



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 12, 2008

The Honorable Mitchell G. Davenport  
County Judge  
Jack County  
100 Main, Suite 206  
Jacksboro, Texas 76458

OR2008-02025

Dear Mr. Davenport:

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# 302113.

The Jack County Judge's Office (the "judge") received a request for all documents related to county business sent or received on all of the judge's or county commissioners' personal and government e-mail accounts. You state that you have released some of the information to the requestor. You have informed the requestor that the judge does not have possession of or access to a portion of the requested information which may be in the possession of the county auditor or the county commissioners. You claim that the information at issue is not public information subject to release under the Act, and alternatively, that the information at issue is excepted from disclosure under sections 552.101, 552.109, and 552.111 of the Government Code. We have considered your arguments and the exceptions you claim and reviewed the submitted information. We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Section 552.002(a) of the Government Code defines "public information" as "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." *Id.* § 552.002(a). You state that judge does not have a portion of the requested information. Ordinarily, a governmental body is not required to obtain information not in its possession. *See* Open Records Decision No. 518 (1990). However, information in the possession of another entity may nevertheless be subject to the Act if the entity holds the information for the governmental body or if the governmental body owns the information or has a right of access to the information. *See* Gov't Code § 552.002(a). You state that the judge does not have "access to or records of any e-mails sent or received by my county commissioners

except as to those provided and made available to me at this time.” You also state that the judge does not have “records [of any billing] outlined in the request” and that “[t]hese records may exist with the [O]ffice of the County Auditor.” However, you have not provided us with documentation or a representation from the auditor or the commissioners that the judge does not have a right of access to the requested information in the custody and control of the auditor and the commissioners. Therefore, we find that if the judge has a right of access to the requested information, the Act requires the judge to produce the requested information to the requestor. If, however, the judge does not have a right of access to the requested information, the Act does not require the judge to produce the requested information to the requestor.

Next, the judge claims that the submitted information is not public information subject to the Act because it was not created as official business of the county. Under Section 552.002 of the Act, information is generally “public information” within the scope of the Act when it relates to the official business of a governmental body or is maintained by a public official or employee in the performance of official duties, even though it may be in the possession of one person. *Id.* § 552.002(a). In addition, section 552.001 of the Government Code states it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees. *See id.* § 552.001(a). We further note that the characterization of information as “public information” under the Act is not dependent on whether the requested records are in the possession of an individual or whether a governmental body has a particular policy or procedure that establishes a governmental body’s access to the information. *See* Open Records Decision No. 635 at 3-4 (1995) (finding that information does not fall outside definition of “public information” in the Act merely because individual member of governmental body possesses information rather than governmental body as whole); *see also* Open Records Decision No. 425 (1985) (concluding, among other things, that information sent to individual school trustees’ homes was public information because it related to official business of governmental body) (overruled on other grounds by Open Records Decision No. 439 (1986)). Thus, the mere fact that the judge generated the information at issue on his desktop computer and sent it to himself on his laptop computer does not take the information outside the scope of the Act. *See id.*

You state that the judge “jotted down several thoughts regarding how he might respond to certain letters published in the local newspaper regarding his actions.” You assert that the information at issue “was never published to anyone else including the newspaper.” Thus, we understand you assert that this information was not created as official business of the judge. However, based on our review of the information at issue and your arguments, we find that the information at issue was collected, assembled, or maintained by or for a governmental body pursuant to law or in connection with the transaction of the official business of the county. Specifically, the information at issue was created by the judge in formulating a response to allegations against him in his official capacity. Therefore, we find that it constitutes public information subject to the Act. Accordingly, we will address the claimed exceptions to disclosure.

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. This section encompasses information that is considered to be confidential under other constitutional, statutory, or decisional law. See Open Records Decision Nos. 600 at 4 (1994) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). Section 552.109 excepts from public disclosure "[p]rivate correspondence or communications of an elected office holder relating to matters the disclosure of which would constitute an invasion of privacy[.]" Gov't Code § 552.109. This office has held that the test to be applied to information under section 552.109 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101. We will therefore consider your claims regarding common-law privacy under section 552.101 together with your claim under section 552.109.

In *Industrial Foundation*, the Texas Supreme Court held that information is protected by common-law privacy if it: (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person; and (2) is not of legitimate concern to the public. *Id.* at 685. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. Having reviewed your arguments and the information, we find that none of the information at issue is protected by common-law privacy. Therefore, none of the information may be withheld under either section 552.101 in conjunction with common-law privacy or under section 552.109.

You assert that the information at issue is excepted under section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." This section 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 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).

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.

You assert that the information consists of a "memorandum" that is excepted under section 552.111; however, you have failed to explain how the draft pertains to advice, recommendations, or opinions that reflect policymaking processes for purposes of section 552.111. Therefore, the judge may not withhold any of the submitted information under the deliberative process privilege. Accordingly, the submitted information must be released.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Laura E. Ream  
Assistant Attorney General  
Open Records Division

LER/jb

Ref: ID# 302113

Enc. Submitted documents

c: Mr. Rod Heltzel  
219 South Main  
Jacksboro, Texas 76458  
(w/o enclosures)