



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

May 28, 2010

Mark Adams  
Assistant General Counsel  
Office of the Governor  
P.O. Box 12428  
Austin, Texas 78711

OR2010-07790

Dear Mr. Adams:

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# 379408.

The Office of the Governor (the "governor") received a request for all correspondence between employees of the governor and the Texas Office of State-Federal Relations (the "OSFR") as of a specified date. You state some of the requested information has been released. You claim the submitted information is excepted from disclosure under sections 552.101, 552.106, 552.111, and 552.131 of the Government Code. You also indicate you have notified Sematech, Inc. ("Sematech") of the request and of that company's right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain the applicability of exception to disclose under Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note an interested third party is allowed ten business days after the date of its receipt of a governmental body's notice under section 552.305(d) of the Government Code to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter,

Sematech has not submitted comments to this office explaining why any portion of the submitted information relating to it should not be released to the requestor. Thus, we have no basis to conclude the release of any portion of the submitted information would implicate Sematech's interests, and no portion of the information may be withheld on that basis. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret).

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. Section 552.101 encompasses common-law privacy, which protects information that (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. *Indus. Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). This office has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally protected by common-law privacy. *See* Open Records Decision Nos. 600 (1992) (employee's designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). You assert submitted Exhibit F consists of personal financial information subject to common-law privacy. Upon review, we agree the information at issue constitutes personal financial information. Furthermore, we find that this information is not of legitimate concern to the public. Accordingly, the governor must withhold Exhibit F under section 552.101 in conjunction with common-law privacy.

Section 552.106 of the Government Code excepts from disclosure "[a] draft or working paper involved in the preparation of proposed legislation" and "[a]n internal bill analysis or working paper prepared by the governor's office for the purpose of evaluating proposed legislation." Gov't Code § 552.106(a)-(b). The purpose of section 552.106(a) is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body; therefore, this section is applicable only to the policy judgments, recommendations, and proposals of persons who are involved in the preparation of proposed legislation and who have an official responsibility to provide such information to members of the legislative body. *See* Open Records Decision No. 460 at 1-2 (1987); *see also* Open Records Decision No. 429 at 5 (1985) (statutory predecessor to section 552.106 not applicable to information relating to governmental entity's efforts to persuade other governmental entities to enact particular ordinances). Section 552.106(b) applies to information created or used by employees of the governor's office for the purpose of evaluating proposed legislation. Section 552.106 only protects policy judgments, advice, opinions, and recommendations involved in the preparation or evaluation of proposed

legislation; it does not except purely factual information from public disclosure. *See* ORD 460 at 2.

You state submitted Exhibit H is excepted under section 552.106 because it consists of a working paper intended to “guide [the governor’s staff] in providing bill analysis[.]” We note, however, the information at issue consists only of general guidelines for drafting a bill analysis. Upon review, we find you have not demonstrated how the information at issue consists of a draft or working paper involved in the preparation of proposed legislation. Further, you have not demonstrated how the information at issue consists of an internal bill analysis or working paper prepared by the governor’s office for the purpose of evaluating any particular piece of proposed legislation. Thus, we find no portion of this information constitutes advice, opinions, and recommendations for purposes of section 552.106. Therefore, none of the information at issue may be withheld under section 552.106 of the Government Code.

You next raise 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.

Section 552.111 can also encompass communications between a governmental body and a third-party. *See* Open Records Decision Nos. 631 at 2 (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 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* ORD 561 at 9. 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 id.*

You assert submitted Exhibits B, C, D, and E consist of interagency and intraagency communications between and among the governor's staff and the OSFR involving the discussion of policy issues facing the governor. You state employees of the governor and the OSFR deliberate and share information in order to help the governor revise, develop, and shape policy goals. You further state Exhibit E contains a draft and discussions of draft documents. Upon review, we find you have established the governor shares a privity of interest or common deliberative process with the OSFR. Further, we agree some of the information at issue reveals advice, opinions, or recommendations that pertain to policymaking. We also find the governor demonstrated Exhibit E contains a draft document intended for public release in its final form. Accordingly, the governor may withhold these portions of the information at issue, which we have marked, under section 552.111 of the Government Code. However, we find portions of the remaining information were communicated with individuals with whom you have failed to demonstrate how the governor shares a privity of interest or common deliberative process. Further, we find portions of the remaining information at issue consist either of general administrative information that does not relate to policymaking or information that is purely factual in nature. Accordingly, you have failed to demonstrate the applicability of section 552.111 to the remaining information in Exhibits B, C, and D, and none of it may not be withheld on that basis.

We now address your argument under section 552.131(b) of the Government Code, which provides as follows:

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].

Gov't Code § 552.131(b). Section 552.131(b) protects information about a financial or other incentive that is being offered to a business prospect by a governmental body or another person. You state submitted Exhibit G consists of documents "related to current negotiations on the part of [the governor] to bring a business operation to Texas." We note, however, section 552.131(b) only excepts those incentives offered to the business prospect by a governmental body or another person; it does not except incentives requested by the business prospect. Further, you have not identified the involved parties or adequately explained what incentives, if any, are being offered by the governor. Upon review, we find the governor has failed to demonstrate the applicability of section 552.131(b) to Exhibits G. Therefore, we conclude the governor may not withhold any of the information at issue under section 552.131(b) of the Government Code.

We note 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. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *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 governor must withhold Exhibit F under section 552.101 of the Government Code in conjunction with common-law privacy. The governor may withhold the information we marked under section 552.111 of Government Code. The remaining information must be released, but only 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](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,

A handwritten signature in black ink, appearing to read 'M E' followed by a stylized flourish.

Matt Entsminger  
Assistant Attorney General  
Open Records Division

MRE/rl

Ref: ID# 379408

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)

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