



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 6, 2019

Mr. Zachary Stephenson
Chief of Staff and General Counsel
Office of State Representative Will Metcalf
P. O. Box 2910
Austin, Texas 78768-2910

OR2019-14982

Dear Mr. Stephenson:

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# 769502.

The Office of State Representative Will Metcalf (the "representative's office") received two requests from the same requestor for information pertaining to House Bill 4654 and communications between the representative and any of six named entities or five named individuals during a specified time period. You state the representative's office has withheld some information pursuant to section 306.004 of the Government Code.¹ You state the representative's office has released some of the requested information. You claim some of the submitted information is excepted from disclosure under sections 552.106 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted 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

¹Release of information subject to section 306.004(a) of the Government Code is governed by chapter 306, not the Act, and it is within the discretion of a legislator to either withhold or release such information. *See* Gov't Code § 306.004(a); *see also* Open Records Decision No. 648 at 3-7 (1996).

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). When determining if an interagency memorandum is excepted from disclosure under section 552.111, we must consider whether the agencies between which the memorandum is passed share a privity of interest or common deliberative process with regard to the policy matter at issue. *See* Open Records Decision No. 561 at 9 (1990).

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 No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). 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. (We note a governmental body does not share a privity of interest with a third party when the governmental body and the third party are involved in contract negotiations, as the parties' interests are adverse.)

The representative's office states the information it marked consists of communications between employees of the representative's office, a legislator's office, and a third party with whom the representative's office shares a privity of interest or common deliberative process regarding the development, analysis, and evaluation of proposed legislation related to the representative's office. Thus, the representative's office states this information consists of advice, opinions, and recommendations of the representative's office pertaining to its policymaking functions. Based on these representations and our review of the information at issue, we find the representative's office has demonstrated the information we have marked consists of documents that provide advice, opinions, or recommendations on the policymaking matters of the representative's office. Thus, the representative's office may withhold the information we have marked under section 552.111 of the Government Code.² Upon review, however, we find the remaining information at issue is general administrative and purely factual information that does not pertain to policymaking. Thus, we find the representative's office has not shown the information at issue consists of advice, opinions, or recommendations on the policymaking matters of the representative's office. Accordingly, the representative's office may not withhold the remaining information at issue 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." Gov't Code § 552.106(a). Section 552.106(a) ordinarily applies only to persons with a responsibility to prepare information and proposals for a legislative body. *See* Open Records Decision No. 460 at 1 (1987). The purpose of this exception is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body; therefore, section 552.106 encompasses only policy judgments, recommendations, and proposals involved in the preparation of proposed legislation and does not except purely factual information from public disclosure. *Id.* at 2. We note sections 552.106 and 552.111 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. However, section 552.106 is narrower than section 552.111 in that it applies specifically to the legislative process. *Id.*

The representative's office argues some of the remaining information is protected by section 552.106 of the Government Code. Upon review, we find you have established the information we marked constitutes advice, opinion, analysis, and recommendations regarding proposed legislation involving the representative's office. Accordingly, the representative's office may withhold the information we marked under section 552.106 of the Government Code. However, we find the representative's office has not demonstrated any of the remaining information constitutes recommendations, opinions, or advice for purposes of

²As our ruling is dispositive, we need not address your remaining exception to disclosure.

section 552.106. We therefore conclude the representative's office may not withhold any of the remaining information under section 552.106 of the Government Code.

In summary, the representative's office may withhold the information we have marked under section 552.111 of the Government Code. The representative's office may withhold the information we marked under section 552.106 of the Government Code. The representative'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,



Jennifer Copeland
Assistant Attorney General
Open Records Division

JC/jxd

Ref: ID# 769502

Enc. Submitted documents

c: Requestor
(w/o enclosures)