



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 12, 2004

Ms. Erin Perales
General Counsel
Houston Municipal Employees Pension System
1111 Bagby, Suite 2450
Houston, Texas 77002-2555

OR2004-3891

Dear Ms. Perales:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 202175.

The Houston Municipal Employees Pension System (the "system") received two requests for information. The first requestor seeks contracts between the system and Towers Perrin during a specified period and any communications between the system and Towers Perrin for that same period. The second requestor asks for certain reports prepared by Towers Perrin and a specified company and certain correspondence. You inform us that the system has made some information available to each requestor. You claim that other responsive information is excepted from disclosure under sections 552.104 and 552.111 of the Government Code.¹ In addition, you assert that the submitted information may be excepted from disclosure under section 552.110 of the Government Code but take no position and make no arguments regarding this exception. Instead, pursuant to section 552.305 of the Government Code, you notified interested third party, Towers Perrin, of the request and of its 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

¹You also claim sections 552.101, 552.136, and 552.137 of the Government Code as exceptions to disclosure. However, in correspondence with this office, the attorney for the requestor states that he "does not seek bank account information, e-mail addresses, or pension information identifiable to an individual member or retiree and hereby consents to have this information redacted." Because the requestor no longer seeks such information, we need not address your arguments under sections 552.101, 552.136, or 552.137.

not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). In correspondence copied to this office, Towers Perrin states that it "does not object to disclosure of any of the documents we have reviewed, including the document [the system] provided to us for review on April 2, 2004." We have considered the exceptions you claim and reviewed the submitted information.² We have also considered comments submitted by and on behalf of one of the requestors. See Gov't Code § 552.304 (providing for submission of public comments).

You assert that portions of the submitted information should be excepted from disclosure under section 552.104 in order to protect the system's standing as a marketplace competitor. Section 552.104 of the Government Code is applicable to "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 competitive bidding and 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. First, the governmental body must demonstrate that it has specific marketplace interests. *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. *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. *Id.* at 10. A general allegation of a remote possibility of harm is not sufficient. See Open Records Decision No. 514 at 2 (1988).

The system claims an exception to disclosure under section 552.104 for much of the submitted information. You assert that the system "competes with private and public pension funds and municipalities for access to national top-ranked actuarial firms." You also state that "[a]ctuarial consultants compete in the pension consulting marketplace for clients that include public and private pension funds and municipalities." You contend that "[r]elease of the information would likely cause specific harm to [the system's] legitimate marketplace interests and could significantly hinder its ability to contract with top-ranked actuarial firms." You further argue that, if the system "were to disclose the information prepared by [the system's] actuarial consultant, it would cause competitive harm to [the system] because the consultant, and other actuarial firms, would be more reluctant to seek

²We assume that the 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.

or retain [the system] as a client. Further, lack of access to top actuarial consulting services would damage [the system's] ability to achieve a high level of services in an area that is critical to the funding, development and administration of the pension plan.”

Having considered your arguments and representations, we find that you have failed to establish that the system competes in a marketplace when engaging the services of actuarial firms. Furthermore, although this office has previously found that the system competes in the investment marketplace, you have failed to demonstrate how release of any of the submitted information would adversely affect the system's competitive interests in that marketplace. We, therefore, find that none of the submitted information may be withheld from disclosure on the basis of section 552.104.

We turn now to your arguments regarding section 552.111 of the Government Code. This section 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. Section 552.111 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) (Gov't Code § 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. If, however, the 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).

This office has also concluded that a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

When determining if an interagency memorandum is excepted from disclosure under section 552.111, we must consider whether the agencies between which the memorandum is passed share a privity of interest or common deliberative process with regard to the policy matter at issue. *See* Open Records Decision No. 561 at 9 (1990). Section 552.111 applies not only to a governmental body's internal memoranda but also to memoranda prepared for a governmental body by its outside consultant. Open Records Decision Nos. 462 at 14 (1987), 298 at 2 (1981).

You assert that "correspondence prepared by [the system] and the consultant's draft reports contain advice, recommendations and opinions of [the system] and of the actuarial consultant acting on behalf of [the system] in an official capacity, involving [the system's] policy matters regarding benefit administration, tax compliance measures, and negotiations with the City of Houston for pension-related changes as authorized under state law." We also understand you to represent that the drafts you seek to withhold have been released or are intended for release in their final forms. We agree that some of the information in the submitted documents is excepted from disclosure under section 552.111 and have marked this information accordingly. The remaining information, however, is purely factual in nature and is, therefore, not excepted from disclosure under section 552.111.

In summary, we have marked information that the system may withhold pursuant to section 552.111. The remaining responsive information must be released.

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).

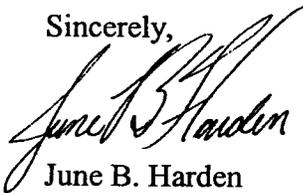
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,



June B. Harden
Assistant Attorney General
Open Records Division

JBH/seg

Ref: ID# 202175

Enc. Submitted documents

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