



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 20, 2017

Ms. ML Calcote
Assistant General Counsel
Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR2017-01409

Dear Ms. Calcote:

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# 642371 (DPS ID Nos. 16-6461, 16-7069, and 17-162).

The Texas Department of Public Safety (the "department") received four requests from three requestors for information related to a specified program. You claim portions of the submitted information are excepted from disclosure under sections 552.104, 552.106, and 552.111 of the Government Code. You also state release of this information may implicate the interests of the Office of the Governor (the "governor's office"). Accordingly, you have notified the governor's office of the request and of its right to submit arguments to this office as to why its information should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have received comments from the governor's office in which it claims some of the information at issue is excepted under sections 552.107 and 552.111 of the Government Code. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note some of the submitted information, which you have indicated, is not responsive to the request for information because it does not relate to the categories of information requested. We further note a portion of the submitted information is not responsive to the first and second requests because it was created after the date of the first and second request. This ruling does not address the public availability of any information

that is not responsive to these requests, and the department is not required to release this information in response to these requests.

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 under this chapter 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). Upon review, we find portions of the submitted information consist of budget information used to estimate the need for or expenditure of public funds or taxes. Thus, the information at issue is subject to section 552.022(a)(5) of the Government Code. Although you seek to withhold this information under sections 552.106 and 552.111 of the Government Code, these are discretionary exceptions 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) (governmental body may waive section 552.111). Therefore, the information we have indicated may be not withheld under section 552.106 or section 552.111 of the Government Code. As you do not raise any other exceptions to disclosure of this information, the information we have indicated must be released pursuant to section 552.022(a)(5) of the Government Code. However, we will consider the arguments against disclosure for the remaining information not subject to section 552.022(a)(5) of the Government Code.

Section 552.104(a) 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). The “test under section 552.104 is whether knowing another bidder’s [or competitor’s information] would be an advantage, not whether it would be a decisive advantage.” *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). You represent the information you have indicated pertains to a competitive bidding situation related to a vendor contract for the development of the Compassionate Use Program. In addition, you state a contract has not yet been executed for the project at issue and release of the information would harm the department’s interest in negotiating this contract. After review of the information at issue and consideration of the arguments, we find the department has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the

department may withhold the information you have indicated under section 552.104(a) of the Government Code.¹

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, orig. proceeding); 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, orig. proceeding). 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. ORD 615 at 5; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). 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). However, 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. ORD 615 at 5-6; *see also Dallas Morning News*, 22 S.W.3d at 364 (section 552.111 not applicable to personnel-related communications that did not involve policymaking).

Further, section 552.111 does not generally except from disclosure facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 157; 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 Nos. 631 at 2 (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body’s request and performing task that

¹As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

is within governmental body's authority), 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body's consultants). 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.

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.

The department and the governor's office state some of the remaining responsive information consists of advice, opinions, recommendations and draft documents of the department and the governor's office, which shares a privity of interest with the department relating to the department's policy-making functions concerning the program at issue. We understand the draft documents will be released in final form. In this instance, we find the information we marked consists of advice, opinions, and recommendations pertaining to the policymaking matters. Accordingly, the department may withhold the information we have marked under section 552.111 of the Government Code.² However, the remaining information at issue either consists of factual information, consists of internal administrative matters that do not rise to the level of policymaking, or is information communicated with parties with whom the department does not share a privity of interest. Therefore, we conclude you have failed to demonstrate the remaining information at issue constitutes internal communications containing advice, recommendations, or opinions reflecting the policymaking processes of the department. Consequently, the department may not withhold any of the remaining responsive information under section 552.111 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." Gov't Code § 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

²As our ruling is dispositive for this information, we need not address the remaining arguments against its disclosure.

evaluating proposed legislation. The purpose of section 552.106 is to encourage frank discussion on policy 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).

You state portions of the remaining information are excepted from disclosure under section 552.106. However, you have not demonstrated the information at issue constitutes a draft or working paper involved in the preparation of proposed legislation. Further, you have failed to demonstrate that this information constitutes an internal bill analysis or working paper prepared by the department for the purpose of evaluating proposed legislation. Therefore, we conclude the department may not withhold any of the remaining information at issue under section 552.106 of the Government Code.

We note some of the remaining information may be subject to section 552.117 of the Government Code.³ Section 552.117(a)(1) of the Government Code excepts from disclosure the current and former home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Section 552.117(a)(1) also applies to the personal cellular telephone number of a current or former official or employee of a governmental body, provided the cellular telephone service is not paid by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, a governmental body must withhold information under section 552.117(a)(1) on behalf of a current or former employee only if the individual made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Therefore, if the employees whose information is at issue timely requested confidentiality under section 552.024 of the Government Code and the cellular telephone service is not paid for by a governmental body, the department must withhold the cellular telephone numbers we have marked under section 552.117(a)(1) of the Government Code. Conversely, if the employees at issue did not timely request confidentiality under section 552.024 or the cellular telephone service is paid for by a governmental body, the department may not withhold the information at issue under section 552.117(a)(1).

³The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision No. 481 (1987), 480 (1987), 470 (1987).

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov’t Code § 552.137(a)-(c). The e-mail addresses at issue are not a type specifically excluded by section 552.137(c) of the Government Code. Accordingly, the department must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their disclosure.

In summary, the department must release the information we have indicated pursuant to section 552.022(a)(5) of the Government Code. The department may withhold the information you have indicated under section 552.104 of the Government Code. The department may withhold the information we have marked under section 552.111 of the Government Code. If the employees whose information is at issue timely requested confidentiality under section 552.024 of the Government Code and the cellular telephone service is not paid for by a governmental body, the department must withhold the cellular telephone numbers we have marked under section 552.117(a)(1) of the Government Code. The department must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their 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,

A handwritten signature in cursive script that reads "Erin Groff".

Erin Groff
Assistant Attorney General
Open Records Division

EMG/som

Ref: ID# 642371

Enc. Submitted documents

c: 3 Requestors
(w/o enclosures)

Third Party
(w/o enclosures)