



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 15, 2020

Mr. Robert Martinez
Environmental Law Division
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

OR2020-25984

Dear Mr. Martinez:

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# 852127 (TCEQ PIR No. 20-52498).

The Texas Commission on Environmental Quality (the "commission") received a request for information pertaining to a specified policy created during a specified time period.¹ You state you released some information. You claim the submitted information is excepted from disclosure under section 552.111 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.²

Initially, we note the submitted information may have been the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2019-26474 (2019). We also note the information that was at issue in Open Records Letter No. 2019-26474 is currently the subject of pending litigation (the "pending litigation") between the commission and the Office of the Attorney General. *See Tex. Comm'n on Env'tl. Quality v. Ken Paxton, Attorney Gen. of Tex.*, No. D-1-GN-19-006941 (53rd Dist. Ct., Travis County, Tex.). Accordingly, to the extent the submitted information is subject to the pending litigation, we will allow the trial court to resolve the issue of whether the information that is the subject of the pending litigation must be released to the public. To the extent the submitted information is not encompassed by the pending litigation, we will consider your argument against disclosure.

¹ The commission states it sought and received clarification of the information requested.

² 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.

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).

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 that is 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* ORD 561.

You seek to withhold the submitted information under section 552.111 of the Government Code. You state the information at issue consists of advice, opinions, and recommendations of commission employees and officials and third parties with whom you state you share a privity of interest regarding policymaking matters. You also state the information at issue includes draft documents that were released to the public in their final forms. Based on your representations and our review of the information at issue, we find the commission has demonstrated the information at issue consists of advice, opinions, or recommendations on the policymaking matters of the commission. Thus, the commission may withhold the submitted information under section 552.111 of the Government Code.

In summary, with regard to any information that is at issue in *Tex. Comm'n on Envtl. Quality v. Ken Paxton, Attorney Gen. of Tex.*, we will allow the trial court to resolve the issue of whether the information that is the subject of Open Records Letter No. 2019-26474 must be released to the public. To the extent the submitted information is not encompassed by the pending litigation, the commission may withhold the submitted information under section 552.111 of the Government Code.

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,

Meagan Hunter
Assistant Attorney General
Open Records Division

MH/jxd

Ref: ID# 852127

Enc. Submitted documents

c: Requestor
(w/o enclosures)