



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 23, 2013

Ms. Thao La
Senior Attorney
Parkland Health and Hospital System
5201 Harry Hines Boulevard
Dallas, Texas 75235

OR2013-18399

Dear Ms. La:

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# 503301 (ORR Nos. 13-92 & 13-93).

The Dallas County Hospital District d/b/a Parkland Health and Hospital System (the "district") received two requests from the same requestor for a specified contract and any related change orders and any written reports submitted by two specified entities. You claim the submitted information is excepted from disclosure under sections 552.103, 552.104, 552.105, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, you state some of the submitted information, which you have noted, is not responsive to the instant request for information. This ruling does not address the public availability of any information that is not responsive to the request and the district is not required to release such information in response to this request.

¹We 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 those records contain substantially different types of information than that submitted to this office.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108; [and]

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1), (3). The responsive information includes a completed report that is subject to subsection 552.022(a)(1), which must be released unless it is excepted from disclosure under section 552.108 of the Government Code or is made confidential under the Act or other law. *See id.* § 552.022(a)(1). The responsive information also contains contracts that are subject to subsection 552.022(a)(3), which must be released unless they are made confidential under the Act or other law. *See id.* § 552.022(a)(3). You seek to withhold the information subject to section 552.022 under sections 552.103, 552.105, and 552.111 of the Government Code. However, sections 552.103, 552.105, and 552.111 are discretionary exceptions and do not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (governmental body may waive section 552.111), 564 (1990) (statutory predecessor to section 552.105 subject to waiver). Therefore, the information subject to section 552.022 may not be withheld under section 552.103, section 552.105, or section 552.111 of the Government Code. You also seek to withhold some of the information at issue under section 552.104 of the Government Code. Because information subject to section 552.022 may be withheld under section 552.104 of the Government Code, we will consider your claim under this exception for the information at issue. *See* Gov't Code § 552.104(b) (information protected by section 552.104 not subject to required public disclosure under section 552.022(a)). We will also consider your remaining arguments for the responsive information not subject to section 552.022.

Section 552.103 of the Government Code provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the

state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show section 552.103(a) is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). *See* ORD 551.

To establish litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *See* Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, or when an individual threatened to sue on several occasions and hired an attorney. *See* Open Records Decision Nos. 346 (1982), 288 (1981). On the other hand, this office has determined if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

You state prior to the date the district received the instant request for information, the requestor, a former district employee, was involuntarily terminated from his position with the district. You also state, and provide documentation showing, the requestor expressed disagreement with his involuntary termination, and indicated he intended to seek

reinstatement or resignation. You also provide documentation showing after the district received the request for information, the district received correspondence from an attorney for the requestor informing the district that the attorney had been retained to represent the requestor in his appeal of his recent termination. However, you have not provided this office with evidence any individual had taken any objective steps toward filing a lawsuit prior to the date the district received the request for information. *See* Gov't Code § 552.301(e); ORD 331. Upon review, therefore, we find you have not established litigation was reasonably anticipated on the date the district received the request for information. Therefore, the district may not withhold any portion of the information at issue under section 552.103 of the Government Code.

Section 552.104 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). This exception protects a governmental body's interests in connection with competitive bidding and in certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). This office has held a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the "competitive advantage" aspect of this exception if it can satisfy two criteria. *See id.* First, the governmental body must demonstrate it has specific marketplace interests. *See id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *See id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body's legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body's demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *See id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

You state the district is located in the Stemmons corridor and the Medical District area, and is a competitor in the marketplace for certain pieces of land in the Dallas area. You explain the responsive information in Exhibit C1 contains research and analytical plan information for certain expansion and land development the district is considering. Based on your representations, we find you have established the district has a legitimate marketplace interest in the land development process for purposes of section 552.104. You argue release of the responsive information in Exhibit C1 would compromise the district's competitive advantage in the marketplace for further growth and service development by facilitating acquisition and similar expansion and development by competing area business owners and developers. You inform us the marketplace for available land is highly competitive, and you contend release of the information would give competing parties an unfair advantage over the district. Based on your representations and our review of the submitted information, we find the district has demonstrated release of the information at issue would cause specific

harm to the district's marketplace interests. We therefore conclude the district may withhold the responsive information in Exhibit C1 under section 552.104 of the Government Code.²

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, 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 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).

This office has also concluded a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the

²As our ruling is dispositive for Exhibit C1, we need not address your remaining argument under section 552.105 of the Government Code against disclosure of the information at issue not subject to section 552.022 of the Government Code.

draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

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 inform us, and provide documentation demonstrating, the district has contracted with KPMG, L.L.P. (“KPMG”), to provide consulting services for the district regarding “risk management and identification of areas of concerns in the multiple coordinated efforts for the master planning, professional services, and procurement as they relate to the construction services, supplies, equipment, and materials that are necessary for the planning and building of one of the largest teaching public hospitals.” Upon review, we agree the district and KPMG share a privity of interest or common deliberative process for purposes of section 552.111 of the Government Code.

You explain pursuant to the contract, KPMG was required to create draft and final reports for the district detailing its findings. You inform us KPMG had produced only draft reports to the district, and you explain the information at issue in Exhibit C2 consists of a draft report consisting of internal communications, discussion, analyses, drafts, and recommendations pertaining to the quality and improvements of care and operations process design, types and quantities of services, contracting processes and administration, and other aspects of the district’s operations. You explain the information at issue consists of a draft policymaking document consisting of advice, opinion, and recommendation pertaining to policymaking matters of the district. However, you do not inform us whether the district will release the draft policymaking document to the public in its final form. Based on your representations and our review of the information at issue, we find the district has generally demonstrated the applicability of section 552.111 to the draft policymaking document at issue in Exhibit C2. Accordingly, we find to the extent such information will be released to the public in its final form, the district may withhold the draft document in Exhibit C2 under section 552.111. To the extent the draft document will not be released to the public in its final form, the district may withhold the information we have marked within the submitted draft document under section 552.111 of the Government Code. However, the remaining information within the draft document at issue is purely factual in nature or does not pertain to policymaking. Thus, to the extent the draft document in Exhibit C2 will not be released in its final form, no portion of the remaining information at issue may be withheld under the

deliberative process privilege of section 552.111 of the Government Code, and the remaining information at issue must be released.

We note some of the 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, the district may withhold the responsive information in Exhibit C1 under section 552.104 of the Government Code. The district may withhold the draft policymaking document in Exhibit C2 under section 552.111 of the Government Code, to the extent the draft policymaking document will be released to the public in its final form. To the extent the draft document will not be released to the public in its final form, the district may withhold the information we have marked within this document under the deliberative process privilege of section 552.111 of the Government Code. The district must release the remaining responsive information; however, any information that is subject to copyright may be released only 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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/som

Ref: ID# 503301

Enc. Submitted documents

c: Requestor
(w/o enclosures)