



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 2, 2010

Ms. Kimberly R. Lafferty
Nichols, Jackson, Dillard, Hager & Smith, L.L.P.
For City of Lancaster
1800 Lincoln Plaza
500 North Akard
Dallas, Texas 75201

OR2010-07979

Dear Ms. Lafferty:

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# 381386.

The City of Lancaster (the "city"), which you represent, received a request for information pertaining to a specified job application. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you claim the submitted information is confidential under section 552.101 of the Government Code based on an agreement between the Lancaster Police Department (the "department") and the requestor. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. We note that section 552.101 may not be invoked based on an agreement to keep information confidential unless a governmental body is specifically authorized by statute to enter an agreement to keep information confidential. *See* Open Records Decision Nos. 653 at 2 n.2 (1997); 444 at 6 (1986). Further, we note that information is not confidential under the Act simply because the party that submits the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act through an agreement or contract. *See*

Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). You inform us the city is a civil service city under chapter 143 of the Local Government Code and has adopted its own policy governing the release of information obtained in confidential interviews. However, you have not identified any specific statute that authorizes either the city or the department to keep any of the submitted information confidential. Consequently, unless the submitted information falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

Next, you state the submitted information has been placed in the file of an applicant who is a licensed police officer. Further, you state this file is maintained by the department and is confidential by law. Thus, we understand you to claim the submitted information is confidential under section 552.101 in conjunction with section 411.083(g) of the Local Government Code. Section 143.089(a) of the Local Government Code requires the civil service director to maintain a personnel file on each “police officer.” Likewise, section 143.089(g) states that a police department may maintain its own personnel file on each “police officer.” Both subsections refer to “police officer.” Section 143.003 defines a police officer as a member of a police department or other peace officer who was appointed in substantial compliance with chapter 143 or who is entitled to civil service status under section 143.005, 143.084, or 143.103. *See* Loc. Gov’t Code § 143.003(5) (defining “police officer” for purposes of section 143.089). We note that in this instance, the individual to whom the submitted information pertains was not hired by the city. Thus, the individual at issue was not appointed in substantial compliance with chapter 143, and therefore is not entitled to the rights and privileges of Chapter 143 of the Local Government Code. Accordingly, the city may not withhold any of the submitted information under section 552.101 in conjunction with section 411.083 of the Local Government Code.

Finally, you claim the submitted information is subject to 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).

Section 552.111 can encompass communications between a governmental body and a third party, including a consultant or other party with a privity of interest. *See* Open Records Decision No. 561 at 9 (1990) (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 id.*

You state the submitted information contains internal records and notations of the department. You further state the information at issue contains handwritten notes of officers acting in their official capacity in performing and responding to background investigations. We note, however, that the submitted information pertains to the requestor's application for employment. Thus, upon review, we find the submitted information deals with a routine personnel matter that does not rise to the level of policymaking. Accordingly, we find none of the submitted information is excepted from disclosure under section 552.111 of the Government Code, and it may not be withheld on that basis. As you raise no further exceptions to disclosure, the submitted information must be released to the requestor.¹

¹We note the information being released contains the requestor's private information. *See* Gov't Code § 552.023(b) (governmental body may not deny access to person to whom information relates solely on grounds that information is considered confidential by privacy principles). Thus, if the city receives another request for this information, then the city should resubmit this same information and request another decision from this office. *See* Gov't Code §§ 552.301(a), .302; Open Records Decision No. 673 (2001).

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/dls

Ref: ID# 381386

Enc. Submitted documents

c: Requestor
(w/o enclosures)