



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 28, 2020

Ms. Leslie A. Whitten
Assistant City Attorney II
City of College Station
P.O. Box 9960
College Station, Texas 77841

OR2020-27060

Dear Ms. Whitten:

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# 851453.

The City of College Station (the "city") received a request for information related to specified reports prepared for the city by a third party. You claim 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.

Initially, we note some of the submitted information, which we marked, is not responsive to the instant request for information because it was created after the city received the instant request. This ruling does not address the public availability of any information that is not responsive to the request and the city is not required to release such information in response to this request.

Some of the responsive 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:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The responsive information includes completed reports that are subject to section 552.022(a)(1) of the Government Code. The city must release the completed reports, which we marked, pursuant to section 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or are made confidential under the Act or other law. *See id.* You seek to withhold the information subject to section 552.022(a)(1) under sections 552.106 and 552.111 of the Government Code. However, sections 552.106 and 552.111 are discretionary in nature and do not make information confidential under the Act. *See Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver).* Accordingly, the city may not withhold the information subject to section 552.022 of the Government Code under section 552.106 or section 552.111 of the Government Code. As you raise no further exceptions for the information subject to section 552.022, it must be released. However, we will consider your arguments under these exceptions against release of the remaining responsive 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).*

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).*

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 state the remaining responsive information consists of advice, opinions, and recommendations of city employees and officials regarding policymaking matters. We also understand the city shares a privity of interest with additional parties to the communications with regard to the policymaking matters at issue. Upon review, we find the city may withhold the information we marked under section 552.111 of the Government Code.¹ However, we find the remaining responsive information at issue consists of either general administrative information that does not relate to policymaking or information that is purely factual in nature. Thus, you have failed to demonstrate the remaining responsive information reveals advice, opinions, or recommendations that pertain to policymaking. Accordingly, the city may not withhold any portion of the remaining responsive information under section 552.111 of the Government Code on the basis of the deliberative process privilege.

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 argue the remaining responsive information is protected by section 552.106 of the Government Code. Upon review, we find you failed to demonstrate the information at issue constitutes recommendations, opinions, or advice for purposes of section 552.106. We therefore conclude the city may not withhold any of the remaining responsive information under section 552.106 of the Government Code.

¹ As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

In summary, the city may withhold the information we marked under section 552.111 of the Government Code. The city must release the remaining responsive 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,

Deborah Southerland
Assistant Attorney General
Open Records Division

DS/be

Ref: ID# 851453

Enc. Submitted documents

c: Requestor
(w/o enclosures)