



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 18, 2014

Mr. Jonathan Miles
Open Government Attorney
Texas Department of Family & Protective Services
Department Mail Code E611
P.O. Box 149030
Austin, Texas 78714-9030

OR2014-04582

Dear Mr. Miles:

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# 516955 (DFPS ORR Nos. 12182013FC9 and 01162014HFZ).

The Department of Family and Protective Services (the "department") received two requests from different requestors for information pertaining to RFP No. 530-13-0070, including copies of the submitted proposals. Additionally, the first requestor also seeks copies of two specified proposals and the best and final offers submitted in response to RFP No. 530-12-0003. You indicate the department has released some information to the first requestor. You state the department will redact insurance policy numbers pursuant to section 552.136(c) of the Government Code, e-mail addresses of members of the public under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009), and social security numbers pursuant to section 552.147(b) of the Government Code.¹ You claim some of the submitted information is excepted from disclosure under sections 552.104, 552.107, and 552.111 of the Government Code. You also state release of

¹Section 552.136(c) of the Government Code allows a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from the attorney general. *See id.* § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See Gov't Code* § 552.136(d), (e). Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. ORD 684. 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. *See Gov't Code* § 552.147(b).

the submitted information may implicate the proprietary interests of ACH Child & Family Services and Lutheran Social Services of the South. You state you notified these third parties of the request and of their right to submit arguments to this office as to why their information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). We have considered the submitted arguments and reviewed the submitted information, a portion of which is a representative sample.²

Initially, we note the first requestor only seeks bid proposals and the best and final offers submitted in response to RFP No. 530-13-0070. Thus, the remaining information you have submitted as responsive to the second request is not responsive to the first request, and the department is not required to release non-responsive information in response to the first request.

Next, we note 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 letter, we have not received arguments from any of the third parties. Thus, the third parties have not demonstrated the companies have protected proprietary interests in any of the submitted 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 department may not withhold the submitted information on the basis of any proprietary interests any of the third parties may have in the information.

Section 552.104 of the Government Code protects from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. The purpose of section 552.104 is to protect the interests of a governmental body in competitive bidding situations where the governmental body wishes to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 (1991). Section 552.104 protects information from disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* Open Records Decision No. 463 (1987). Generally, section 552.104 does not except bids from disclosure after bidding is completed and the contract has been executed. *See* Open

²We 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.

Records Decision No. 541 (1990). However, in some situations, section 552.104 will operate to protect from disclosure bid information that is submitted by successful bidders. *See id.* at 5 (recognizing limited situation in which statutory predecessor to section 552.104 continued to protect information submitted by successful bidder when disclosure would allow competitors to accurately estimate and undercut future bids).

You inform us the information at issue pertains to an existing contract executed by the department for foster care redesign for Region 3. However, you explain the department intends to request proposals for foster care redesign in other regions across the state. You assert that disclosure of the information you have marked would jeopardize the department's bargaining position. You explain the information at issue identifies the evaluators and could subject the evaluators to "unwelcome lobbying or other impropriety" by competitive bidders. Further, you state release of the evaluators' comments would allow future bidders to frame their proposals according to the evaluators' preferences in order to increase their chances of being awarded the contract in the upcoming procurements. Based on these representations and our review, we find the department has demonstrated release of the information at issue could harm the department's interests in a particular competitive situation. Accordingly, the department may withhold the information you have marked under section 552.104 of the Government Code, until such time as the contracts have been executed.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.*, meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those

reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state the information you marked consists of communications between department attorneys and their staff and department employees in their role as clients. We note some of the communications were made between department attorneys, department employees, and employees of the Texas Health and Human Services Commission (the “commission”). We understand the commission is the umbrella agency for the department. You state these communications were made for the purpose of receiving legal advice. You further state the communications were intended to be, and have been kept, confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the department may withhold the information you have marked under section 552.107(1) of the Government Code.³

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, 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 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

³As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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).

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 state some of the remaining information consists of discussions between the department and the commission regarding the issuing of the foster care redesign contract. We note the commission shares a privity of interest with the department. Based on your representations and our review, we find most of the information you marked consists of advice, opinions, and recommendations pertaining to the policymaking functions of the department. However, we find a portion of the information at issue is either factual information or general administrative information. This information, which we have marked for release, may not be withheld under section 552.111. Thus, except for the information we marked for release, the department may withhold the information you marked under section 552.111 of the Government Code.

In summary, the department may withhold the information you have marked under section 552.104 of the Government Code, until such time as the contracts have been executed. The department may withhold the information you have marked under section 552.107(1) of the Government Code. With the exception of the information we have marked for release, the department may withhold the information you have marked under section 552.111 of the Government Code. The department 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 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,



Britni Fabian
Assistant Attorney General
Open Records Division

BF/tch

Ref: ID# 516955

Enc. Submitted documents

c: Two Requestors
(w/o enclosures)

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