



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

This ruling has been modified by court action.
The ruling and judgment can be viewed in PDF
format below.



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 16, 2015

The ruling you have requested has been amended as a result of litigation and has been attached to this document.

Ms. Ann-Marie Sheely
Assistant County Attorney
County of Travis
P.O. Box 1748
Austin, Texas 78767

OR2015-26495

Dear Ms. Sheely:

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# 590891.

The Travis County Juvenile Probation Department (the "department") received a request for the documents reviewed in a specified hearing, along with information pertaining to the related audit. The department states it has released some information. The department claims the submitted information is excepted from disclosure under sections 552.111 and 552.116 of the Government Code. We have considered the exceptions the department claims and reviewed the submitted information.

Initially, we note the department has marked portions of the submitted information as non-responsive. This ruling does not address the public availability of non-responsive information, and the department is not required to release such information in response to this request.

Next, we note the department has redacted portions of the responsive information. Pursuant to section 552.301 of the Government Code, a governmental body that seeks to withhold requested information must submit to this office a copy of the information, labeled to indicate which exceptions apply to which parts of the copy, unless the governmental body has received a previous determination for the information at issue or has statutory authorization to withhold the information without requesting a decision under the Act. *See* Gov't Code § 552.301(a), (e)(1)(D). The department does not assert, nor does our review of our records indicate, the department is authorized to withhold the redacted information at

issue without first seeking a ruling from this office. *See id.* § 552.301(a); Open Records Decision No. 673 (2000) (previous determinations). Therefore, this information must be submitted in a manner that enables this office to determine whether it falls within the scope of an exception to disclosure. However, because we can discern the nature of the redacted information, being deprived of the information does not inhibit our ability to make a ruling. Nonetheless, in the future, the department must not redact information from the information it submits to this office unless it is authorized to do so by statute or the information is the subject of a previous determination under section 552.301 of the Government Code. Failure to comply with section 552.301 may result in the information being presumed public under section 552.302 of the Government Code. *See Gov't Code* § 552.302.

Section 552.116 of the Government Code provides as follows:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, a hospital district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from the requirements of Section 552.021. If information in an audit working paper is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 by this section.

(b) In this section:

(1) 'Audit' means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, the bylaws adopted by or other action of the governing board of a hospital district, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) 'Audit working paper' includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Id. § 552.116. The department states the responsive information consists of portions of drafts of an audit report conducted by the Texas Juvenile Justice Department (the "TJJD").

The department states the TJJD is required to conduct the audit in accordance with the Texas Administrative Code. However, the purpose of section 552.116 is to protect the interests of the auditor, not the auditee. Here, the TJJD is the auditor, and the information at issue is maintained by the department, the auditee. As the auditee, the department may not assert section 552.116 to protect its own interests in withholding information from disclosure. Accordingly, none of the responsive information may be withheld under section 552.116 of the Government Code.

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[.]” *Id.* § 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 (1993), 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 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). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5. 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 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 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.

We note section 552.111 can encompass communications between a governmental body and a third party. *See* Open Records Decision Nos. 631 at 2 (Gov't Code § 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 561 at 9 (1990) (Gov't Code § 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (Gov't Code § 552.111 applies to memoranda prepared by governmental body's consultants). When determining if an interagency communication is excepted from disclosure under section 552.111, we must consider whether the entities between which the communication is passed share a privity of interest or common deliberative process with regard to the policy matter at issue. *See id.* In order 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 at 9.

The department raises section 552.111 of the Government Code for the submitted draft audit of the department by the TJJD. However, in this instance, we find the department has not demonstrated the department and the TJJD share a privity of interest or common deliberative process. Thus, we find the department has failed to establish any of the information at issue constitutes advice, opinions, recommendations, or other material reflecting the policymaking processes of the department. Accordingly, the department may not withhold any of the responsive information under section 552.111 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."¹ Gov't Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. This office has also found common-law privacy generally protects the identifying information of juvenile offenders. *See* Open Records Decision No. 394 (1983); *cf.* Fam. Code § 58.007(e). In this instance, the responsive information contains the identifying information of individuals who may have been juvenile offenders. However, because the responsive information does not

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470(1987).

reflect the age of these individuals, we must rule conditionally. Therefore, to the extent the information we have marked pertains to offenders who were between the ages of ten and sixteen at the time of the alleged conduct, the department must withhold the information we have marked pertaining to those offenders under section 552.101 of the Government Code in conjunction with common-law privacy. However, to the extent the information we have marked does not identify offenders who were between the ages of ten and sixteen at the time of the alleged conduct, the department may not withhold this information on that basis. As the department raises no further exceptions against disclosure, the remaining responsive information must be released.

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,



Rahat Huq
Assistant Attorney General
Open Records Division

RSH/som

Ref: ID# 590891

Enc. Submitted documents

c: Requestor
(w/o enclosures)

MAY 21 2018

At 1:49 p M.
Velva L. Price, District Clerk

CAUSE NO. D-1-GN-15-005855

ESTELA MEDINA, CHIEF JUVENILE
PROBATION OFFICER,
Plaintiff,

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IN THE DISTRICT COURT OF

v.

345th JUDICIAL DISTRICT

KEN PAXTON, STATE OF TEXAS
ATTORNEY GENERAL,
Defendant.

TRAVIS COUNTY, TEXAS

AGREED ORDER OF DISMISSAL

This is an action brought under the Texas Public Information Act (PIA), Texas Government Code chapter 552, in which Plaintiff Medina sought declaratory relief from Attorney General Open Records Letter Ruling OR2015-26495. Pursuant to section 552.327 of the Government Code, the Court may dismiss a suit brought under the PIA when all parties to the suit agree to the dismissal and the Attorney General determines and represents to the Court that the requestor has voluntarily withdrawn the request for information or has abandoned the request. And section 552.301(g) of the Government Code permits a governmental body to request another open records decision from the Attorney General concerning the information at issue in a lawsuit that has been dismissed pursuant to section 552.327.

The Attorney General has determined and represents to the Court that the requestor has abandoned the request for information that gave rise to this lawsuit. Accordingly, the Parties request that the Court enter this Agreed Order of Dismissal. The Court agrees entry of this order is appropriate.

IT IS THEREFORE ADJUDGED, ORDERED, AND DECLARED that:

Plaintiff's cause of action against Defendant is dismissed without prejudice upon agreement of all Parties pursuant to Tex. Gov't Code § 552.327;



Plaintiff is not bound by OR2015-26495 and may request a new ruling from the Attorney General, should Plaintiff receive another request for the information that was at issue in this lawsuit;

All relief not expressly granted is denied; and

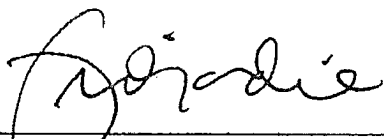
This Order disposes of all claims between the Parties and is final.

Signed this 21st day of May, 2018.



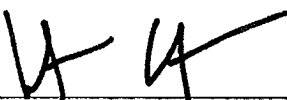
JUDGE PRESIDING
AMY CLARK MEACHUM

AGREED:



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JUVENILE PROBATION OFFICER



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