



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 10, 2017

Ms. Patsy Spaw
Secretary of the Senate
Senate of the State of Texas
P.O. Box 12068
Austin, Texas 78711

OR2017-10103

Dear Ms. Spaw:

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# 657494.

The Office of Senator Charles Schwertner (the "senator's office") received two requests from the same requestor for communications to or from the senator's office concerning three specified bills during a certain time period and a specified hearing.¹ You indicate the senator's office released some information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.106, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.106 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." Section 552.106 ordinarily applies only to persons with a responsibility to prepare

¹The senator's office sought and received clarification of the information requested. *See* Gov't Code § 552.222 (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) (if governmental entity, acting in good faith, requests clarification of unclear or over-broad request, ten-day period to request attorney general ruling is measured from date request is clarified).

information and proposals for a legislative body. Open Records Decision No. 460 (1987). 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, and therefore, it does not except from disclosure purely factual information. *Id.* at 2. However, a comparison or analysis of factual information prepared to support proposed legislation is within the ambit of section 552.106. *Id.* We note sections 552.111 and 552.106 are similar in that they both protect advice, opinion, and recommendation on policy matters in order to encourage frank discussion during the policymaking process. *Id.* at 3 (1987). However, section 552.106 is narrower than section 552.111 in that it applies specifically to the legislative process. *Id.*

You assert the submitted information consists of communications between, and working papers created by, legislators and legislative staff related to pending legislation during the 85th Legislature, and contain confidential analysis and description of such legislation. You explain the communications contain policy judgments, internal discussion of the legislative process, and confidential analysis and descriptions of such legislation. Upon review, we find the senator's office has demonstrated some of the submitted information constitutes policy judgments, recommendations, and proposals regarding proposed and filed legislation. Accordingly, the senator's office may withhold the information we marked under section 552.106 of the Government Code.² However, you have not demonstrated the remaining 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 senator's office for the purpose of evaluating proposed legislation. Therefore, we conclude the senator's office may not withhold any of the remaining information at issue under section 552.106 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[.]” 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

²As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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 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.

You assert the remaining information consists of advice, opinions, and recommendations of representatives of the senator's office, members of the legislature, legislature staff, and certain privileged state agency personnel relating to the development and enactment of legislation and other legislative activities. You explain, with respect to the information at issue, the senator's office shares a privity of interest with these parties. Based on your representations and our review, we find the senator's office may withhold the information we have marked under section 552.111 of the Government Code.³ However, we find the

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

remaining information at issue consists of information that is administrative or purely factual in nature. Thus, we find you have failed to demonstrate the remaining information at issue is excepted under section 552.111. Accordingly, the remaining information may not be withheld under section 552.111 of the Government Code.

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses information protected by section 323.017 of the Government Code, which provides:

Communications, including conversations, correspondence, and electronic communications, between a member of the legislature or the lieutenant governor and an assistant or employee of the [Texas Legislative] council [the “council”] that relate to a request by the official for information, advice, or opinions from an assistant or employee of the council are confidential. Information, advice, and opinions given privately by an assistant or employee of the council to a member of the legislature, or the lieutenant governor, acting in the person’s official capacity, are confidential. However, the member or lieutenant governor may choose to disclose all or a part of the communications, information, advice, or opinions to which this section applies, and such a disclosure does not violate the law of this state.

Id. § 323.017. You state some of the remaining information consists of communications between a member of the senator’s office and employees of the council that relate to requests for information, advice, or opinions. Upon review, we agree the information at issue consists of communications between a member of the legislature and employees of the council that relate to a request for information, advice, or opinion from council employees. Accordingly, the senator’s office must withhold the marked information under section 552.101 of the Government Code in conjunction with section 323.017 of the Government Code.

In summary, the senator’s office may withhold the information we marked under section 552.106 of the Government Code. The senator’s office may withhold the information we marked under section 552.111 of the Government Code. The senator’s office must withhold the marked information under section 552.101 of the Government Code in conjunction with section 323.017 of the Government Code. The senator’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,

A handwritten signature in black ink that reads "Emily Kurst". The signature is written in a cursive style with a large initial "E" and a stylized "K".

Emily Kurst
Assistant Attorney General
Open Records Division

EK/eb

Ref: ID# 657494

Enc. Submitted documents

c: Requestor
(w/o enclosures)