



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 8, 2012

Ms. Cathy Cunningham
For the Town of Westlake
Boyle & Lowry, L.L.P.
4201 Wingren, Suite 108
Irving, Texas 75062-2763

OR2012-18002

Dear Ms. Cunningham:

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# 470468.

The Town of Westlake (the "town"), which you represent, received a request for any communications between the town's manager and four specified officials of the Town of Trophy Club for a specified period of time. You state you have released some information to the requestor. You claim the submitted information is not public information that is subject to the Act. In the alternative, you claim the submitted information is excepted from disclosure under section 552.111 of the Government Code. We have considered your arguments and reviewed the submitted information.

Initially, we address the town's argument the submitted draft document is not public information that is subject to the Act. The Act is applicable to "public information," as defined by section 552.002 of the Government Code. Section 552.002(a) provides "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.

Gov't Code § 552.002(a). Information is generally subject to the Act when it is held by a governmental body and it relates to the official business of a governmental body or is used by a public official or employee in the performance of official duties. *See* Open Records Decision No. 635 (1995). Virtually all of the information in a governmental body's physical possession constitutes public information and thus is subject to the Act. Gov't Code § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). Draft documents constitute public information subject to the Act provided this information is maintained by the governmental body and relates to the transaction of official business. You state submitted draft document pertains to a proposal regarding the town and the Town of Trophy Club. Further, you state the draft document was created by the town manager to make operations of the town more efficient. Therefore, we conclude the information at issue was collected or assembled or is maintained in connection with the transaction of official business and, thus, constitutes "public information" as defined by section 552.002(a). Accordingly, we consider the town's argument under section 552.111 of the Government Code.

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, 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* 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 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 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 of section 552.111). 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). When determining if an interagency memorandum is excepted from disclosure under section 552.111, we must consider whether the entities between which the memorandum is passed share a privity of interest or common deliberative process with regard to the policy matter at issue. *See id.* 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 submitted information consists of advice, recommendations, opinions, and a draft document pertaining to the policymaking process of the town regarding the efficiency of the operations of its Municipal Court. You state the draft document will be released to the public in its final form. You further state the town is working with the officials of the Town of Trophy Club regarding efforts to improve the efficiency of the Municipal Court operations between the two towns. Based on your representations and our review, we find the town may withhold the information we have marked under section 552.111 of the Government Code. However, we find the remaining information to be purely factual in nature. You have not explained how this information constitutes internal advice, recommendations, or opinions regarding policymaking issues. Therefore, the town may not withhold any of the remaining information under section 552.111 of the Government Code. As you raise no further exception to disclosure, the remaining information 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,

A handwritten signature in cursive script, appearing to read "Kathleen J. Santos".

Kathleen J. Santos
Assistant Attorney General
Open Records Division

KJS/dls

Ref: ID# 470468

Enc. Submitted documents

c: Requestor
(w/o enclosures)