



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 22, 2015

Ms. Sarah Parker
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701

OR2015-19856

Dear Ms. Parker:

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# 580072.

The Texas Department of Transportation (the "department") received a request for communications and documents related to specified projects and specified people during a specified time period. You state you will release some information. You claim the submitted information is excepted from disclosure under sections 552.101 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 some of the submitted information in Exhibit B is not responsive to the instant request for information because it falls outside of the specified time period. The ruling does not address the public availability of the non-responsive information, which we have marked, and that information need not be released.

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.

Next, we note some of the responsive information is subject to section 552.022(a)(3) of the Government Code. Section 552.022(a)(3) provides for the required public disclosure of “information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body” unless it is “made confidential under [the Act] or other law[.]” Gov’t Code § 552.022(a)(3). This information, which we have marked, must be released unless it is confidential under the Act or other law. Although you assert this information is excepted from disclosure under section 552.111 of the Government Code, this section is discretionary and does not make information confidential under the Act. *See* Open Records Decision No. 470 at 7 (1987) (governmental body may waive statutory predecessor to section 552.111 deliberative process); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the department may not withhold the information subject to section 552.022(a)(3) under section 552.111. However, we note some of this information is subject to section 552.137 of the Government Code, which makes information confidential under the Act; therefore, we will address the applicability of section 552.137.² We will also consider your arguments under sections 552.101 and 552.111 for the remaining responsive information that is not subject to section 552.022.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate or embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987).

Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find you have failed to demonstrate the remaining information in Exhibit C is highly intimate or embarrassing and not of legitimate public concern. Therefore, the department may not withhold the remaining information at issue under section 552.101 of the Government Code on that basis.

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

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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 id.* at 9.

You state the information in Exhibit B consists of internal pre-decisional deliberations regarding agency policy and contains advice, opinions, and recommendations regarding the department's policy matters. You further state Exhibit B includes communications between department administration, employees, and consultants, which we understand share a privity of interest or common deliberative process with the department. You explain some of the information consists of draft documents. You state the draft documents were intended to be released in final form. However, you do not explain which portions of the responsive information consists of the draft documents the department intends to release in their final form. Thus, we must rule conditionally. Accordingly, to the extent the draft documents in the responsive information have been or will be released to the public in their final forms, the department 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 department may not withhold them in their entireties under section 552.111. In this case, we find portions of the responsive draft documents constitute advice, opinions, or recommendations. Thus, to the extent the responsive draft documents will not be released in their final forms, the department may withhold the information we marked under section 552.111 of the Government Code within the remaining draft documents. Further, we find the information we have marked in the remaining information consists of advice, opinions, and recommendations pertaining to a policymaking matter of the department. Accordingly, the department may withhold this information we have marked under section 552.111. However, we find the remaining responsive information at issue consists of communications with individuals you have failed to demonstrate share a privity of interest or common deliberative process with the department, general administrative information that does not relate to policymaking, or information that is purely factual in nature. Thus, 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 subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) applies to records a governmental body holds in an employment capacity and excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Section 552.117 is also applicable to cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See Open Records Decision No. 506 at 5-6 (1988)* (statutory predecessor to section 552.117 of the Government Code not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989)*. Therefore, a governmental body must withhold information under section 552.117

on behalf of a current or former official or employee only if the individual made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the individuals whose information is at issue timely requested confidentiality pursuant to section 552.024, the department must withhold the cellular telephone numbers we have marked under section 552.117(a)(1) if the cellular telephone service is not paid for by a governmental body. The department may not withhold this information under section 552.117 for those employees who did not make a timely election to keep the information confidential or if the cellular telephone service is paid for by a governmental body.

We note the remaining responsive information also includes e-mail addresses of members of the public that are subject to section 552.137 of the Government Code. Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov’t Code § 552.137(a)-(c). The e-mail addresses we have marked are not one of the types specifically excluded by section 552.137(c). *See id.* § 552.137(c). Accordingly, the department must withhold the e-mail addresses we have marked under section 552.137 unless the owners of the addresses affirmatively consent to their release.

In summary, the department must withhold the information we have marked in Exhibit C under section 552.101 of the Government Code in conjunction with common-law privacy. The department may withhold the information we have marked under section 552.111 of the Government Code. To the extent the responsive draft documents in Exhibit B have been or will be released to the public in their final forms, the department may withhold them in their entireties under section 552.111 of the Government Code. If the individuals whose information is at issue timely requested confidentiality pursuant to section 552.024 of the Government Code, the department must withhold the cellular telephone numbers we have marked under section 552.117(a)(1) of the Government Code if the cellular telephone service is not paid for by a governmental body. The department must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their release. The remaining responsive 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.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 "Mili Gosar". The signature is fluid and cursive, with the first name "Mili" being more prominent than the last name "Gosar".

Mili Gosar
Assistant Attorney General
Open Records Division

MG/akg

Ref: ID# 580072

Enc. Submitted documents

c: Requestor
(w/o enclosures)