



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 15, 2016

Mr. Timothy E. Bray
Deputy General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

OR2016-20877

Dear Mr. Bray:

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# 626493 (DSHS File #25904).

The Texas Department of State Health Services (the "department") received a request for information pertaining to two specified federal grants and all e-mail correspondence between the department and a named individual during a specified time.¹ 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.²

Initially, we note the requestor excluded from the request personal e-mail addresses. Accordingly, this type of information is not responsive to the present request. This ruling does not address the public availability of non-responsive information, and the department is not required to release non-responsive information in response to this request.

¹You state the department sought and received clarification of the information requested. *See Gov't Code* § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²We 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.

Next, we note some of the submitted information is subject to section 552.022 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 unless made confidential under this chapter or other law:

...

(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). The submitted information contains information from a completed estimate used to estimate the need for or expenditure of public funds or taxes by a governmental body that is subject to section 552.022(a)(5). Such records must be released unless they are made confidential under the Act or other law. *See id.* You seek to withhold this information under section 552.111 of the Government Code. However, section 552.111 is a discretionary exception and does not make information confidential under the Act. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (deliberative process privilege under statutory predecessor to Gov't Code § 552.111 subject to waiver). Therefore, the information subject to section 552.022(a)(5), which we have marked, may not be withheld under section 552.111 of the Government Code. As you raise no further exceptions to disclosure for this information, the department must release the information we have marked. We will consider your argument against disclosure for the remaining information.

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, writ ref'd n.r.e.); 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. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *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). 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.

You state the submitted information consists of advice, opinions, and recommendations of the department pertaining to the policymaking functions of the department. You further seek to withhold the draft documents in the remaining information under section 552.111. You inform us some of the communications at issue involve consultants for the department, with which the department shares a privity of interest with regard to the matters at issue. Upon review, we find the draft documents we marked constitute drafts of policymaking documents. Therefore, if the marked draft documents have been or will be released to the public in their final forms, then the department may withhold the drafts we marked under section 552.111 of the Government Code. Moreover, we find portions of the remaining information consist of advice, opinion, or recommendations on policymaking matters of the department. Thus, you may withhold the information we marked under section 552.111 of the Government Code. However, the remaining information consists of general administrative information

that does not relate to policymaking, information that is purely factual in nature, or information that was received from individuals with whom you have not demonstrated the department shares a privity of interest or common deliberative process. Therefore, you have failed to demonstrate the remaining information at issue consists of advice, opinion, or recommendations that reflect deliberative or policymaking processes. Accordingly, none of the remaining information may be withheld under section 552.111 of the Government Code.

In summary, the department must release the information we marked under section 552.022(a)(5) of the Government Code. To the extent the department will release the draft documents to the public in their final forms, the department may withhold the draft documents we have marked in their entireties under section 552.111 of the Government Code. The department may withhold the information we have marked under section 552.111 of the Government Code. The department must release the remaining responsive 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,



Meagan J. Conway
Assistant Attorney General
Open Records Division

MJC/akg

Ref: ID# 626493

Enc. Submitted documents

c: Requestor
(w/o enclosures)