



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 15, 2017

Mr. Ronald J. Bounds
Assistant General Counsel for Open Records
Teacher Retirement System of Texas
1000 Red River Street
Austin, Texas 78701-2698

Mr. Dan Junell
Assistant General Counsel
Teacher Retirement System of Texas
1000 Red River Street
Austin, Texas 78701-2698

OR2017-28511

Dear Mr. Bounds and Mr. Junell:

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# 689585 (TRS Ref. Nos. Navitus Health Solutions 18-1, Market Analytics 18-1, OptumRx 18-1).

The Teacher Retirement System of Texas ("TRS") received three requests from different requestors for proposals, evaluations, and contracts pertaining to a specified request for proposals. You state some of the requested information does not exist.¹ You state you will

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

redact information subject to section 552.136 of the Government Code.² You claim some the submitted information is excepted from disclosure under section 552.111 of the Government Code and may be protected by copyright. Further, you state release may implicate the proprietary interests of CVS Caremark (“CVS”), Express Scripts (“Express”), and OptumRx, Inc (“OptumRx”). Accordingly, you state, and provide documentation showing, you notified the third parties of the request and their rights to submit arguments to this office. *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 CVS, Express, and OptumRx. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note CVS argues against disclosure of information not submitted to this office for review. This ruling does not address information beyond what TRS has submitted for our review. *See* Gov’t Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit a copy of specific information requested). Accordingly, this ruling is limited to the information TRS submitted as responsive to the request for information.

We note some of the submitted information consists of information that is subject to section 2261.253 of the Government Code. Section 2261.253(a) provides, in relevant part, as follows:

(a) For each contract for the purchase of goods or services from a private vendor, each state agency shall post on its Internet website:

(1) each contract the agency enters into, including contracts entered into without inviting, advertising for, or otherwise requiring competitive bidding before selection of the contractor, until the contract expires or is completed[.]

(b) A state agency monthly may post contracts described by Subsection (a) that are valued less than \$15,000.

Gov’t Code § 2261.253(a)(1), (b). The contracts at issue are valued at more than \$15,000, are between TRS, which is a state agency, and a private vendor for the purchase of services, and the contracts are not expired or completed. Although CVS seeks to withhold the submitted contracts under sections 552.104 and 552.110 of the Government Code, the

²Section 552.136(c) of the Government Code allows a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from the attorney general. *See* Gov’t Code § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e).

exceptions to disclosure found in the Act do not generally apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Accordingly, the TRS may not withhold any portion of the contracts at issue under sections 552.104 or 552.110 of the Government Code. Consequently, TRS must release the contracts we marked in their entireties pursuant to section 2261.253 of the Government Code.

Section 552.104(a) of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). In considering whether a private third party may assert this exception, the supreme court reasoned because section 552.305(a) of the Government Code includes section 552.104 as an example of an exception that involves a third party’s property interest, a private third party may invoke this exception. *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). 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. CVS, Express, and OptumRx state they have competitors. Express states release of its information at issue would provide its competitors with its pricing data and strategy, allowing them to more effectively and efficiently compete and providing them an advantage in future bidding processes. OptumRx states release of its information at issue would tell competitors how to use pricing factors to undercut OptumRx and gain an advantage. CVS states release of its information at issue would allow competitors to refine their services and offerings and reverse engineer rates in order to undercut CVS in future bids. After review of the information at issue and consideration of the arguments, we find CVS, Express, and OptumRx have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude TRS may withhold the information we marked under section 552.104(a).³

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

³As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

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).

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 (1990) (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* ORD 561.

You state the information you marked consists of advice, opinions, and recommendations of TRS employees and consultants, who were hired by TRS to provide advice related to the evaluation and ranking of proposals submitted in response to TRS's request for proposals, regarding policymaking matters. Upon review, we find TRS may withhold the information you marked under section 552.111 of the Government Code.

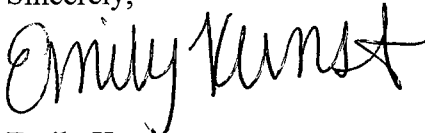
We note some of the remaining materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection 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 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, TRS must release the contracts we marked in their entirety pursuant to section 2261.253 of the Government Code. TRS may withhold the information we marked under section 552.104(a). TRS may withhold the information you marked under section 552.111 of the Government Code. The remaining information must be released; however, any information protected by copyright may only be released 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, 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# 689585

Enc. Submitted documents

c: 3 Requestors
(w/o enclosures)

3 Third Parties
(w/o enclosures)