



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 16, 2012

Mr. John Sirman
Legal Counsel
State Bar of Texas
1414 Colorado
Austin, Texas 78701

OR2012-16502

Dear Mr. Sirman:

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# 467976.

The State Bar of Texas (the "state bar") received a request for three categories of information pertaining to the Texas Supreme Court's Grievance Oversight Committee and its annual report during a specified time period.¹ You state that some information will be released to the requestor. You claim a portion of the requested information is not subject to the Act. Additionally, you claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered your arguments and reviewed the submitted representative sample of information.²

¹You state the requestor clarified her request for information. *See* Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if a large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

²We assume the "representative sample" of information 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 those records contain substantially different types of information than those submitted to this office.

Initially, you state the information responsive to categories two and three of the request are created, maintained, or held by the Commission for Lawyer Discipline (“CFLD”) and the Board of Disciplinary Appeals (the “board”), and thus, are not subject to the Act. You explain rules 4.09 and 7.12, respectively, of the Texas Rules of Disciplinary Procedure state that the CFLD and the board are not governmental bodies “as that term is defined in section 551.001 of V.C.T.A., Government Code, and [are] not subject to either the provisions of the Open Meetings Act or the Open Records Act.” *See* Tex. R. Disciplinary P. 4.09, 7.12. Accordingly, we agree the CFLD and the board are not subject to the Act, and the information responsive to categories two and three of the request need not be released in response to this request pursuant to rules 4.09 and 7.12 of the Texas Rules of Disciplinary Procedure.

We next address your contention that Attachment C is not subject to the Act. The Act is applicable to “public information.” *See* Gov’t Code § 552.021. Section 552.002 of the Act provides that “public information” consists of “information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it.” *Id.* § 552.002(a). Thus, virtually all information that is in a governmental body’s physical possession constitutes public information that is subject to the Act. *Id.* § 552.002(a)(1); *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body, and the governmental body owns the information or has a right of access to it. Gov’t Code § 552.002(a)(2); *see* Open Records Decision No. 462 at 4 (1987). Moreover, section 552.001 of the Act provides that it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees. *See* Gov’t Code § 552.001(a).

You contend that Attachment C consists of records that are created, maintained, or held by the Chief Disciplinary Counsel (“CDC”) on behalf of the CFLD, and thus, pursuant to rule 4.09 of the Texas Rules of Disciplinary Procedure, Attachment C is not subject to the Act.

You state:

Rule 5.01 of the TRDP [Texas Rules of Disciplinary Procedure] provides that the General Counsel of the State Bar serves as the Chief Disciplinary Counsel; the rule also provides, however, that if the CFLD determines that the General Counsel should no longer serves as the CDC, it shall so notify the Board of Directors of the State Bar and, in the next succeeding fiscal year, the State Bar shall provide adequate funds to the CFLD sufficient for it to select and hire a lawyer as CDC and sufficient deputies and assistants as may be required to operate the disciplinary and disability system efficiently and

effectively. In such event, Rule 5.01 states that the CFLD “alone shall possess the right of selection.” Further, TRDP Rule 5.03 provides that, in disciplinary and disability matters, the CDC is accountable only to the CFLD.

In fiscal year 1999-2000, the CFLD elected this option and selected a CDC separate from the State Bar’s General Counsel. This structure has remained in place to the present. Under this structure, the CDC’s purview is the attorney disciplinary system, while the State Bar’s General Counsel serves as administrative counsel to the State Bar and its leadership. The duties of the CDC under this structure are delineated in TRDP Rule 5.02. While some of the CDC’s records eventually become State Bar records subject to the Act, such as its submission to the State Bar of a proposed budget, the vast majority of its records are generated in its work serving as the CFLD’s attorney, administering the attorney discipline and disability system for the CFLD, and performing “such other duties relating to disciplinary and disability matters as may be assigned by the Commission [CFLD].”

As previously noted, rule 4.09 of the Texas Rules of Disciplinary Procedure provides as follows:

The Commission is not a “governmental body” as that term is defined in Section 551.001(3) of V.T.C.A., Government Code, and is not subject to either the provisions of the Open Meetings Act or the Open Records Act.

Tex. R. Disciplinary P. 4.09. You inform us the information at issue consists of communications between CDC employees and CFLD employees or its representatives. We understand you to represent that the information in Attachment C was created and is maintained by the CDC on behalf of the CFLD. Based on your representations and our review of the submitted information, we agree the information in Attachment C is held by the CDC on behalf of the CFLD. Accordingly, we find these records are records of the CFLD for purposes of rule 4.09 of the Texas Rules of Disciplinary Procedure. Therefore, pursuant to rule 4.09 of the Texas Rules of Disciplinary Procedure, we conclude Attachment C is not subject to the Act and need not be released in response to this request. Accordingly, we need not address your remaining arguments against disclosure of this information.

We now turn to your claim that Attachment B is excepted from disclosure under section 552.111 of the Government Code, which 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, no writ); see also 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 only those internal communications that consist of advice, opinions, recommendations 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. See *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 has also concluded a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafters 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 at 9.

You state Attachment B consists of state bar records from state bar staff, officers, and board members. You further state the information at issue consists of "internal communications that reflect the advice, recommendations, opinions, and other material reflecting the policymaking processes of the [s]tate [b]ar." We note Attachment B contains documents labeled as drafts. Based on your representations and our review, we find the state bar may

withhold the information we have marked in Attachment B under section 552.111 of the Government Code. However, we find the remaining information at issue is purely factual in nature or does not consist of draft documents or advice, opinion, or recommendations on policymaking matters. Thus, we conclude you failed to demonstrate the applicability of the deliberative process privilege to the remaining information at issue, and it may not be withheld under section 552.111 of the Government Code.

In summary, the information responsive to categories two and three of the request need not be released in response to this request pursuant to rules 4.09 and 7.12 of the Texas Rules of Disciplinary Procedure. Attachment C is not subject to the Act and need not be released in response to this request pursuant to rule 4.09 of the Texas Rules of Disciplinary Procedure. The state bar may withhold the information we have marked in Attachment B under section 552.111 of the Government Code. The remaining information in Attachment B must be released.

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,



Sean Opperman
Assistant Attorney General
Open Records Division

SO/som

Ref: ID# 467976

Enc. Submitted documents

c: Requestor
(w/o enclosures)