



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

January 20, 2017

Mr. Spencer Walker  
Public Information Coordinator  
State Bar of Texas  
1414 Colorado  
Austin, Texas 78701

OR2017-01405

Dear Mr. Walker:

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# 642294.

The State Bar of Texas (the "state bar") received a request for five categories of information pertaining to voting by state bar members.<sup>1</sup> You state some of the requested information does not exist.<sup>2</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.106, 552.111, and 552.116 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>3</sup>

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<sup>1</sup>We note the bar sought and received clarification of the information requested. See Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); see also *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

<sup>2</sup>The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2(1990), 452 at 3 (1986), 362 at 2 (1983).

<sup>3</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.

Initially, we note some of the requested information may have been the subject of a previous ruling from this office. In Open Records Letter No. 2016-25319 (2016), this office ruled the state bar (1) must withhold certain information under section 552.101 of the Government Code in conjunction with section 325.0195 of the Government Code; (2) may withhold certain information under section 552.111 of the Government Code; and (3) must release the remaining information. We have no indication the law, facts, or circumstances upon which the prior ruling was based have changed. Accordingly, to the extent the requested information is identical to the information previously requested and ruled upon, the state bar must continue to rely on Open Records Letter No. 2016-25319 as a previous determination, and withhold or release the previously ruled upon information in accordance with it. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, to the extent the information in the current request is not encompassed by the prior ruling, we will consider the exceptions you raise.

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:

...

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate[.]

Gov't Code § 552.022(a)(5). The submitted information includes information used to estimate the need for or expenditure of public funds or taxes by a governmental body subject to section 552.022(a)(5) of the Government Code. Information subject to section 552.022(a)(5) must be released unless such information is made confidential under the Act or other law. *See id.* You seek to withhold the information at issue under sections 552.106, 552.111, and 552.116 of the Government Code. However, these sections are discretionary in nature and do not make information confidential under the Act. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). Therefore, the state bar may not withhold the information subject to section 552.022, which we have marked, under section 552.106, section 552.111, or section 552.116 of the Government Code. However, as section 552.101 of the Government Code can make information confidential under the Act, we will address

your argument under section 552.101 for the information subject to section 552.022. Further, we will consider your arguments against disclosure for the remaining information.

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 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 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.

You assert the information that is not subject to section 552.022 of the Government Code consists of advice, recommendations, and opinions of the state bar's staff regarding policy decisions. You also inform us this information includes draft documents that reflect the deliberations of the state bar's staff. You state the final versions of these draft documents have been released to the public in their final forms. Upon review, we find you have demonstrated the applicability of the deliberative process privilege to the information we have marked. Therefore, the state bar may withhold this information under section 552.111 of the Government Code.<sup>4</sup> However, we find the remaining information at issue consists of information that is administrative or purely factual in nature or does not pertain to policymaking. Thus, you have failed to demonstrate the remaining information at issue reveals advice, opinions, or recommendations that pertain to policymaking. Accordingly, the state bar may not withhold any portion of the remaining information under section 552.111 of the Government Code on the basis of the deliberative process privilege.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses statutes such as section 325.0195 of the Government Code. Section 325.0195 provides in relevant part:

(a) A working paper, including all documentary or other information, prepared or maintained by the [Sunset Advisory Commission (the "commission")] staff in performing its duties under this chapter or other law to conduct an evaluation and prepare a report is excepted from the public disclosure requirements of Section 552.021.

*Id.* § 325.0195(a). Section 325.0195 only applies to working papers prepared or maintained by the commission. *See id.* We note the remaining information you have marked consists of internal communications of state bar employees and draft documents maintained by the state bar. Further, we note the present request for information was sent to the state bar, and not the commission. Therefore, we find the state bar has failed to establish the remaining information you have marked consists of working papers made confidential under section 325.0195. *See id.* Thus, we find the state bar may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with section 325.0195 of the Government Code.

Section 552.106 of the Government Code excepts from disclosure "[a] draft or working paper involved in the preparation of proposed legislation" and "[a]n internal bill analysis or working paper prepared by the governor's office for the purpose of evaluating proposed legislation." *Id.* § 552.106(a)-(b). We note section 552.106(b) applies to information created or used by employees of the governor's office for the purpose of evaluating proposed legislation. The purpose of section 552.106 is to encourage frank discussion on policy

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<sup>4</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

matters between the subordinates or advisors of a legislative body and the members of the legislative body. *See* Open Records Decision No. 615 at 2 (1993). Therefore, section 552.106 is applicable only to the policy judgments, recommendations, and proposals of persons who are involved in the preparation of proposed legislation and who have an official responsibility to provide such information to members of the legislative body. *See id.* at 1; *see also* Open Records Decision No. 429 at 5 (1985) (statutory predecessor to section 552.106 not applicable to information relating to governmental entity's efforts to persuade other governmental entities to enact particular ordinances).

Upon review, we find you have failed to demonstrate any of the remaining information at issue consists of policy judgments, recommendations, and proposals protected by section 552.106. Therefore, we conclude the state bar may not withhold any of the remaining information at issue under section 552.106.

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, 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, 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.

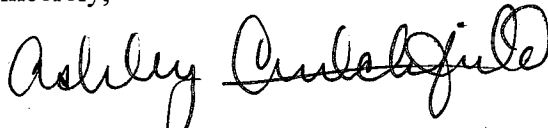
Gov't Code § 552.116. You assert some of the remaining information is excepted from disclosure under section 552.116 of the Government Code. However, upon review, we find you have failed to demonstrate the information at issue consists of audit working papers excepted from disclosure under section 552.116. Thus, the state bar may not withhold the remaining information at issue under section 552.116 of the Government Code.

In summary, the state bar must continue to rely on Open Records Letter No. 2016-25319 as a previous determination, and withhold or release any previously ruled upon information in accordance with the prior ruling. The state bar may withhold the information we have marked under section 552.111 of the Government Code. The state bar 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](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,



Ashley Crutchfield  
Assistant Attorney General  
Open Records Division

AC/bw

Ref: ID# 642294

Enc. Submitted documents

c: Requestor  
(w/o enclosures)