



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 18, 2020

Mr. Joseph Behnke
Assistant General Counsel
Office of the Governor of the State of Texas
P.O. Box 12428
Austin, Texas 78711

OR2020-04933

Dear Mr. Behnke:

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# 812178 (OOG ID# 482-19).

The Office of the Governor of Texas (the "governor's office") received a request for certain types of e-mail communications and text messages during a specified time period.¹ The governor's office states it will release some of the requested information. The governor's office claims some of the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code.² Additionally, we understand the governor's office notified the Texas Department of Public Safety (the "department") of the request for information and of its right to submit arguments to this office as to why the submitted 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

¹ The governor's office states it sought and received clarifications of the information requested. *See* Gov't Code § 552.222 (providing 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) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

² The governor's office also raised section 552.101 of the Government Code for some of the submitted information. However, in correspondence dated December 19, 2019, the governor's office informs us it wishes to withdraw its claim this section applies to the information at issue. *See* Gov't Code §§ 552.301, .302. Accordingly, we do not address the applicability of this exception.

received comments from the department. We have considered the submitted arguments and reviewed the submitted representative sample of information.³

Initially, you inform us some of the requested information was the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2019-34644 (2019) and 2020-02859 (2020). As we have no indication the law, facts, and circumstances on which the prior rulings were based have changed, the governor's office must continue to rely on Open Records Letter Nos. 2019-34644 and 2020-02859 as previous determinations and withhold or release information at issue in accordance with those rulings.⁴ 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 that information is or is not excepted from disclosure). We will address your argument against disclosure of the remaining requested 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 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).

³ We 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.

⁴ As we are able to make this determination, we need not address your argument against disclosure of this information.

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).

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 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 *id.*

The governor's office states some of the remaining information, which it marked, consists of internal communications shared between governor's office employees and officials that contain advice and recommendations pertaining to the governor's office's policymaking functions. The governor's office also states the information at issue includes draft documents that will be released in their final forms and communications between employees of the governor's office and other state agencies that share a common deliberative process with the governor's office regarding the policymaking matters at issue. Based on these representations and our review of the information at issue, we find the governor's office has demonstrated the information it marked consists of advice or recommendations on the policymaking matters of the governor's office. Thus, the governor's office may withhold the information it marked under section 552.111 of the Government Code.⁵

In summary, the governor's office must continue to rely on Open Records Letter Nos. 2019-34644 and 2020-02859 as previous determinations and withhold or release information at issue in accordance with those rulings. The governor's office may withhold

⁵ As our ruling is dispositive, we need not address the department's arguments against disclosure of this information.

the information it marked under section 552.111 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 <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,

A handwritten signature in black ink, appearing to read 'Michelle Garza', with a long horizontal flourish extending to the right.

Michelle Garza
Assistant Attorney General
Open Records Division

MRG/jxd

Ref: ID# 812178

Enc. Submitted documents

c: Requestor
(w/o enclosures)

1 Third Party
(w/o enclosures)