



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 25, 2017

Ms. Ana Vieira Ayala
Assistant General Counsel & Public Information Coordinator
The University of Texas System
210 West 7th Street
Austin, Texas 78701

OR2017-21899

Dear Ms. Ayala:

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# 676867 (OGC Nos. 176151, 176478, 176540, and 176541).

The University of Texas System (the "system") received four requests from two requestors for information pertaining to a specific review of system initiatives and information pertaining to audits or reviews of system initiatives and funded projects in a certain time period. You claim the submitted information is excepted from disclosure under sections 552.104, 552.111, and 552.139 of the Government Code. You also state you notified Ernst & Young, LLP ("EY") of the request for information and of its right to submit arguments to this office as to why the submitted information 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 EY. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The submitted information contains completed reports that are subject to section 552.022(a)(1). The system must release the completed reports pursuant to section 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or are made confidential under the Act or other law. *See id.* Although you raise section 552.111 of the Government Code for some of the information, and EY raises section 552.116 of the Government Code for the information at issue, these exceptions are discretionary in nature and do not make information confidential under the Act. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). Therefore, the system may not withhold the information subject to section 552.022 under section 552.111 or section 552.116 of the Government Code. However, information encompassed by section 552.022 may be withheld under section 552.104. *See* Gov't Code § 552.104(b) (information protected by section 552.104 not subject to required public disclosure under section 552.022(a)). Further, section 552.139 of the Government Code makes information confidential for purposes of section 552.022. We will also consider EY's arguments under section 552.110 of the Government Code, as that exception also makes information confidential under the Act for purposes of section 552.022. Accordingly, we will consider the applicability of sections 552.104, 552.110, and 552.139 to the information subject to section 552.022. We will also address the system's arguments against disclosure of the information not subject to section 552.022.

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). The system states it has specific marketplace interests in the information at issue because the system is a healthcare provider competing "in the market for research and development of medical breakthroughs and technology, medical/academic training programs, and the provision of hospital and clinical health care services." In addition, the system states it has numerous competitors and release of the information at issue would "undermine the [s]ystem's ability to meet its mission, increase revenues through the expansion of medical products and services, provide medical care throughout the state of Texas, and thereby serve the people of Texas." 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 the information it indicated under section 552.104(a) of the Government Code.¹

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 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 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).

You seek to withhold some of the remaining information under section 552.111 of the Government Code. You state the information at issue consists of advice, opinions, and recommendations of employees and officials of the system regarding policymaking matters. Upon review, we find the system may withhold the information it marked under section 552.111 of the Government Code on the basis of the deliberative process privilege.

¹As our ruling is dispositive, we need not address EY’s remaining arguments against disclosure of this information.

Section 552.139 of the Government Code provides, in part:

(a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; [and]

(2) any other assessment of the extent to which data processing operations, a computer, a computer program, network, system, or system interface, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use[.]

Gov't Code § 552.139(a), (b)(1)-(2). Section 2059.055 of the Government Code provides, in pertinent part:

(b) Network security information is confidential under this section if the information is:

(1) related to passwords, personal identification numbers, access codes, encryption, or other components of the security system of a governmental entity;

(2) collected, assembled, or maintained by or for a governmental entity to prevent, detect, or investigate criminal activity; or

(3) related to an assessment, made by or for a governmental entity or maintained by a governmental entity, of the vulnerability of a network to criminal activity.

Id. § 2059.055(b)(2)-(3); *see* Act of May 27, 2017, 85th Leg., R.S., S.B. 564, § 2 (to be codified as an amendment to Gov't Code § § 2059.055(b)(1)). You seek to withhold some of the remaining information under section 552.139. You state the information at issue includes an assessment of website access security. You further state release of the information at issue would “provide individuals with specific weaknesses of the website, making it vulnerable to attacks. . . [and] unauthorized access or harm.” Based on your

arguments and our review of the information, we conclude the system must withhold the information you indicated under section 552.139 of the Government Code.

In summary, the system may withhold the information it indicated under section 552.104(a) of the Government Code. The system may withhold the information it marked under section 552.111 of the Government Code. The system must withhold the information you indicated under section 552.139 of the Government Code. The system must release the remaining 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,



Emily Kunst
Assistant Attorney General
Open Records Division

EK/tdw

Ref: ID# 676867

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

2 Third Parties
(w/o enclosures)