



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 15, 2015

Ms. Jessica L. Marsh
General Counsel
Office of Violent Sex Offender Management
P.O. Box 149347
Austin, Texas 78714-9347

OR2015-09493

Dear Ms. Marsh:

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# 563695 (PIR No. 2015-0002).

The Office of Violent Sex Offender Management ("OVSOM") received a request for: (1) information from a specified time period regarding budgetary shortfalls due to increased patient population; (2) information from a specified time period relating to the total number of patients, including the number of patients in halfway houses, private residences, jails, state hospitals, and prisons; (3) information from a specified time period relating to any person who had final decision-making authority regarding the written instructions imposed upon civil commitment patients, including e-mails and drafts relating to the written instruction; (4) information from a specified time period relating to any person who had final decision-making authority regarding the treatment plan imposed on civil commitment patients; (5) information from a specified time period relating to any person who had final decision-making authority regarding the unsuccessful discharge of patients; and (6) any non-privileged documentation regarding changes that have been identified as necessary to bring Texas's civil commitment program into compliance with state and federal law. You state OVSOM has released some information to the requestor, including all of the information

responsive to categories five and six of the request. You claim the submitted information is excepted from disclosure under sections 552.106 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note OVSOM states the information responsive to category 2 “is not available in the requested format and would require OVSOM staff to manipulate the requested data in order to provide the information in the requested format.” The Act does not require a governmental body to answer factual questions, conduct legal research, or create new information in responding to a request. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). Furthermore, the Act does not require a governmental body to compile information or prepare new information. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). We note, however, a governmental body may not refuse to comply with the requirements of the Act on the ground of administrative inconvenience. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976); *see also* Open Records Decision No. 497 at 4 (1988) (fact that submitting copies for review may be burdensome does not relieve governmental body of its responsibility to do so). Accordingly, a governmental body must make a good faith effort to relate a request to information held by the governmental body. *See* Open Records Decision No. 561 at 8 (1990). While OVSOM is not required to create documents that did not exist when it received the request, documents from which the information responsive to category 2 may be derived are responsive to this request. Additionally, to the extent this information exists in any format, OVSOM may only withhold that information if an exception to disclosure is applicable. We note you have not submitted information responsive to category 2 of the request, and you indicate you have not released any such information. Thus, to the extent any such information existed in any format when the present request was received, it must be released at this time. *See* Gov’t Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, we note some of the information you have submitted as responsive to category one of the request is subject to section 552.022(a) of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure under this chapter unless made confidential under this chapter or other law:

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 those records contain substantially different types of information than that submitted to this office.

...

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate[.]

Gov't Code § 552.022(a)(5). We find the information we have marked consists of budget information used to estimate the need for or expenditure of public funds or taxes; thus, this information is subject to section 552.022(a)(5) of the Government Code. Although you seek to withhold this information under section 552.106 of the Government Code, this is a discretionary exception and does not make information confidential under the Act. *See* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the information we have marked may be not withheld under section 552.106 of the Government Code. As you raise no other exceptions to disclosure for this information, OVSOM must release the information we have marked under section 552.022(a)(5) of the Government Code.

Section 552.106(a) of the Government Code excepts from required public disclosure “[a] draft or working paper involved in the preparation of proposed legislation[.]” Gov't Code § 552.106(a). Section 552.106(a) ordinarily applies only to persons with a responsibility to prepare information and proposals for a legislative body. *See* Open Records Decision No. 460 at 1 (1987). The purpose of this exception is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body; therefore, section 552.106 encompasses only policy judgments, recommendations, and proposals involved in the preparation of proposed legislation and does not except purely factual information from public disclosure. *Id.* at 2. However, a comparison or analysis of factual information prepared to support proposed legislation is within the ambit of section 552.106. *Id.* A proposed budget constitutes a recommendation by its very nature and may be withheld under section 552.106. *Id.* Section 552.106 protects only policy judgments, advice, opinions, and recommendations involved in the preparation or evaluation of proposed legislation; it does not except purely factual information from public disclosure. *See id.*

You contend the remaining information at issue responsive to category one is excepted from disclosure under section 552.106 of the Government Code. You explain this information relates to communications between the former executive director of OVSOM and staff of the legislative budget board pertaining to analyses and recommendations made to the board pertaining to OVSOM's proposed budget. Upon review, we find the information we have marked constitutes advice, opinion, analysis, and recommendation regarding proposed legislation. Therefore, OVSOM may withhold this information under section 552.106 of the Government Code. However, we find you have failed to demonstrate how the remaining information at issue constitutes advice, opinion, analysis, or recommendations regarding

proposed legislation. Accordingly, OVSOM may not withhold any of the remaining information at issue under section 552.106 of the Government Code.

You contend the information responsive to categories three and four is excepted from disclosure under the deliberative process privilege encompassed by section 552.111 of the Government Code. *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* 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). When determining if an interagency memorandum is excepted from disclosure under section 552.111, we must consider whether the agencies between which the memorandum is passed share a privity of interest or common deliberative process with regard to the policy matter at issue. *See* Open Records Decision No. 561 at 9 (1990).

This office has also concluded a preliminary draft of a document 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* ORD 561 at 9 (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 id.*

You state the information at issue consists of communications between a consultant for OVSOM and OVSOM staff relating to the supervision and treatment of civilly committed sex offenders (“clients”), which is a primary policymaking function of OVSOM. You also state the information at issue includes draft documents of rules, instructions, and plans related to the supervision and treatment of clients, and you state these draft documents have been publicly released in their final forms. Thus, OVSOM may withhold the submitted draft documents under section 552.111 of the Government Code. Further, we find OVSOM has demonstrated the information we have marked consists of advice, opinions, and recommendations pertaining to a policymaking matter. Accordingly, OVSOM may also withhold the information we marked under section 552.111 of the Government Code. However, we find the remaining information at issue consists of routine administrative information or purely factual information. Therefore, you have failed to establish that any of the remaining information at issue constitutes advice, opinions, recommendations, or other material reflecting the policymaking processes of OVSOM. Accordingly, OVSOM may not withhold any portion of the remaining information under section 552.111 of the Government Code.

In summary, OVSOM may withhold the information we have marked under section 552.106 of the Government Code. OVSOM may withhold the submitted draft documents and the information we marked under section 552.111 of the Government Code. OVSOM must release the remaining information.

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,

A handwritten signature in black ink, appearing to read "Lee Seidlits", written in a cursive style.

Lee Seidlits
Assistant Attorney General
Open Records Division

CLS/som

Ref: ID# 563695

Enc. Submitted documents

c: Requestor
(w/o enclosures)