



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 21, 2009

Ms. Jerris Penrod Mapes
Assistant City Attorney
Killeen Police Department
402 North Second Street
Killeen, Texas 76541-5298

OR2009-18083

Dear Ms. Mapes:

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#365111 (ID#W002466).

The Killeen Police Department (the "department") received a request for seven categories of information pertaining to department officers. You state you have released information responsive to categories 1, 2, and 5 to the requestor. You also state you do not maintain information responsive to category 3 of the request. You claim that the submitted information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code. We have considered 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).

Initially, we address the requestor's assertion that the department failed to meet its obligations under section 552.301(b) of the Government Code. Section 552.301 prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires that a governmental body ask for a decision from this office and state which exceptions apply to the requested information by the tenth *business* day after receiving the request. *Id.* § 552.301(b). The department and the requestor agree that the request was received on September 30, 2009. We note that this office does not count the date the request was received or holidays as business days for the purpose of calculating a governmental body's

deadlines under the Act. The department informs this office that it was closed for business on October 12, 2009, in observance of Columbus Day. Accordingly, the tenth business day after the receipt of the instant request was October 15, 2009. The department's request for a ruling from this office was faxed to this office on October 15, 2009. Therefore, we find the department's request for a ruling was timely. *See id.* § 552.301(b).

Next, we note that you state the civilian staffing information in Attachment D is not responsive to the request for information. In this instance, the requestor generally seeks information pertaining to the methods used to determine department staffing needs, including any statistics that describe service demand. The submitted information reveals that the civilian staffing information is part of the data used to make this determination. Thus, upon review, we find the civilian staffing information in Attachment D is responsive to the instant request, and must be released unless an exception to disclosure applies to it. Because you assert section 552.111 of the Government Code for a portion of this information, we will address your argument against release of this information along with the remaining submitted information.

You assert that the information submitted as Attachment F is excepted from disclosure under section 552.103 of the Government Code, which provides in part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You inform us and provide documentation showing that, prior to the department's receipt of the request for information, a lawsuit was filed against the department and the City of Killeen pertaining to the physical fitness testing of officers. We therefore agree that litigation was pending on the date the department received the request. The information in Attachment F pertains to officers that did not pass their physical fitness evaluations and their current assignments and tenure. Accordingly, we find that the information in Attachment F is related to the pending proceedings for purposes of section 552.103. Therefore, the department may generally withhold such information pursuant to section 552.103.

We note, however, that once the information has been obtained by all parties to the pending litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note that the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

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 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).

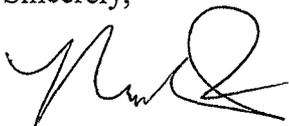
You state that the information in Attachment D is an internal communication which consists of opinions or recommendations on a department policymaking matter. You further state that this information is the opinion of the police Chief as to his recommendations and deliberations prior to any request to the City Council for their approval. Based on your representation and our review, we determine the department may withhold portions of the information in Attachment D, which we have marked, under section 552.111 of the Government Code. However, we find that the remaining information consists purely of factual information that does not reveal advice, opinions, or recommendations on a policymaking matter. Accordingly, you may only withhold the information we have marked under section 552.111 of the Government Code.

In summary, the department may withhold the information in Attachment F under section 552.103 of the Government Code. The department may withhold the information we have marked in Attachment D under section 552.111 of the Government Code. The remaining information must be released to the requestor.

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,



Nneka Kanu
Assistant Attorney General
Open Records Division

NK/rl

Ref: ID# 365111

Enc. Submitted documents

cc: Requestor
(w/o enclosures)