



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 15, 2004

Mr. Steve Aragón
General Counsel
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711

OR2004-3054

Dear Mr. Aragón:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 199611.

The Texas Health and Human Services Commission (the "commission") received a request for thirteen categories of information. You inform us that the commission does not maintain information responsive to categories 1-5 and 12 of the request. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986) (governmental body not required to disclose information that did not exist at time request was received). You also state that the requestor "has withdrawn the request regarding items 8, 9, 10, and 11" of the request. In addition, you inform us that the commission will provide the requestor with most of the information responsive to item 6 of the request and a copy of a request for proposal responsive to category 13 of the request. You claim that the remaining information responsive to categories 6 and 13 of the request is excepted from disclosure under sections 552.104 and 552.111 of the Government Code. In addition, you have notified third parties AirLogix, Inc.; Health Alliance; LifeMasters; McKesson Health Solutions; Pfizer Health Solutions; and SDM Services of the request and of their opportunity to submit comments to this office. *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 section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). As for the information responsive to category 7 of the request, although you make no arguments and take no position as to

whether it is excepted from disclosure, pursuant to section 552.305 of the Government Code, you notified interested third party Health Alliance of the request and of its opportunity to submit comments to this office. *See* Gov't Code § 552.305; Open Records Decision No. 542 (1990). We have considered all claimed exceptions and reviewed the submitted information.

Section 552.104 states that information is excepted from required public disclosure if release of the information would give advantage to a competitor or bidder. The purpose of this exception is to protect the interests of a governmental body, usually in competitive bidding situations. *See* Open Records Decision No. 592 (1991). This exception protects information from public disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* Open Records Decision No. 463 (1987). Generally, section 552.104 does not except bids from public disclosure after bidding is completed and a contract has been signed. *See, e.g.*, Open Records Decision Nos. 541 (1990), 514 (1988), 306 (1982), 184 (1978), 75 (1975).

In this case, you inform us that Exhibits E and E-1 pertain to a competitive request for proposals issued by the commission. You tell us that “[a]lthough the Commission has announced the tentative award of a contract to two entities, negotiations with those two entities is on-going [sic].” Based on your representations and our review of the information at issue, we conclude that the information submitted as Exhibits E and E-1 may be withheld under section 552.104. Because our decision under section 552.104 is dispositive as to Exhibits E and E-1, we need not consider your remaining arguments or those submitted by or on behalf of the third parties with respect to this information.

We turn now to your arguments regarding section 552.111 of the Government Code, which excepts from required public disclosure “an 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, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615 (1993), 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 that 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* Open Records Decision No. 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. The 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. *See* Open Records Decision No. 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 inform us that Exhibit B "is an intra-agency memorandum discussing policy issues regarding the state Medicaid program vis-à-vis the merits of a proposal the Commission received from Health Alliance in 2002." You contend that this document "consists almost entirely of the drafter's opinions regarding Medicaid policy issues raised by the proposal" and assert that "[a]ny factual information contained in the memorandum is inextricably intertwined with subjective advice, opinion, and recommendation." Based on your representations and arguments and our review of Exhibit B, we conclude that the commission may withhold this document under section 552.111 of the Government Code.

Finally, we address Exhibit C. The commission raises no exception and makes no argument regarding this document but has notified interested third party Health Alliance of the request and its opportunity to submit comments to this office. *See* Gov't Code § 552.305. 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, Health Alliance has not submitted to this office any reasons explaining why its information should not be released. We thus have no basis for concluding that any portion of Exhibit C constitutes proprietary information protected under section 552.110, and none of it may be withheld on that basis. *See* Gov't Code § 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 (1990). Because we have received no arguments from the interested third party and the information at issue is not otherwise confidential by law, Exhibit C must be released.

In summary, the commission may withhold Exhibits E and E-1 pursuant to section 552.104 and may withhold Exhibit B under section 552.111. The information submitted as Exhibit C must be released.

You request a previous determination allowing the commission to withhold information pertaining to pending bidding situations under section 552.104 of the Government Code. We decline to issue such a ruling at this time. Therefore, 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).

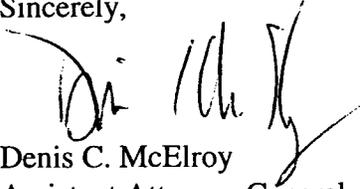
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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 Texas Building and Procurement 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. We note that a third party may challenge this

ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 199611

Enc. Submitted documents

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