



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 18, 2014

Mr. Carey E. Smith
General Counsel
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711

OR2014-14432

Dear Mr. Smith:

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# 533063.

The Texas Health and Human Services Commission (the "commission") received a request for information pertaining to "allergy related services" for a specified period of time. We understand the commission will release some information to the requestor. You claim the submitted information is excepted from disclosure under section 552.111 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.¹

Initially, we note the requestor seeks information pertaining to "allergy related services." You have submitted documents that do not pertain to "allergy related services." Thus, the portions of the submitted documents that do not consist of the information requested are not responsive to the present request. This ruling does not address the public availability of any information that is not responsive to the request, and the commission is not required to release that information in response to the request.

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

¹We assume 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.

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, writ ref’d n.r.e.); *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 that 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 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.

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. We note a governmental body does not have a privity of interest or common deliberative process with a third party when the governmental body and the third party are involved in contract negotiations, as the parties' interests are adverse. *See id.* (Section 552.111 not applicable to communication with entity with which governmental body has no privity of interest or common deliberative process).

You state the submitted responsive information consists of advice, opinions, and recommendations relating to the commission's "policies and procedures concerning the manner in which medical providers' claims for reimbursement for allergy testing under Medicaid are to be processed" and other related Medicaid policy matters. You state the submitted responsive information includes communications between the commission, its Medicaid administrative contractor, TMHP, and outside experts. You explain some of the information consists of draft documents. We understand some of the draft documents will be released in final form. Thus, the commission may withhold the draft documents we have marked in their entireties under section 552.111 of the Government Code. However, you do not explain whether the remaining draft documents will be released in their final forms. For the remaining draft documents, we must rule conditionally. Accordingly, to the extent the draft documents we have marked will be released to the public in their final forms, the commission may withhold them in their entireties under section 552.111. If the draft documents will not be released to the public in their final forms, then the commission may not withhold them in their entireties under section 552.111. In this case, we find portions of the remaining draft documents constitute advice, opinions, or recommendations. Thus, to the extent the remaining draft documents will not be released in final form, the commission may withhold the information we marked under section 552.111 of the Government Code within the remaining draft documents. Further, we find the remaining information we have marked consists of advice, opinions, and recommendations pertaining to a policymaking matter. Accordingly, the commission may withhold the remaining information we have marked under section 552.111. However, we find some of the remaining information at issue consists of either general administrative information that does not relate to policymaking or information that is purely factual in nature. We also note some of the remaining responsive information was communicated with individuals you have failed to demonstrate share a privity of interest or common deliberative process with the commission. Accordingly, the remaining responsive information may not be withheld under section 552.111 of the Government Code.

We note some of the remaining responsive information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted

by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the commission may withhold the draft documents we have marked in their entireties under section 552.111 of the Government Code. To the extent the remaining draft documents we have marked will be released to the public in their final forms, the commission may withhold them in their entireties under section 552.111. If the remaining draft documents will not be released to the public in their final forms, then the commission may not withhold them in their entireties under section 552.111, but may withhold the information we marked under section 552.111 of the Government Code within the remaining draft documents. Further, the commission may withhold the remaining information we marked under section 552.111 of the Government Code. The remaining information must be released; however, any information protected by copyright may only be released in accordance with copyright law.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Paige Thompson
Assistant Attorney General
Open Records Division

PT/dls

Ref: ID# 533063

Enc. Submitted documents

c: Requestor
(w/o enclosures)