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ATTORNEY GENERAL OF TEXAS

October 4, 2019

Mr. Larry L. Foerster
Counsel for the City of Montgomery
Darden, Fowler, and Creighton, L.L.P.
414 West Phillips. Suite 100
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OR2019-27863

Dear Mr. Foerster:

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# 789520 (Ref. No. 2019-61).

The City of Montgomery (the "city"), which you represent, received a request for a specified audit report. You state the city has released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.108 and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments submitted by the requestor. See Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

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[.]" *Id.* § 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*,

¹ Although you also raise section 552.101 of the Government Code, you make no arguments to support this exception. Therefore, we assume you have withdrawn your claim that this exception applies to the submitted information. See Gov't Code §§ 552.301, .302.

842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 exempts 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 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 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.

Section 552.111 can also encompass communications between a governmental body and a third party, including a consultant or other party, with which the governmental body establishes it has a privity of interest or common deliberative process. *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.

You assert the submitted information consists of advice, opinions, and recommendations of third-party consultants hired by the city and with whom the city shares a privity of interest. You state the information at issue consists of a draft document pertaining to the internal operation of the city's police department. However, you do not explain whether the submitted draft document was intended to be released in its final form. Thus, we must rule conditionally. If the draft document at issue will be released to the public in its final form, then the city may withhold the submitted draft document in its entirety under section

552.111 of the Government Code.² However, if the submitted draft document will not be released to the public in its final form, then the city may not withhold it in its entirety under section 552.111.

Nevertheless, in that instance, we find portions of the information at issue consist of advice, opinions, or recommendations on the policymaking matters of the city. Accordingly, to the extent the submitted draft document will not be released to the public in its final form, the city may withhold the information we marked under section 552.111 of the Government Code.³ However, we find the remaining information at issue is general administrative and purely factual information or does not pertain to policymaking. Thus, we find you have failed to demonstrate the remaining information consists of internal communications containing advice, opinions, or recommendations on the policymaking matters of the city. Therefore, to the extent the city will not release the submitted draft document to the public in its final form, the city 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 552.108(b)(1) of the Government Code excepts from disclosure “[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if . . . release of the internal record or notation would interfere with law enforcement or prosecution[.]” Gov’t Code § 552.108(b)(1). This section is intended to protect “information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State.” *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.). Rather than merely making a conclusory assertion that releasing the information would interfere with law enforcement, the governmental body claiming section 552.108(b)(1) must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. *See* Open Records Decision No. 562 at 10 (1990) (construing statutory predecessor). This office has concluded section 552.108(b)(1) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Record Decision No. 252 (1980) (section 552.108 designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment). However, section 552.108(b)(1) is not applicable to generally known policies and procedures. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (1989) (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

You state the remaining information details certain information pertaining to the city’s police department, such as “staffing and operations, evidence and property control, . . . facilities and equipment, and other operational issues[.]” You assert release of the information at issue “could compromise the operating procedures and security system that

² In this instance, as our ruling is dispositive, we need not address your remaining arguments against disclosure of the submitted information.

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


has been put in place to protect [the c]ity's law enforcement officers as well as protect the public[.]” Based on your representations and our review, we find you have demonstrated release of some of the remaining information, which we marked, would interfere with law enforcement. Accordingly, the city may withhold the information we marked under section 552.108(b)(1) of the Government Code. However, we find you have failed to demonstrate release of any of the remaining information would interfere with law enforcement or crime prevention. Therefore, the city may not withhold any portion of the remaining information under section 552.108(b)(1).

In summary, if the draft document at issue will be released to the public in its final form, then the city may withhold the submitted draft document in its entirety under section 552.111 of the Government Code. To the extent the submitted draft document will not be released to the public in its final form, the city: (1) may withhold the information we marked under section 552.111 of the Government Code; (2) may withhold the information we marked under section 552.108(b)(1) of the Government Code; and (3) 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,



Blake Brennan
Assistant Attorney General
Open Records Division

BBX/jxd

Ref: ID# 789520

Enc. Submitted documents

c: Requestor
(w/o enclosures)