



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 17, 2009

Ms. Neera Chatterjee
Public Information Coordinator
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2009-13148

Dear Ms. Chatterjee:

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# 355609.

The University of Texas System (the "system") received a request for any and all information pertaining to the proposed American Clean Energy and Security Act of 2009 and related legislation. You claim that portions of the requested information are excepted from disclosure under sections 552.117 and 552.137 of the Government Code. Further, you explain the submitted information may implicate the interests of the Office of the Governor (the "governor") and the Texas Comptroller of Public Accounts (the "comptroller"). Accordingly you have notified the governor and comptroller of their right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). You state the governor does not object to the release of its information. The comptroller responded to the notice and claims the submitted information is excepted from disclosure under sections 552.111, 552.117, and 552.136¹ of the Government Code. We have considered the submitted arguments and reviewed the submitted information.

¹ Although the comptroller raises section 552.147 of the Government Code, based on the substance of its arguments, we understand the comptroller to raise section 552.136.

The comptroller asserts portions of the submitted information are excepted from disclosure pursuant to 552.111, which 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." 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, 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.

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).

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 id.* (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.

The comptroller argues that the submitted information includes communications shared amongst the system, the comptroller, and Regional Economic Models, Inc. ("REM"). The comptroller states it is working with the system and REM on an economic impact report and study. The comptroller states the communications concern the development of an economic impact study. The comptroller also states that the information at issue includes draft policy documents which have been released to the public in final form. Based upon your representations and our review, we agree that the system may withhold portions of the remaining information, which we have marked, under section 552.111. However, we find the comptroller has failed to demonstrate how any of the remaining information consists of draft documents or reflects advice, opinions, or recommendations pertaining to the policymaking processes of the system. Therefore, the system may not withhold any of the remaining information under section 552.111 of the Government Code.

The system and the comptroller both raise section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. Gov't Code §§ 552.117(a)(1), .024. Additionally, section 552.117 encompasses personal cellular telephone numbers, provided the cellular telephone service is paid for by the employee with his or her own funds. Open Records Decision No. 670 at 6 (2001) (extending section 552.117(a)(1) exception to personal cellular telephone number and personal pager number of employee who elects to withhold home telephone number in accordance with section 552.024). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. Open Records Decision No. 530 at 5 (1989). The system may only withhold information under section 552.117(a)(1) on behalf of former or current employees who have made a request for confidentiality under section 552.024 prior to the date on which the request for information was made. You have marked the information that is subject to section 552.117. You do not inform this office that the system employee whose information is at issue elected to keep her personal information confidential before the system received the instant request for information. We must

therefore rule conditionally. If the employee whose personal information you have marked timely elected to withhold her personal information under section 552.024, the system must withhold the marked information under section 552.117(a)(1) of the Government Code; however, the system may only withhold a personal cellular telephone number if the cellular service was paid for with the employee's own funds. If the employee did not timely elect confidentiality, the system may not withhold the marked information under section 552.117(a)(1).

The comptroller raises section 552.136. Section 552.136 states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b). An access device number is one that may be used to (1) obtain money, goods, services, or another thing of value; or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument. *Id.* The comptroller seeks to withhold a teleconference code under section 552.136. However, upon review we find the comptroller has failed to demonstrate the information the comptroller marked under section 552.136 constitutes an access device number used to obtain money, goods, services, or another thing of value or initiate a transfer of funds other than a transfer originated solely by paper instrument. We therefore conclude the system may not withhold the information the comptroller marked under section 552.136 of the Government Code.

Section 552.137 of the Government Code 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). *Id.* § 552.137(a)-(c). The e-mail addresses you have marked are not of a type specifically excluded by section 552.137(c) of the Government Code. In addition, you state the system has not received consent for the release of the marked e-mail address. Therefore, the system must withhold the e-mail addresses you have marked under section 552.137 of the Government Code.

Finally, we note that some of the remaining information is 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. *See* Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See id.* 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. *See* Open Records Decision No. 550 (1990).

In summary, the system may withhold the information we have marked under section 552.111 of the Government Code. If the employee whose personal information you have marked timely elected to withhold her personal information under section 552.024, the

system must withhold the marked information under section 552.117(a)(1) of the Government Code; however, the system may only withhold a personal cellular telephone number if the cellular service was paid for with the employee's own funds. The system must withhold the e-mail addresses you have marked under section 552.137 of the Government Code. The remaining information must be released, but any information protected by copyright must 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.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Chris Schulz
Assistant Attorney General
Open Records Division

CS/cc

Ref: ID#

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

Ms. Ruth H. Soucy
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