



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 22, 2007

Mr. David A. Reisman
Executive Director
Texas Ethics Commission
P.O. Box 12070
Austin, Texas 78711-2070

OR2007-00672

Dear Mr. Reisman:

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# 268498.

The Texas Ethics Commission (the "commission") received a request for information pertaining to an ID number and information regarding requests and commission opinions that relate to the use of campaign funds to buy real property or rent property from a spouse.¹ You state that some of the requested information has been provided to the requestor, but claim that some of the requested information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹The committee sought and received a clarification of the information requested. See Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); see also Open Records Decision No. 31 (1974) (when presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed).

²We 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. We also note that the requestor made his request for information on September 27, 2006; however, you explain that the commission required the requestor to make a deposit for payment of the anticipated costs in accordance with section 552.263 of the Government Code, and that, on October 16, 2006, the requestor submitted the deposit. See Gov't Code 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 that the governmental body receives deposit or bond). Thus, we agree that October 16, 2006, is the date the commission received this specific request for information.

Initially, we note you have redacted information that you seek to withhold under the Act. You do not assert, nor does our review of our records indicate, that you have been authorized to withhold any such information without seeking a ruling from this office. *See Gov't Code § 552.301(a); Open Records Decision 673 (2000)*. Because we can discern the nature of the information that has been redacted, being deprived of this information does not inhibit our ability to make a ruling in this instance. Nevertheless, be advised that a failure to provide this office with requested information generally deprives us of the ability to determine whether information may be withheld and leaves this office with no alternative other than ordering that the redacted information be released. *See Gov't Code §§ 552.301(e)(1)(D) (governmental body must provide this office with copy of "specific information requested" or representative sample), 552.302*.

You assert that the information you have redacted is excepted under section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 571.091 of the Government Code requires the commission to prepare a written opinion that answers an advisory opinion request from a person who has standing to request such an opinion. *Gov't Code § 571.091; see also 1 T.A.C. § 8.3*. Section 571.093 of the Government Code provides the following:

- (a) The commission shall maintain the confidentiality of the name of the person requesting an advisory opinion and shall issue opinions in a form necessary to maintain that confidentiality.
- (b) The commission may not issue an opinion that includes the name of any person who may be affected by the opinion.
- (c) Subsections (a) and (b) do not apply to a person who requests an opinion and files written notice with the commission waiving the confidentiality of the person's identity.

Gov't Code § 571.091; see 1 T.A.C. § 8.19. After review of your arguments, we agree that the information you have redacted is confidential under section 571.093 of the Government Code; therefore, the commission must withhold this information under section 552.101 of the Government Code.

You assert that some of the remaining information is excepted under section 552.111 of the Government Code, which excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." 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, no writ); *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 that 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 Open Records Decision No. 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. See Open Records Decision No. 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 that 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.

Exhibit C consists of draft opinions that you indicate will be released to the public in their final form. You explain that Exhibit D contains internal communications between commission staff and members "regarding the manner in which a final draft of an opinion is prepared and the form in which it will take when it is submitted to the commission for voting in a public meeting." You also assert that "[s]uch communications reveal the specific process through which the draft opinions are prepared[.]" After review of your arguments, we conclude that the commission may withhold the information we have marked under section 552.111. However, we find the commission has not established that the remaining information consists of the commission's advice, opinion, or recommendation; therefore, the commission may not withhold the remaining information under section 552.111.

To conclude, the commission must withhold the redacted information under section 552.101 of the Government Code in conjunction with section 571.093 of the Government Code. The commission may withhold the information we have marked under section 552.111 of the Government Code. The commission must release the remaining information to the requestor.

Although you request a previous determination regarding the requested categories of information, we decline to issue one at this time. Accordingly, this letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

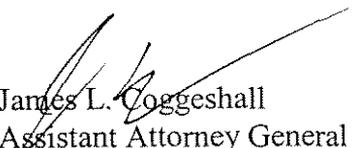
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/jww

Ref: ID# 268498

Enc. Submitted documents

c: Mr. Matt Glazer
Texas Progress Council
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Austin, Texas 78701
(w/o enclosures)