



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 22, 2010

Ms. Cynthia Villarreal-Reyna
Section Chief - Agency Counsel
Legal & Regulatory Affairs MC 110-1A
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2010-16046

Dear Ms. Villarreal-Reyna:

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# 397722 (TDI ORR#'s 107003 and 106988).

The Texas Department of Insurance (the "department") received two requests for information related to request for proposal 10-MVB-SFMO-LT.¹ You also state some of the responsive information is being made available to the requestors. You claim some of the submitted information is excepted from disclosure under section 552.111 of the Government Code. Although you do not take a position as to whether the remaining bid proposal information is excepted under the Act, you state its release may implicate the proprietary rights of Prometric and Pearson VUE ("Pearson"). Accordingly, you state you have notified Prometric and Pearson of their rights to submit arguments to this office as to why the submitted information pertaining to each company 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 Prometric and Pearson. We have considered the submitted arguments and reviewed the submitted information.

¹The department sought and received clarification from the requestor regarding the second category of the request. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

Section 552.111 excepts from disclosure “an 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, no writ); 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 that 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 No. 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 that are severable from advice, opinions, and recommendations. *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 states the submitted scoring sheets and summaries, as well as additional evaluation documents, relate to your evaluation of prospective contractors’ proposals. You contend that this information is subject to section 552.111 because it is “reflective of the deliberative process by which the evaluation committee arrives at the final rankings.” Upon review, we agree the information at issue represents the advice, opinion, and recommendations of the department concerning matters of policy. Accordingly, the department may withhold the submitted scoring information you have marked under section 552.111 of the Government Code.

We note Prometric argues against disclosure of its financial statements, given to the department as part of the contract negotiations. However, these financial statements were not submitted by the department. This ruling does not address information related to Prometric beyond what the department submitted to this office for review, and is limited to

the information the department submitted as responsive to the instant request.² *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested).

Next, Prometric argues that it labeled certain information in its proposal confidential. We note that information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the information at issue comes within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

Pearson claims that the social security number in the remaining information is excepted from disclosure under section 552.147 of the Government Code. This section provides “[t]he social security number of a living person is excepted from” required public disclosure under the Act. Gov't Code § 552.147(a). Therefore, the department may withhold the social security number in the remaining information under section 552.147 of the Government Code.

We note that portions of the remaining information are 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 (1978). 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, the department may withhold the submitted scoring information you have marked under section 552.111 of the Government Code. The department also may withhold the social security number in the remaining information under section 552.147 of the Government Code. The department must release the remaining information, but any information that is protected by copyright may only be released in accordance with copyright law.

²As we are able to make this determination, we need not address Prometric's remaining argument against disclosure of this 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.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Tamara Wilcox
Assistant Attorney General
Open Records Division

TW/dls

Ref: ID# 397722

Enc. Submitted documents

c: Requestors
(w/o enclosures)

Mr. Anthony R. Scicchitano
Senior Vice President and General Counsel
Prometric
1501 South Clinton Street
Baltimore, Maryland 21224
(w/o enclosures)

Mr. Michael Walsh
Contract Manager
Pearson VUE
5601 Green Valley Drive
Bloomington, Minnesota 55437
(w/o enclosures)