



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 10, 1997

Ms. Sharon Alexander
Office of General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR97-1564

Dear Ms. Alexander:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 108246.

The Texas Department of Health (the "department") received a request for the following:

- Technical and Price proposals submitted by Birch & Davis Health Management Corporation, Inc. ("B & D") in response to the Texas Department of Health's (the "Department") Request for Proposal for a STAR Network Program Administrator, No. HCF-96-05 (the "Procurement" or "RFP").
- Any and all evaluation materials used to score the proposals submitted in response to the RFP, including but not limited to directions to evaluators, and preliminary and final score sheets.
- Any and all reports, recommendations or other materials prepared by The Lewin Group, Inc. or any other third parties under contract to the Department related to the Procurement.
- Copies of all correspondence or other written materials sent to or received from B & D related to the Procurement, including but not limited to copies of letters, memoranda and presentations.
- Copies of all notes taken by or in the possession of any employee of the Department or any third party under contract to the Department related to the Procurement.

You contend that the requested information is excepted from required public disclosure by sections 552.104 and 552.111 of the Government Code. We have considered your arguments and have reviewed the submitted representative sample of documents.¹

Section 552.104 excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of this exception is to protect the purchasing interests of a governmental body, usually in competitive bidding situations prior to the awarding of a contract. Open Records Decision No. 593 (1991) at 2. Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision 541 (1990) at 4. Section 552.104 is generally invoked to except information submitted to a governmental body as part of a bid or similar proposal. *See, e.g.*, Open Records Decision No. 463 (1987). However, other types of information may be withheld pursuant to section 552.104 during the competitive bidding process. *Cf.* Open Records Decision No. 170 (1977). For example, in Attorney General Opinion MW-591 (1982), this office determined that the General Land Office may withhold "the identities of those who nominate tracts to be leased by the School Land Board at mineral lease sales."

You state that the competitive bidding process has not yet been completed for the service contract at issue and that the contract has not yet been awarded. Therefore, we conclude that the department may withhold the information which you have asserted is excepted from disclosure under section 552.104. Once the competitive bidding process is completed and a contract has been awarded, you may not continue to withhold this information under section 552.104. Open Records Decision No. 541 (1990) at 5.

Next, you contend that reports prepared by the Lewin Group is excepted from disclosure by section 552.111. You inform us that the department retained the Lewin Group "as temporary consultants on a particular project, to address the special strategic needs of the department in essentially redesigning the department's method of operating and administering the Medicaid program, matters which affect the department's policy mission." Section 552.111 may apply to information created for a governmental body by an outside consultant when the outside consultant is acting at the request of the governmental body and performing a task within the authority of the governmental body. Open Records Decision No. 631 (1995).

Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111

¹In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 (1993) at 5-6. In addition, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5. After a review of the records at issue, we conclude that you may withhold the consultant's reports pursuant to section 552.111.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/rho

Ref.: ID# 108246

Enclosures: Submitted documents

cc: Mr. Donald S. Picard
Counsel, NHIC
EDS
13600 EDS Drive
Herndon, Virginia 22071
(w/o enclosures)

