



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

January 11, 2010

Ms. Molly Shortall
Assistant City Attorney
City of Arlington
P.O. Box 90231
Arlington, Texas 76004-3231

OR2010-00519

Dear Ms. Shortall:

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# 366841.

The City of Arlington (the "city") received two requests for information pertaining to a specified Ethics Point investigation. You claim that the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the city's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b) of the Government Code, a governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the written request. *See* Gov't Code § 552.301(b). In this instance, the city

¹ Although you also raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 1-2 (1990). In addition, because the information for which you claim this provision is not subject to section 552.022 of the Government Code, the information is properly addressed here under section 552.107 rather than rule 503. Open Records Decision No. 677 at 8-9 (2002); *see also* Gov't Code § 552.022 (listing categories of information that are expressly public under the Act and must be released unless confidential under "other law").

received two requests from two separate requestors for the information at issue. The city received the first request for information on October 19, 2009. Thus, the ten business day deadline for requesting a ruling from this office was November 2, 2009. While the city raised section 552.111 for the first request within the ten business day time period as required by subsection 552.301(b), the city did not raise section 552.107 until November 3, 2009, which was more than ten business days after the receipt of the first request. Consequently, we find the city failed to comply with the requirements of section 552.301 with respect to its claim under 552.107 of the Government Code.

Generally, a governmental body's failure to comply with section 552.301 results in the waiver of its claims under the exceptions at issue, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *City of Dallas v. Abbott*, 279 S.W.3d 806, 811 (Tex. App.—Amarillo 2007, pet. granted); *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). You assert the submitted information is excepted from disclosure under section 552.107 of the Government Code. This section, however, is discretionary in nature. It serves only to protect a governmental body's interests, and may be waived; as such, it does not constitute a compelling reason to withhold information for purposes of section 552.302. *See also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (waiver of discretionary exceptions). In failing to comply with section 552.301, the city has waived its claim under section 552.107 for this information. We note that in waiving section 552.107 for the first request, the city also waived section 552.107 with respect to the same information in the second request. Consequently, the city may not withhold any of the submitted information under section 552.107 of the Government Code. However, we will consider your timely raised claim under section 552.111 of the Government Code.

You state the submitted information is excepted under section 552.111 of the Government Code, which 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, 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. 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).

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 Exhibit B of the information you submitted to this office on November 3, 2009 consists of advice, opinion, or recommendation on policymaking matters. You further assert that a portion of Exhibit B consists of a draft of a document that was disclosed in its final form. However, Exhibit B consists of e-mail communications, including attached draft investigation reports, between members of the city's workforce services department that pertain to four specific employee complaints against the city's fire department. Upon review, we find the complaints that are the subject of the e-mails and drafts investigation reports in Exhibit B are routine personnel matters that do not rise to the level of policymaking. Moreover, although you also assert Exhibit C of the information you submitted to this office in the November 3, 2009 supplement is confidential under section 552.111, we note Exhibit C consists of purely administrative or factual information or information pertaining to routine personnel matters. Thus, the city may not withhold any of the submitted information under section 552.111 of the Government Code.

However, we note a portion of the submitted information is subject to the doctrine of common law privacy.² Section 552.101 excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses the common-law right of privacy, which protects information that is 1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and 2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976).

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.— El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public’s interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that “the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released.” *Id.*

Thus, if there is an adequate summary of an investigation of alleged sexual harassment, the investigation summary must be released along with the statement of the accused under *Ellen*, but the identities of the victims and witnesses of the alleged sexual harassment must be redacted, and their detailed statements must be withheld from disclosure. *See Open Records Decision Nos. 393 (1983), 339 (1982)*. If no adequate summary of the investigation exists, then all of the information relating to the investigation ordinarily must be released, with the exception of information that would identify the victims and witnesses. We note that supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context. Further, since common-law privacy does not protect information about a public employee’s alleged misconduct on the job or complaints made about a public employee’s job performance, the identity of the individual accused of sexual harassment is not protected from public disclosure. *See Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978)*.

The submitted information consists of e-mail communications, attached draft investigation reports, and attached interview questions pertaining to a claim of sexual harassment. Upon review, we find the submitted draft investigation report we have marked constitutes an adequate summary of the investigation into alleged sexual harassment. Thus, pursuant to section 552.101 and the ruling in *Ellen*, this draft investigation report is not confidential.

² The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987)*.

However, the alleged victim's identifying information in this report, which we have marked, must be withheld under section 552.101 in conjunction with common-law privacy. The city must withhold the remaining records of the sexual harassment investigation under section 552.101 in conjunction with common-law privacy and the court's holding in *Ellen*.

In summary, the city must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. The remaining information 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,



James McGuire
Assistant Attorney General
Open Records Division

JM/jb

Ref: ID# 366841

Enc. Submitted documents

c: Requestor
(w/o enclosures)