



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

June 9, 2020

The Honorable Ben Leman  
State Representative  
House District 13  
P.O. Box 2910  
Austin, Texas 78768-2910

OR2020-15711

Dear Representative Leman:

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# 830257.

The Office of Representative Ben Leman (the "representative's office") received a request for information pertaining to Texas Central Railroad & Infrastructure, Inc. and high-speed rail.<sup>1</sup> You state you have released some of the requested information. We also understand you will withhold some of the requested information pursuant to sections 306.003 and 306.004 of the Government Code.<sup>2</sup> You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.106, 552.109, 552.110, 552.111, and 552.146 of the Government Code.<sup>3</sup> We have considered the exceptions you claim and reviewed the submitted information.

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<sup>1</sup> You state the representative's office sent the requestor a cost estimate of charges pursuant to section 552.2615 of the Government Code, and the requestor accepted the cost estimate. *See* Gov't Code § 552.2615. The estimate of charges required the requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. *See id.* § 552.263(a). You also inform us the representative's office received the required deposit on March 9, 2020. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date governmental body receives bond or deposit).

<sup>2</sup> Release of information subject to section 306.003(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 §§ 306.003(a), .004(a); *see also* Open Records Decision No. 648 at 3-7 (1996).

<sup>3</sup> Although you do not raise section 552.146 of the Government Code in your brief, we understand you to raise this exception based on your markings.

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(17). The submitted information contains court-filed documents that are subject to section 552.022(a)(17), which must be released unless they are made confidential under the Act or other law. *See id.* You seek to withhold the information subject to section 552.022(a)(17) under section 552.106 of the Government Code. However, section 552.106 is a discretionary exception and does not make information confidential under the Act. *See* Open Records Decision Nos. 663 at 5 (1999) (governmental body may waive section 552.111), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the marked court-filed documents may not be withheld under section 552.106 of the Government Code. As you raise no other exceptions to the disclosure for the marked court-filed documents, they must be released pursuant to section 552.022(a)(17) of the Government Code. However, we will address your arguments against disclosure of the remaining information.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov't Code § 552.101. This section encompasses section 306.008 of the Government Code, which provides as follows:

(a) To protect the public's interest in the proper performance of the deliberative and policymaking responsibilities of the legislature and to preserve the legislative branch's independence under the fundamental principle of separation of powers, as guaranteed by Article II and Section 21, Article III, Texas Constitution, a communication is confidential and subject to legislative privilege if the communication:

- (1) is given privately;
- (2) concerns a legislative activity or function; and
- (3) is among or between any of the following:
  - (A) a member of the house or senate;
  - (B) the lieutenant governor;
  - (C) an officer of the house or senate;

(D) a member of the governing body of a legislative agency;  
or

(E) a legislative employee.

*Id.* § 306.008(a). You inform us the information you marked consists of communications that were given privately involving members of the state legislature concerning legislative activities and functions. Therefore, upon review, we find the information at issue is confidential under section 306.008(a) and the representative's office must withhold it under section 552.101 of the Government Code on this basis.<sup>4</sup>

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.*

You state the information you marked consists of communications and legislative working papers created by legislative staff and third parties who share a privity of interest with the representative's office for the purpose of enacting legislation. You assert the information at issue reveals advice, opinions, recommendations, and policy judgments made in the preparation of proposed legislation. You further state the information at issue has not been made public. Upon review, we find you have established the information we marked constitutes advice, opinion, analysis, and recommendation regarding proposed legislation. Accordingly, the representative's office may withhold the information we marked under section 552.106 of the Government Code.<sup>5</sup> However, we find you have not demonstrated any of the remaining information you marked constitutes recommendations, opinions, or advice for purposes of 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.

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

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<sup>4</sup> As our ruling is dispositive, we need not consider your remaining arguments against disclosure of this information.

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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).

You state the remaining information you marked consists of communications between Representative Leman and staff of the representative's office that contain analysis and recommendations pertaining to policymaking matters of the representative's office. Based on your representations and our review of the information at issue, we find the representative's office has demonstrated portions of the information at issue, which we have marked, consist of advice, opinions, or recommendations on the policymaking matters of the representative's office. Thus, the representative's office may withhold the information we marked under section 552.111 of the Government Code. However, we find the remaining information at issue is general administrative and purely factual information or has been shared with individuals with whom you have not demonstrated the representative's office shares a privity of interest. Thus, we find you have failed to show the remaining information at issue consists of advice, opinions, or recommendations on the policymaking matters of the representative's office. Accordingly, the remaining information at issue may not be withheld under section 552.111 of the Government Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered highly intimate or embarrassing by the Texas Supreme Court are delineated in *Industrial*

*Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). This office has also found personal financial information not relating to the financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. *See* Open Records Decision Nos. 600 (1992), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). However, we note common-law privacy protects the interests of individuals, not those of corporate and other business entities. *See* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989) (corporation has no right to privacy (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950))), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990). Upon review, we find the information we marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the representative's office must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy.<sup>6</sup>

Section 552.109 of the Government Code excepts from disclosure “[p]rivate correspondence or communications of an elected office holder relating to matters the disclosure of which would constitute an invasion of privacy[.]” Gov’t Code § 552.109. This office has held the test to be applied to information under section 552.109 is the same as the common-law privacy standard under section 552.101, as discussed above. *Indus. Found.*, 540 S.W.2d at 682. Upon review, we find you have failed to demonstrate any of the information at issue constitutes highly intimate or embarrassing information that is of no legitimate concern to the public. Therefore, the representative's office may not withhold the remaining information you marked under section 552.109 of the Government Code.

Section 552.110 of the Government Code protects (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov’t Code § 552.110(b)-(c). Although the representative's office argues some of the remaining information is excepted under section 552.110, that exception is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address the argument of the representative's office under section 552.110.

Section 552.146 of the Government Code provides, in relevant part:

- (a) All written or otherwise recorded communications, including conversations, correspondence, and electronic communications, between a member of the legislature or the lieutenant governor and an assistant or employee of the Legislative Budget Board [the “board”] are excepted from [required public disclosure].

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<sup>6</sup> As our ruling is dispositive, we need not consider your remaining argument against disclosure of this information.

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(c) This section does not except from required disclosure a record or memoranda of a communication that occurs in public during an open meeting or public hearing conducted by the [board].

*Id.* § 552.146(a), (c). Upon review, we find you have failed to demonstrate the applicability of section 552.146 to the information you marked. Accordingly, the representative's office may not withhold the information you marked under section 552.146.

In summary, the representative's office must release the information we marked pursuant to section 552.022(a)(17) of the Government Code. The representative's office must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 306.008 of the Government Code. The representative's office may withhold the information we marked under sections 552.106 and 52.111 of the Government Code. The representative's office must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. 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 <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,

Nick Ybarra  
Assistant Attorney General  
Open Records Division

NY/jlbm

Ref: ID# 830257

Enc. Submitted documents

c: Requestor  
(w/o enclosures)