



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 26, 2011

Ms. Suzanne Mitchell  
Assistant General Counsel  
Texas Medical Board  
P.O. Box 2018  
Austin, Texas 78768-2018

OR2011-15721

Dear Ms. Mitchell:

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# 434405 (TMB Reference Numbers: 21589 and 21646).

The Texas Medical Board (the "board") received two requests for proposals and evaluation information pertaining to Request for Offer No. 503-12-05.<sup>1</sup> You state you have released some of the requested information to the requestors. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.110, and 552.111 of the Government Code. You also state that release of some of the submitted information may implicate the proprietary interests of Pearson VUE ("Pearson") and E-Strategy Solutions, Inc. ("E-Strategy"). Accordingly, you inform us, and provide documentation showing, that you notified Pearson and E-Strategy of the request and of their right to submit arguments to this office as to why its information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

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<sup>1</sup>You inform us the board sought and received clarification of the first request. *See* Gov't Code § 552.222(b) (providing that if request for information is unclear, governmental body may ask requestor to clarify the request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

We have considered the exceptions you claim and reviewed the submitted information, a portion of which is a representative sample.<sup>2</sup>

Initially, we note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. See Gov't Code § 552.305(d)(2)(B). As of the date of this decision, we have not received correspondence from Pearson or E-Strategy. Although we understand the board to claim the submitted information is excepted under section 552.110 of the Government Code, that exception is designed to protect the proprietary interests of third parties, not the interests of a governmental body. Thus, as we have not received any arguments from Pearson or E-Strategy, we have no basis for concluding that any portion of the submitted information constitutes their proprietary information. See *id.* § 552.110(a)-(b); Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the board may not withhold the submitted information on the basis of any proprietary interests these interested third parties may have in the information.

We understand the board to raise section 552.101 of the Government Code. Section 552.101 encompasses "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," Gov't Code § 552.101. However, the board does not present any arguments against disclosure under that section nor has the board directed our attention to any law under which any of its information is considered to be confidential for the purposes of section 552.101. See Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). In addition, this office has concluded section 552.101 does not encompass other exceptions found in the Act. See Open Records Decision Nos. 676 at 1-2 (2000), 575 at 2 (1990). Accordingly, none of the submitted information may be withheld under section 552.101 of the Government Code.

Section 552.111 of the Government Code excepts from disclosure "an interagency or intra-agency 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).

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<sup>2</sup>We assume 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.

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 that are 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 state the submitted information consists of scoring sheets, evaluator notes, evaluation forms, tabulations, reference check material, and third-party proposals pertaining to the evaluation of the responses to the request for offers at issue. You state the submitted information consists of “intra-agency communications pertaining to administrative matter of broad scope that affect the [board]’s policy mission.” Based on your representations and our review of the information at issue, we find the board has demonstrated that the scoring sheets, evaluator notes, evaluation forms, tabulations, reference check material, which we have marked, consist of advice, opinions, or recommendations on the policymaking matters of the board. Thus, the board may withhold the marked information under section 552.111 of the Government Code. We note, however, the remaining information at issue consists of the proposals of third parties. Thus, we find you have failed to show how the remaining information at issue consists of advice, opinions, or recommendations on the policymaking matters of the board. Accordingly, the remaining information at issue may not be withheld under section 552.111 of the Government Code. As you raise no further exceptions to disclosure, the remaining information must be released.<sup>3</sup>

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<sup>3</sup>We note the remaining information contains social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person’s social security number from public release without the necessity of requesting a decision from this office under the Act. Gov’t Code § 552.147(b).

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](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,



Sarah Casterline  
Assistant Attorney General  
Open Records Division

SEC/ag

Ref: ID# 434405

Enc. Submitted documents

c: 2 Requestors  
(w/o enclosures)

E-Strategy Solutions, Inc.  
c/o Suzanne Mitchell  
Assistant General Counsel  
Texas Medical Board  
P.O. Box 2018  
Austin, Texas 78768-2018  
(w/o enclosures)

Pearson VUE  
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