ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 30, 2009

Ms. Moira Schilke
Assistant District Attorney
Denton County
P.O. Box 2850
Denton, Texas 76202

OR2009-13754

Dear Ms. Schilke:

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# 356902.

Denton County (the "county") received a request for all electronic mail sent to or from a named individual during a specified time period which includes a specified term. You claim the submitted information is excepted from disclosure under section 552.111 of the Government Code.[1] We have considered the exception you claim and reviewed the submitted information. We have also considered the comments submitted to this office by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note some of the submitted information is not responsive to this request as it was created after the county received the request. This ruling does not address the public availability of non-responsive information, and the county is not required to release non-responsive information in response to this request. Accordingly, we will address your arguments with regard to the responsive information.

Section 552.111 excepts from public 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. Section 552.111 encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice,

[1]Although you raise section 552.101 of the Government Code, you have not asserted any law under which any of the information at issue is considered to be confidential for purposes of section 552.101. Thus, we assume you no longer claim this exception. *See* Gov't Code §§ 552.301, .302.

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 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. 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).

Section 552.111 can also encompass communications between a governmental body and a third-party consultant. *See* Open Records Decision Nos. 631 at 2 (1995) (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body's consultants). When determining if an interagency memorandum is excepted under section 552.111, we must also 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* ORD 561 at 9. For section 552.111 to apply in such instances, 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 inform us the submitted information consists of communications between the county employee at issue and elected district and county clerks from other counties. You state the communications at issue concern policy matters of common interest to those elected officials. However, the submitted information consists of e-mails sent from an e-mail list management service to which the county subscribes and responses to these e-mails also sent through this service. We note most of the submitted information consists of either general administrative information that does not relate to policy making or purely factual information. Upon review, we find you have failed to demonstrate the county shares a privity of interest or common deliberative process with each subscriber of the list management service. Further, you have not demonstrated the submitted information consists of advice, opinion, or recommendation relating to policymaking. Accordingly, you have failed to demonstrate the applicability of section 552.111 to the submitted information. Thus, we find none of the submitted information is excepted from disclosure under section 552.111, and it may not be withheld on that basis. As you raise no further arguments against disclosure of the submitted information, it 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.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,

Karen E. Stack
Assistant Attorney General
Open Records Division

KES/jb

Ref: ID# 356902

Enc. Submitted documents

c: Requestor
(w/o enclosures)