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ATTORNEY GENERAL OF TEXAS

April 2, 2015

Ms. Maureen Franz
Deputy Chief Counsel
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711

OR2015-06330

Dear Ms. Franz:

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# 558730.

The Texas Health and Human Services Commission (the "commission") received a request for the following categories of information: (1) resignation letters of two named individuals; (2) communications "about the concept of a private company operating Terrell State Hospital"; (3) communications related to GEOCare or Green Oaks Hospital; (4) communications between the commission and GEOCare or Green Oaks Hospital; (5) communications regarding "the crafting of the RFP for a private company to operate Terrell State Hospital; and (6) communications regarding the rejection of GEOCare's 2012 bid to operate Kerrville State Hospital. The commission claims the information at issue is excepted from disclosure under sections 552.104 and 552.111 of the Government Code. We have considered the claimed exceptions and reviewed the submitted information.

Initially, the commission informs us the submitted information consists of a representative sample of item numbers two and six of the requested categories of information. However, the commission does not assert the submitted information is representative of the other requested categories. Thus, we find the submitted information is not representative of the other types of information to which the requestor seeks access. Please be advised, this open records letter ruling applies only to the type of information you have submitted for our review. This ruling does not authorize the commission to withhold any information that is

substantially different from the type of information you submitted to this office. *See* Gov't Code § 552.302. Accordingly, to the extent any information responsive to the remainder of the request for information existed in the possession of the commission when it received the request, we assume the commission has released that information to the requestor. *See* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible). If the commission has not released any such information, it must do so at this time. *See* Gov't Code §§ 552.301(a), .302.

We next note some of the information in Exhibit C is not responsive to the request for information because it was created after the commission received the request. This ruling does not address the public availability of any information that is not responsive to the request, and the commission is not required to release this information in response to this request.

Section 552.104 of the Government Code excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." *Id.* § 552.104(a). The purpose of section 552.104 is to protect the purchasing interests of a governmental body in competitive bidding situations where the governmental body wishes to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 (1991). Section 552.104 protects information from 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 disclosure after bidding is completed and the contract has been executed. *See* Open Records Decision No. 541 (1990).

The commission states Exhibit C pertains to a bid in response to a request for proposals for a contract to operate Terrell State Hospital, where a bidder has been selected, but the contract has not been executed. The commission informs us negotiations are ongoing and asserts, if those negotiations fail, it may enter into competitive negotiations with another bidder. The commission argues release of Exhibit C would jeopardize its bargaining position if it were to enter into contract negotiations with another bidder. Upon review, we find the commission has demonstrated release of the information at issue would harm its interests in a competitive situation. Accordingly, the commission may withhold the responsive information in Exhibit C under section 552.104 of the Government Code.

Section 552.111 of the Government Code excepts from disclosure "[a]n 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, 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 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* 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).

This office has also concluded 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.

The commission asserts Exhibit D is excepted from release under section 552.111 and the deliberative process privilege because it consists of the commission's advice, opinion, or recommendations pertaining to the rejection of GeoCare's 2012 bid to operate Kerrville State Hospital. Upon review, we find the commission has established the deliberative process privilege is applicable to some of the information in Exhibit D, including drafts of documents, which we have marked. However, you do not inform us the drafts at issue will be released to the public in their final form. Thus, the commission may withhold the information we have marked in Exhibit D under section 552.111 of the Government Code and the deliberative process privilege; however, the commission may only withhold the draft

documents we have marked if these draft documents will be released to the public in their final form. The commission has not established the remaining information consists of advice, opinion, or recommendations, or it is purely factual in nature. Accordingly, the commission may not withhold any of the remaining information under section 552.111 and the deliberative process privilege.

To conclude, the commission may withhold the responsive information in Exhibit C under section 552.104 of the Government Code. The commission may also withhold the information we have marked in Exhibit D under section 552.111 of the Government Code and the deliberative process privilege; however, the commission may only withhold the draft documents we have marked if these draft documents will be released to the public in their final form. The commission must release the remaining responsive information.

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,


James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/cbz

Ref: ID# 558730

Enc. Submitted documents

c: Requestor
(w/o enclosures)