



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 27, 2017

Ms. Jessica Vu
Public Information Coordinator
Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2017-08992

Dear Ms. Vu:

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# 655249 (OOG ID# 17-049).

The Office of the Governor (the "governor's office") received a request for copies of e-mails relating to the Super Bowl during a specified time period.¹ You state the governor's office released some of the responsive information. The governor's office states it will redact e-mail addresses under section 552.137 of the Government Code in accordance with Open Records Decision No. 684 (2009).² You claim the submitted information is excepted from disclosure under sections 552.104 and 552.111 of the Government Code. We have

¹We note the requestor excluded from the request correspondence "that contained elected officials' travel security details[.]"

²Open Records Decision No. 684 serves as a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. *See* ORD 684.

considered the exceptions you claim and reviewed the submitted representative sample of information.³

Initially, we note some of the responsive information may be the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2017-08718 (2017). In that ruling, we determined the governor's office may withhold the information at issue under section 552.104 of the Government Code. There is no indication the law, facts, and circumstances on which the prior ruling was based have changed. Accordingly, we conclude the governor's office may continue to rely on Open Records Letter No. 2017-08718 as a previous determination and withhold the identical information in accordance with that ruling. *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 prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes information is or is not excepted from disclosure). To the extent the submitted information is not identical to the information at issue in Open Records Letter No. 2017-08718, we will address your arguments against its disclosure.

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, 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, 364 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body’s policymaking functions 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

³We 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.

and written observations of facts and events severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152, 157 (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, section 552.111 protects the factual information. See Open Records Decision No. 313 at 3 (1982).

This office has also concluded section 552.111 exempts from disclosure a preliminary draft of a document intended for public release in its final form because the draft necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document. 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 of a preliminary draft of a policymaking document, including comments, underlining, deletions, and proofreading marks, that will be released to the public in its final form. See *id.* at 2.

The governor's office states the marked information consists of advice, opinions, and recommendations relating to the governor's office's policymaking. The governor's office also states the information at issue contains draft documents that will be released to the public in final form. Upon review, we find the governor's office may withhold the information it has marked under section 552.111 of the Government Code.

Section 552.104 of the Government Code excepts from required public 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, 841 (Tex. 2015). The governor's office states it has specific marketplace interests in the information at issue because expansion and recruitment of businesses to the State of Texas is a competitive process and you inform us the governor's office "works tirelessly to promote Texas, in part by providing state resources to encourage business growth within the state." In addition, you state "Texas devotes substantial resources to programs designed primarily to attract new businesses to the state or assist with the substantial expansion of an existing business as part of competitive recruitment." You explain the governor's office is currently negotiating potential approvals or contracts with the businesses at issue, and contracts with these businesses have not been executed. You argue release of this information, before contracts are signed or final approval is given, would disadvantage Texas by permitting other states to directly approach these businesses and their representatives with competing incentives. Based on your representations and our review, we find the governor's office has established release of the marked information would give advantage to a competitor or bidder. Accordingly, the governor's office may withhold the marked information under section 552.104 of the Government Code.

In summary, the governor's office must continue to rely on Open Records Letter No. 2017-08718 as a previous determination and withhold the responsive information in accordance with that ruling. The governor's office may withhold the information it has marked under section 552.111 of the Government Code. The governor's office may withhold the information it has marked under section 552.104 of the Government Code. The governor's office 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,



Kelly McWethy
Assistant Attorney General
Open Records Division

KSM/sb

Ref: ID# 655249

Enc. Submitted documents

c: Requestor
(w/o enclosures)