



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 24, 1997

Mr. Charles H. Hundley
Superintendent of Schools
Abilene Independent School District
P.O. Box 981
Abilene, Texas 79604

OR97-0156

Dear Mr. Hundley:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 103138.

The Abilene Independent School District (the "district") received a request for the proposals received by the district from Abilene Regional Medical Center and Hendrick Medical Center to provide health care services to employees of the district for the 1996-1997 school year, as well as any minutes or correspondence (including consultant reports and memoranda) concerning the selection of Hendrick Medical Center as the district's PPO hospital. You claim that the requested information is excepted from disclosure under sections 552.101, 552.104, 552.110, and 552.111 of the Government Code.

Pursuant to section 552.305 of the Government Code, this office informed Hendrick Medical Center ("Hendrick") of the request and of its obligation to submit to this office arguments as why any claimed exceptions to disclosure apply to its information. Hendrick responded, claiming that sections 552.101, 552.104, 552.110, and 552.111 of the Government Code except its information from required public disclosure.

Section 552.104 excepts information that, if released, would give advantage to a competitor or bidder. The purpose of this exception is to protect the interests of a governmental body in competitive bidding situations. See Open Records Decision No. 592 (1991). Section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. *Id.* at 8-9. Consequently, this exception is not available to Hendrick. As the exception was developed to protect a governmental body's interests, that body may waive section 552.104. See Open Records Decision No. 592 (1991) at 8.

Chapter 552 of the Government Code imposes a duty on governmental bodies seeking an open records decision pursuant to section 552.301 to raise any claimed exceptions to disclosure within ten days after the governmental body's receipt of the request for information. Gov't Code § 552.301(a). The time limitation found in section 552.301 is an express legislative recognition of the importance of having public

information produced in a timely fashion. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ). You state that the district received the request for information on October 18, 1996. However, the district did not raise the section 552.104 exception until November 1, 1996, more than ten days after the district's receipt of the request for information. As this exception was not timely raised, the district has waived that exception. See Open Records Decision No. 592 (1991) at 8.

Section 552.111 excepts "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. An agency's policymaking functions, however, 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. Open Records Decision No. 615 (1993) at 5-6. In addition, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5.

We have reviewed Exhibit H and conclude that it relates to an internal administrative matter: the selection of a health-care provider for the district's employees. Therefore, the district may not withhold Exhibit H under section 552.111 of the Government Code.

Section 552.110 excepts from disclosure trade secrets or commercial or financial information obtained from a person and confidential by statute or judicial decision. Hendrick argues that portions of the requested information are protected under both prongs of section 552.110. We address the second prong first. In Open Records Decision No. 639 (1996), this office established that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act in applying the second prong of section 552.110. In *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770. "To prove substantial competitive harm, the party seeking to prevent disclosure 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." *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted).

We have reviewed Exhibits I and K submitted by the district, and conclude that, with the exception of one sentence we marked in Exhibit K, the district must withhold the marked information under the second prong of section 552.110. The Services Highlights

document may not be withheld under section 552.110, as Hendrick did not mark any information in that document to be withheld under that exception. Although the district may not withhold Exhibit H under section 552.111, it must withhold certain of the marked information in that exhibit under the second prong of section 552.110. We have indicated on Exhibit H the portions of the markings that may not be withheld under section 552.110. The remainder of the marked information in that exhibit must be withheld under section 552.110.

We now address Exhibit J submitted by the district. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 241.152(a) of the Health and Safety Code provides that "a hospital or an agent or employee of a hospital may not disclose health care information about a patient to any person other than the patient without the written authorization of the patient or the patient's legally authorized representative." Health & Safety Code § 241.152(a). "Health care information" means "information recorded in any form or medium that identifies a patient and relates to the history, diagnosis, treatment, or prognosis of a patient." Health & Safety Code § 241.151(1).

Section 241.153 provides several instances in which a patient's health care information may be disclosed without the patient's written authorization. One such instance is if the disclosure is to "a federal, state, or local government agency or authority to the extent authorized or required by law." *Id.* § 241.153(3). We assume that the health care information was released by Hendrick to the district in compliance with this provision. There is no provision authorizing the district to re-release the health care information. Therefore, it remains confidential under section 241.152 of the Health and Safety Code. We have marked the information in Exhibit J that must be withheld under section 241.152. The remainder of Exhibit J may not be withheld.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee
Assistant Attorney General
Open Records Division

SES/ch

Ref.: ID# 103138

Enclosures: Submitted documents

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