



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 20, 2012

Ms. Sarah Tuthill
Assistant General Counsel
Texas Medical Board
P.O. Box 2018
Austin, Texas 78768-2018

OR2012-18786

Dear Ms. Tuthill:

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# 471588 (TMB Ref. No. 22744).

The Texas Medical Board (the "board") received a request for the winning bidder's responses, proposal tabulation, and scoring sheet for RFP No. 503-12-06.¹ You state you have released some of the requested information. You further state some of the requested information does not exist.² You state portions of the submitted information are excepted from disclosure under section 552.111 of the Government Code.³ In addition, you state release of some of the submitted information may implicate the proprietary interests of Recovery Trek, LLC ("Recovery"). Accordingly, you state you notified Recovery of the

¹We note the board sought and received clarification of the request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

²The Act does not require a governmental body to release information that did not exist when it received a request or to create responsive information. *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), 555 at 1 (1990).

³Although you raise section 552.110 of the Government Code, you have not submitted arguments explaining how this exception applies to the submitted information. Therefore, we presume you have withdrawn this exception. *See* Gov't Code §§ 552.301, .302. Furthermore, we note section 552.110 is designed to protect the interests of third parties, not the interest of a governmental body.

request and of its right to submit arguments to this office as to why their information should not be released. Gov't Code § 552.305(d); *see also* 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 under the Act in certain circumstances). We have received comments from a representative of Recovery. We have considered the submitted arguments and reviewed the submitted information. We have also received and considered comments from the requestor's attorney. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note the requestor has expressly excluded social security numbers from her request. Additionally, we note that the submitted request for proposals is not responsive to the instant request, as the requestor only seeks the winning bidder's response to the request for proposals, proposal tabulation, and scoring sheet. Thus, this information is not responsive to the instant request. This ruling does not address the public availability of non-responsive information, and the board is not required to release non-responsive information in response to this request.

Next, we note Recovery seeks to withhold information that the board did not submit for our review. This ruling does not address information beyond what the board has submitted to us for review. *See id.* § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested). Accordingly, this ruling is limited to the information the board submitted as responsive to the request for information. *See id.* For this reason, we do not address Recovery's arguments against disclosure of the information not submitted by the board.

Next, we note some of the responsive information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2012-14008 (2012). You notified Recovery of the previous request for information and the company did not submit comments to this office. In that ruling, we concluded the board must release the information at issue, which consisted of Recovery's proposal. Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure, unless its public release is expressly prohibited by law or the information is confidential by law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the board may not now withhold the previously released information, unless its release is expressly prohibited by law or the information is confidential by law. In this instance, Recovery has submitted arguments to our office. Recovery claims portions of its proposal are excepted under section 552.110 of the Government Code, which makes information confidential under the Act. Therefore, because circumstances have changed with respect to Recovery's information, the board may not rely upon the prior ruling as a previous determination for Recovery's information, and we will address Recovery's arguments against

release of its information. We will also address the board's arguments against disclosure of the responsive information.

Section 552.110 of the Government Code protects (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a)–(b). Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts, which holds a trade secret to be:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.⁴ This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 at 5 (1990). However, we cannot conclude that

⁴The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

As mentioned above, Recovery's proposal was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2012-14008. In that prior ruling, the board notified Recovery pursuant to section 552.305, and Recovery failed to submit any arguments that its information was excepted from disclosure under the Act. Since the issuance of the previous ruling on September 5, 2012, Recovery has not disputed this office's conclusion regarding the release of their proposal, and we presume the board has released the proposal in accordance with that ruling. In this regard, we find Recovery has not taken any measures to protect the requested proposal in order for this office to conclude any portion of the proposal now either qualifies as a trade secret or contains commercial or financial information, the release of which would cause Recovery substantial harm. See Gov't Code § 552.110; RESTATEMENT OF TORTS § 757 cmt. b; see also ORDs 661, 319 at 2, 306 at 2, 255 at 2. Accordingly, we conclude the board may not withhold any information in Recovery's proposal under section 552.110 of the Government Code.

The board raises section 552.111 of the Government Code for the remaining responsive information. We also understand Recovery to assert 552.111 for some of the remaining responsive information. However, section 552.111 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. See Open Records Decision Nos. 592 (1991), 522 (1989) (discretionary exceptions in general). Therefore, we only address the board's arguments under section 552.111.

Section 552.111 excepts from 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, this office reexamined 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. ORD 615 at 5; see also *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). 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). However, 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. ORD 615 at 5-6; *see also Dallas Morning News*, 22 S.W.3d at 364 (section 552.111 not applicable to personnel-related communications that did not involve policymaking).

Further, section 552.111 does not generally except from disclosure facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 157; 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 inform us the submitted scoring sheets relate to the board's evaluation of prospective vendors, and that they were created by board personnel in a deliberative process. You state the information at issue pertains to policymaking functions of the board. Additionally, you contend the information at issue consists of advice, opinion, and recommendation, the release of which would have a chilling effect on the deliberative process by inhibiting the board's free discussion of policy issues. Based on your representations and our review of the information at issue, we find the scoring sheets we have marked constitute advice, opinion, and recommendation made by the board. Thus, the board may withhold the information we have marked under section 552.111 of the Government Code. However, we find the remaining information you seek to withhold under section 552.111 is factual or you have not demonstrated it constitutes advice, opinion, or recommendations on a policymaking matter. Accordingly, the board may not withhold any of the remaining responsive information at issue under section 552.111 of the Government code on the basis of the deliberative process privilege.

The remaining responsive information contains an e-mail address that is subject to section 552.137 of the Government Code.⁵ Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). The e-mail address at issue is not excluded by subsection (c). Therefore, the board must withhold the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure.

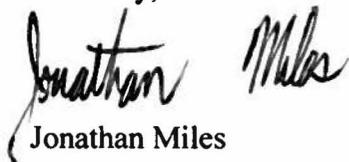
⁵The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

In summary, the board may withhold the information we have marked under section 552.111 of the Government Code. The board must withhold the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure. The remaining responsive information must be released.

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.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/bhf

Ref: ID# 471588

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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