



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 29, 2022

Ms. Lori J. Robinson
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Austin, Texas 78746

OR2022-18900

Dear Ms. Kelley:

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# 954980.

The Harris-Galveston Subsidence District (the "district") received a request for 1) specified fee bills, 2) certain communications pertaining to a named groundwater district during specified time periods, and 3) certain communications pertaining to the Spring Creek Watershed during a specified time period. You state you will release some information to the requestor. You claim the submitted information is excepted from disclosure under section 552.111 of the Government Code. You also state you notified the Harris County Flood Control District ("HCFCD") and the Federal Emergency Management Agency ("FEMA") of the request for information and of the right to submit arguments to this office as to why the submitted information should not be released.¹ *See Gov't Code* § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the exception you claim and reviewed the submitted representative sample of information.²

¹ As of the date of this letter, we have not received any comments from either HCFCD or FEMA explaining why any portion of the submitted information should not be released to the requestor.

² We assume that 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 that those records contain substantially different types of information than that submitted to this office.

Initially, you state the district sought clarification of a portion the request. *See id.* § 552.222 (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 over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). You state you have not received a response to the request for clarification. Thus, for the portion of the requested information for which you have sought but have not received clarification, we find the district is not required to release information in response to this portion of the request. However, if the requestor clarifies this portion of the request for information, the district must seek a ruling from this office before withholding any responsive information from the requestor. *See Gov't Code § 552.222; City of Dallas*, 304 S.W.3d at 387.

Next, we note some of the remaining information has been published on the district's publicly available website. Section 552.007 of the Government Code provides information that has been voluntarily released to a member of the public may not subsequently be withheld from another member of the public, unless public disclosure of the information is expressly prohibited by law or the information is confidential under law. *See Gov't Code § 552.007; Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988)*. Accordingly, the district may not withhold previously released information unless its release is expressly prohibited by law or the information is confidential under law. Although you seek to withhold the previously released information under section 552.111 of the Government Code, this section is a discretionary exception to disclosure that protects a governmental body's interests and do not make information confidential under the Act. *See Gov't Code § 552.007; 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 Gov't Code § 552.111 subject to waiver)*. Therefore, the district may not withhold the information published on its publicly available website, which we have marked for release, under section 552.111 of the Government Code. As no other exceptions to disclosure have been raised for this information, the district must release it pursuant to section 552.007 of the Government Code. However, we will address your argument against disclosure of the information which was not previously released.

We note some of the remaining 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 remaining information includes a completed report that is subject to section 552.022(a)(1). The district must release the completed report pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or made confidential under the Act or other law. *See id.* Although you raise section 552.111 of the Government Code for the information at issue, as noted above,

this section is a discretionary exception to disclosure and does not make information confidential under the Act. *See* ORDs 665 at 2 n.5, 470 at 7. Therefore, none of the information subject to section 552.022(a)(1), which we have marked, may be withheld under section 552.111. As you raise no further exceptions against disclosure of this information, it must 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[.]” 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).

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* ORD 561.

You state the remaining information consists of advice, opinions, and recommendations of district employees and officials and individuals and agencies with whom the district shares a privity of interest regarding policymaking matters. You further state some of the information at issue consists of draft documents that were intended to be released in their final forms. Upon review, we find with the exception of the information we have marked for release, the district may withhold the remaining information under section 552.111 of the Government Code. However, the remaining information at issue is either factual in nature or consists of internal administrative matters that do not rise to the level of policymaking. Therefore, we find the district has failed to demonstrate the information we have marked for release constitutes internal communications containing advice, recommendations, or opinions reflecting the policymaking processes of the district. Accordingly, the district may not withhold information we have marked for release under section 552.111 of the Government Code.

In summary, the district must release the information we have marked pursuant to sections 552.007 and 552.022 of the Government Code. With the exception of the information we have marked for release, which must be released, the district may withhold the remaining 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,

Meredith L. Coffman
Assistant Attorney General
Open Records Division

MLC/jm

Ref: ID# 954980

Enc. Submitted documents

c: Requestor
(w/o enclosures)

2 Third Parties
(w/o enclosures)