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ATTORNEY GENERAL OF TEXAS

March 1, 2016

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

OR2016-04920

Dear Ms. Schloss:

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# 600372.

The Texas General Land Office (the "GLO") received a request for information related to contracts between the GLO and three specified corporations; a list of all retail customers under the State Power Program (the "program"); a list of all taxes imposed on electricity sold under the program; all correspondence and documents related to the GLO's solicitation of energy providers for the program; all correspondence and documents related to the GLO's profits under the program; and all correspondence and documents related to the authorized vendor's profits under the program. You state you released some information. You state you have no information responsive to a portion of the request.¹ You claim the submitted information is excepted from disclosure under sections 552.104, 552.110, 552.111, and 552.136 of the Government Code.² You also state release of the submitted information may implicate the proprietary interests of Cavallo Energy Texas ("Cavallo") and Direct

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

²Although you do not raise section 552.136 of the Government Code in your brief, we understand you to raise this exception based on your markings.

Energy (“Direct”). Accordingly, you state, and provide documentation showing, you notified Cavallo and Direct 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 Cavallo. We have reviewed the submitted information and the submitted arguments.

Initially, 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 Direct explaining why the submitted information should not be released. Therefore, we have no basis to conclude Direct has 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 GLO may not withhold the submitted information on the basis of any proprietary interest Direct may have in the information.

Section 552.104(a) of the Government Code exempts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). 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.” *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). The GLO states it has specific marketplace interests in the information at issue because the GLO is competing in the electrical energy marketplace. In addition, the GLO states the information it has marked contains its business strategies, pricing formulas and structures, and customer information. The GLO states release of this information would cause specific harm to the GLO and place it at a competitive disadvantage when making future bids in the marketplace. After review of the information at issue and consideration of the arguments, we find the GLO has established the release of the information it has marked would give advantage to a competitor or bidder. Thus, we conclude the GLO may withhold the marked information under section 552.104(a) of the Government Code.³

Section 552.111 of the Government Code exempts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation

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

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).

Further, section 552.111 does not protect facts and written observations of facts and events that are 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 state the information at issue consists of a forecast of the program and details how much energy volume the GLO expects to sell through 2019. You state this information was created by GLO staff who have knowledge of the electric industry, and this information will be used to establish new policies regarding the marketing and bidding of the program. You explain this information is reflective of the deliberative process by which the GLO’s executive management gauges the program’s success. Thus, you state the information at issue consists of the advice, opinions, and recommendations of GLO staff pertaining to the policymaking functions of the GLO. Based on your representations and our review of the information at issue, we find the GLO has demonstrated portions of the information at issue, which we have marked, consist of advice, opinions, or recommendations on the policymaking matters of the GLO. Thus, the GLO may withhold the marked information under section 552.111 of the Government Code. Upon review, however, we find the remaining information at issue is general administrative and purely factual information or does not pertain to policymaking. Thus, we find you have failed to show the remaining information at issue consists of internal

communications containing advice, opinions, or recommendations on the policymaking matters of the GLO. Accordingly, the GLO may not withhold the remaining information at issue under section 552.111 of the Government Code.

We understand you to claim the user identification, password, and utility identification number you have marked are excepted from disclosure under section 552.136 of the Government Code. However, we note this information is subject to section 552.139 of the Government Code.⁴ Section 552.139 of the Government Code provides, in part:

(a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

Gov't Code § 552.139(a). Section 2059.055 of the Government Code provides in pertinent part:

(b) Network security information is confidential under this section if the information is:

(1) related to passwords, personal identification numbers, access codes, encryption, or other components of the security system of a state agency[.]

Id. § 2059.055(b). We understand the user identification, password, and utility identification number you have marked are used by the GLO to access the U.S. Energy Information Administration's secure computer database. Upon review, we find the user identification, password, and utility identification number relate to computer network security. Accordingly, the GLO must withhold this information under section 552.139 of the Government Code.

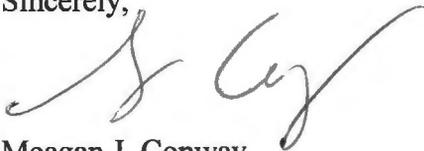
In summary, the GLO may withhold the information you marked under section 552.104(a) of the Government Code. The GLO may withhold the information we have marked under section 552.111 of the Government Code. The GLO must withhold the user identification, password, and utility identification number under section 552.139 of the Government Code. The GLO must release the remaining information.

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).

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,



Meagan J. Conway
Assistant Attorney General
Open Records Division

MJC/akg

Ref: ID# 600372

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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