



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 30, 2022

Ms. Jasmin Augustus
Public Information Coordinator
Public Utility Commission of Texas
P.O. Box 13326
Austin, Texas 78711

OR2022-18972

Dear Ms. Augustus:

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# 956865 (PUC ID No. 2022-04-003).

The Public Utility Commission of Texas (the "commission") received a request for two categories of information pertaining to a specified rule, regulation, contract, and request for proposals. You state you have released some information to the requestor. You claim some of the submitted information is excepted from disclosure under section 552.111 of the Government Code. In addition, you state release of the information at issue may implicate the proprietary interests of Solix, Inc. ("Solix"). Accordingly, you state, and provide documentation showing, you notified Solix 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. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have considered the exception you claim and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received

comments from Solix explaining why the submitted information should not be released. Therefore, we have no basis to conclude Solix has a protected proprietary interest in the submitted information. *See, e.g., id.* § 552.110 (requiring the provision of specific factual evidence demonstrating the applicability of the exception). Accordingly, the commission may not withhold the submitted information on the basis of any proprietary interest Solix may have in the information.

Next, 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, as follows:

[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[.]

Id. § 552.022(a)(17). Some of the submitted information consists of court-filed documents that are subject to section 552.022(a)(17). The commission must release this information unless it is made confidential under the Act or other law. *See id.* Although the commission raises section 552.111 of the Government Code for the information subject to section 552.022(a)(17), this section is discretionary in nature and does 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) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver). Therefore, none of the information subject to section 552.022(a)(17), which we marked, may be withheld under section 552.111 of the Government Code. As no further exceptions to disclosure have been raised, the commission must release the marked court-filed documents pursuant to section 552.022(a)(17) of the Government Code. However, we will consider your argument for the information not subject to section 552.022.

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 section 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 information 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 2002, no pet.); *see* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendations 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 of the Government Code 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 or deliberative process with the third party. *See* ORD 561.

You assert the remaining information consists of advice, recommendations, and opinions between and among employees of the commission and a third party with whom the commission shares a privity of interest or a common deliberative process. Based upon your representations and our review, we find the commission may withhold the information we marked under section 552.111 of the Government Code. However, we find the remaining information consists of general administrative information that does not relate to policymaking or is purely factual in nature. Thus, we find you have failed to demonstrate how the remaining information is excepted under section 552.111. Accordingly, the commission may not withhold any of the remaining information under section 552.111.

In summary, the commission must release the marked court-filed documents pursuant to section 552.022(a)(17) of the Government Code. The commission may withhold the information we marked under section 552.111 of the Government Code. The commission 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,

Kimbell Kesling
Assistant Attorney General
Open Records Division

KK/jxd

Ref: ID# 956865

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)