



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

August 5, 2016

Ms. Leena Chaphekar  
Assistant General Counsel  
Employees Retirement System of Texas  
P.O. Box 13207  
Austin, Texas 78711-3207

OR2016-17672

Dear Ms. Chaphekar:

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# 621433.

The Employees Retirement System of Texas (the "system") received six requests from five requestors for information pertaining to a specified request for proposals issued by the system.<sup>1</sup> You state you have made some of the requested information available to the requestors. You claim some of the submitted information is excepted from disclosure under sections 552.104, 552.110, and 552.111 of the Government Code. You also state release of this information may implicate the proprietary interests of United Healthcare Services, Inc. ("United"), CaremarkPCS Health, L.L.C. ("Caremark"), Express Scripts, Inc. ("Express"), and MedImpact Healthcare Systems Inc. ("MedImpact"). Accordingly, you state you notified the third parties of the requests for information and of their rights to submit arguments to this office as to why the information at issue should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from United, Caremark, Express, and MedImpact. We have considered the submitted arguments and reviewed the submitted information.

The system assert some of the submitted information is excepted from disclosure under section 552.110 of the Government Code. However, section 552.110 protects only the

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<sup>1</sup>We note the system received clarification of one of the requests for information. *See* Gov't Code § 552.222(b) (stating governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

interests of the third parties that have provided information to a governmental body, not those of the governmental body itself. *See* Gov't Code § 552.110 (excepts from disclosure trade secrets or commercial or financial information obtained from person). Therefore, we do not address the system's argument under section 552.110.

Next, we note Express makes arguments for withholding certain information that was not submitted by the system to this office for review. Because we do not have this information before us for review, this ruling does not address any such information, and is limited to the information submitted as responsive by the system. *See id.* § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested, or representative sample if voluminous amount of information was requested).

Section 552.104(a) of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." *Id.* § 552.104(a). The "test under section 552.104 is whether knowing another bidder's [or competitor's information] would be an advantage, not whether it would be a decisive advantage." *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). You represent the information at issue pertains to a competitive bidding situation. In addition, you state United was selected for a contract. However, you inform us the contract is currently in the negotiation phase. You explain if the system is unable to negotiate a satisfactory contract with United within a reasonable amount of time, the system may open contract negotiations with another bidder. Thus, you assert if the information at issue is released, it could affect the ability of the system to negotiate the specific terms of the contract. After review of the information at issue and consideration of the arguments, we find the system has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the system may withhold Exhibits E and F under section 552.104(a).<sup>2</sup>

Additionally, a private third party may invoke section 552.104(a) of the Government Code. *Id.* at 831. As previously noted, the "test under section 552.104 is whether knowing another bidder's [or competitor's information] would be an advantage, not whether it would be a decisive advantage." *Id.* at 841. United, Express, MedImpact, and Caremark inform us they have competitors. In addition, United, Express, MedImpact, and Caremark state release of the information at issue would give advantage to a competitor or bidder. We note Caremark seeks to withhold the terms of an executed contract with the system. For many years, this office concluded the terms of a contract and especially the pricing of a winning bidder are public and generally not excepted from disclosure. Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision Nos. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency), 514 (1988) (public has interest in knowing prices charged by government contractors), 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act

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<sup>2</sup>As our ruling is dispositive, we need not consider the remaining arguments against disclosure of this information.

reasoning that disclosure of prices charged government is a cost of doing business with government). However, now, pursuant to *Boeing*, section 552.104 is not limited to only ongoing competitive situations, and a third party need only show release of its competitively sensitive information would give an advantage to a competitor even after a contract is executed. *Boeing*, 466 S.W.3d at 839. After review of the information at issue and consideration of the arguments, we find United, Express, MedImpact, and Caremark have established release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the system may withhold all remaining information pertaining to United, as well as the information we have marked and indicated, under section 552.104(a).<sup>3</sup>

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. 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 protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *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).

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<sup>3</sup>As our ruling is dispositive, we need not consider the remaining arguments against disclosure of this information.

Section 552.111 can also encompass communications between a governmental body and a third party, including a consultant or other party with a privity of interest. *See* Open Records Decision No. 561 at 9 (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See id.*

You assert Exhibit G and the remaining information in Exhibit H are excepted from disclosure pursuant to section 552.111 of the Government Code. You state some of the information at issue consists of bid scores created by system employees and pertaining to the submitted proposals. You state this information consists of advice, opinions, and recommendations regarding policymaking functions of the system. Based on your representations and our review of the information at issue, we find you have demonstrated portions of the information at issue, which we have marked, consist of advice, opinions, or recommendations on the policymaking matters of the system. Thus, the system may withhold the information we have marked under section 552.111. However, we find some of the remaining information at issue was communicated to individuals with whom you have failed to demonstrate the system shares a privity of interest or common deliberative process. Further, upon review, we find the remaining information at issue consists of either general administrative information that does not relate to policymaking, or information that is purely factual in nature. Thus, you have failed to demonstrate this information is excepted under section 552.111. Accordingly, we find none of the remaining information at issue may be withheld on this basis.

Section 552.136 of the Government Code provides, “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.”<sup>4</sup> Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. *See* Open Records Decision No. 684 at 9 (2009). Accordingly, the system must withhold all insurance policy numbers in the remaining information under section 552.136.

We note portions of the remaining information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the

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<sup>4</sup>The 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).

governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the system may withhold Exhibits E and F under section 552.104(a) of the Government Code. The system may withhold all remaining information pertaining to United as well, as the information we have marked and indicated, under section 552.104(a) of the Government Code. The system may withhold the information we have marked under section 552.111 of the Government Code. The system must withhold all insurance policy numbers in the remaining information under section 552.136 of the Government Code. The remaining information must be released; however, any information subject to copyright may be released only in accordance with copyright law.

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](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,



Cole Hutchison  
Assistant Attorney General  
Open Records Division

CH/bhf

Ref: ID# 621433

Enc. Submitted documents

c: Requestors  
(w/o enclosures)

Third Parties  
(w/o enclosures)