
Buck Consultants, LLC
A Xerox Company
14911 Quorum Drive, Suite 200
Dallas, Texas 75254
(w/o enclosures)

Mr. Bradley R. Heinrichs
CEO
Foster & Foster
13420 Parker Commons Boulevard, Suite 104
Fort Myers, Florida 33912
(w/o enclosures)

Ms. Christine Scheer
COFO
Gabriel, Roeder, Smith & Company
One Towne Square, Suite 800
Southfield, Michigan 48076
(w/o enclosures)

Ms. Mary C. Clare
Milliman
Chief Legal Officer
1301 Fifth Avenue, Suite 3800
Seattle, Washington 98101-2605
(w/o enclosures)