



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 1, 2011

Ms. Katherine R. Fite
Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2011-02958

Dear Ms. Fite:

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# 410447.

The Office of the Governor (the "governor") received a request for documents relating to the decision to deny incentive payments for the Troublemaker Studios ("Troublemaker") film *Machete*. You state you have released some information to the requestor. You claim a portion of the submitted information is excepted from disclosure under section 552.111 of the Government Code. Although you take no position with respect to the public availability of the remaining information, you state release of this information may implicate the proprietary interests of Troublemaker.¹ You inform us, pursuant to section 552.305 of the Government Code, you have notified Troublemaker of the request and of its right to submit arguments to this office explaining why its information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have received comments from Troublemaker. We have considered the submitted arguments and reviewed the submitted information.

The governor asserts Exhibit B is excepted from disclosure under the deliberative process privilege encompassed by section 552.111 of the Government Code. *See* Gov't Code

¹In correspondence dated January 19, 2011, you inform this office you withdraw your request for an opinion regarding a portion of Troublemaker's information because Troublemaker informed the governor it has no objection to the release of certain documents, which you state you will release to the requestor.

§ 552.111; *see also* Open Records Decision No. 615 at 2 (1993). Section 552.111 of the Government Code excepts from public disclosure “an 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. 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 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. The 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* 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 also has 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.

You state the information in Exhibit B consists of draft versions of a letter from the governor. You contend these drafts reflect the advice, opinion, and recommendations of the governor’s employees as to the form and content of the final document. Upon review, we agree Exhibit B consists of drafts of a document relating to policymaking. You further state the governor has released the final version of this letter to the public. Upon review of your arguments and the information at issue, we find you have established the deliberative process

privilege is applicable to Exhibit B. Therefore, the governor may withhold Exhibit B under section 552.111 of the Government Code.

Next, we address Troublemaker's argument against disclosure of its information. Section 552.110(b) of the Government Code excepts from disclosure "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." Gov't Code § 552.110(b). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the requested information. *See* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Troublemaker contends its detailed budget information in Exhibit C is excepted from disclosure under section 552.110(b). Upon review, we conclude Troublemaker has established the information it seeks to withhold constitutes commercial or financial information, the release of which would cause it substantial competitive injury. Therefore, the governor must withhold Troublemaker's detailed budget information in Exhibit C, which we have marked, under section 552.110(b) of the Government Code.

In summary, the governor may withhold Exhibit B under section 552.111 of the Government Code. The governor must withhold Troublemaker's detailed budget information in Exhibit C, which we have marked, under section 552.110(b) 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 http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Mack T. Harrison
Assistant Attorney General
Open Records Division

MTH/em

Ref: ID# 410447

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Kevin Dartt
General Counsel
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(w/o enclosures)