



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

December 20, 2022

Ms. Melinda D. Hamm  
General Counsel  
Office of Legal and Regulatory Affairs  
Midland Heath  
400 Rosalind Redfern Grover Parkway  
Midland, Texas 79701

OR2022-39747

Dear Ms. Hamm:

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# 988181.

The Midland County Hospital District d/b/a Midland Memorial Hospital ("MMH") received a request for e-mails for a specified period of time pertaining to certain facilities or a certain project. You state MMH has released some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.104, 552.105, 552.110, and 552.1101 of the Government Code.<sup>1</sup> Additionally, you state you have notified third parties of the request. *See* Gov't Code § 552.304 (interested third party may submit comments stating why information should or should not be released). We have received comments from The University of Texas System (OGC# 207403) on behalf of it and The University of Texas Permian Basin (together, "UT") and from Texas Tech University System ("TTU"). We have considered submitted arguments and reviewed the submitted information.

Initially, we must address MMH's obligations under section 552.301 of the Government Code, which prescribes the procedures a governmental body must follow in asking this

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<sup>1</sup> Although you raise section 552.305 of the Government Code, we note this section is not an exception to disclosure. *See* Gov't Code § 552.305.

office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires that a governmental body ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. Gov't Code § 552.301(b). Section 552.301(e) requires the governmental body to submit to the attorney general, not later than the fifteenth business day after the date of the receipt of the request: (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples if the information is voluminous. *Id.* § 552.301(e)(1). You state MMH received the request for information on August 29, 2022. We note September 5, 2022, was a holiday. This office does not count the date the request was received or holidays for the purpose of calculating a governmental body's deadlines under the Act; therefore, we find MMH's ten- and fifteen-business-day deadlines were September 13, 2022, and September 20, 2022, respectively. However, the envelope in which you provided the information required by subsections 552.301(b) and (e) was postmarked September 22, 2022. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Thus, MMH failed to comply with the requirements mandated by section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ). Because sections 552.110 and 552.1101 can provide compelling reasons to overcome the presumption of openness, we will address your arguments under these sections for the submitted information. Additionally, because third party interests can provide a compelling reason to overcome the presumption of openness caused by a failure to comply with section 552.301, we will consider the arguments submitted by UT and TTU. *See id.* § 552.302; Open Records Decision No. 150 at 2 (1977). However, we find you have failed to establish a compelling reason to address your remaining exceptions.

You claim some of the submitted information is subject to sections 552.110 and 552.1101 of the Government Code. Section 552.110 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(b)-(c). Although you argue the submitted information is excepted under section 552.110, that exception is designed to protect the interests of third parties, not the interests of a governmental body. Further, section 552.1101 protects only the interests of a vendor, contractor, potential vendor, or potential contractor that has provided information to a

governmental body, not those of the governmental body itself. *See id.* § 552.1101(c). Therefore, we do not consider your arguments under section 552.110 or section 552.1101.

Section 552.104(a) of the Government Code excepts from disclosure information that a governmental body demonstrates, if released, would “harm its interests by providing an advantage to a competitor or bidder in a particular ongoing competitive situation or in a particular competitive situation where the governmental body establishes the situation at issue is set to reoccur or there is a specific and demonstrable intent to enter into the competitive situation again in the future.” *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, 841 (Tex. 2015). UT states it has specific marketplace interests in the information at issue because UT is a healthcare provider that competes with other private and public medical facilities. UT explains, in order to remain competitive in the marketplace, UT “must continue to make strategic decisions, such as creating beneficial relationships with other entities and expanding areas of healthcare offerings.” UT asserts release of the information at issue, which contains the details of plans for the development of healthcare facilities in the Permian Basin, would cause substantial competitive harm to UT in the healthcare marketplace. Further, UT asserts release of the information at issue “would create a substantial hindrance for the State [of Texas] because [UT] would be at a decided disadvantage in comparison to private entities that are not subject to the Act.” Based upon UT’s representations and our review, we find UT has demonstrated it has specific marketplace interests and may be considered a “competitor” for purposes of section 552.104. We also find UT has demonstrated release of the information it marked would give advantage to a competitor or bidder. Accordingly, MMH may withhold the information UT marked under section 552.104(a) on behalf of UT.<sup>2</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 section 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

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

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 information 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 2002, no pet.); *see* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendations 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 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 a 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.*

UT states the remaining information it marked consists of advice, opinions, and recommendations of UT employees and officials and individuals with UT states it shares a privity of interest regarding the policymaking matters at issue. Based upon these representations and our review, we find the information at issue consists of advice, opinions, or recommendations on the policymaking matters. Thus, MMH may withhold the remaining information UT marked under section 552.111.

In summary, MMH may withhold the information UT marked under section 552.104(a) of the Government Code and the remaining information UT marked under section 552.111 of the Government Code. MMH 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 <https://www.texasattorneygeneral.gov/open->

[government/members-public/what-expect-after-ruling-issued](#) or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Lindsay E. Hale  
Assistant Attorney General  
Open Records Division

LEH/pt

Ref: ID# 988181

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

2 Third Parties  
(w/o enclosures)