



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 24, 2010

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

OR2010-14562

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# 394759.

The Office of the Governor (the "governor") received a request for documents pertaining to "attempts to collect reimbursement for overpayment/double dipping from any former members of the Texas National Guard," including three named generals. You state you have released some information to the requestor.¹ You claim portions of the submitted information are excepted from disclosure under sections 552.111 and 552.116 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You assert portions of Exhibit C are excepted under section 552.111 of the Government Code. 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, opinion, and recommendation in the decisional process and to encourage

¹In a letter dated August 2, 2010, you inform this office you withdraw your request for an opinion regarding Exhibit D because the individual whose information is at issue informed the governor she has no objection to its release.

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).

You state Exhibit C consists of a media appearance brief created by the governor's staff to prepare the governor for an interview. You further state this brief was used to formulate policy and assist in the internal decision-making process. You state the information you have marked in Exhibit C constitutes advice, opinion, and recommendations regarding the governor's response to questions from a member of the news media. Based on your representations and our review, we find you have established the deliberative process privilege is applicable to the information you have marked in Exhibit C. Therefore, the governor may withhold this information under section 552.111 of the Government Code.

You assert Exhibit B is excepted under section 552.116 of the Government Code, which provides as follows:

- (a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from [required public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public disclosure] by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You state, and the information at issue reflects, Exhibit B was prepared by the State Auditor's Office (the "state auditor") while conducting an audit. We note the state auditor is the independent auditor for Texas state government. *See generally* Gov't Code ch. 321. You represent this audit is authorized by section 321.013 of the Government Code. The state auditor has authority under section 321.013 to conduct audits of all state departments as specified in the audit plan. *Id.* § 321.013(a). The governor and the state auditor assert Exhibit B is part of the audit working papers of the state auditor. Based on these representations and our review, we conclude Exhibit B consists of an audit working paper prepared or maintained by the state auditor in conducting an audit authorized or required by a statute of this state. *See id.* § 552.116(a), (b)(1), (b)(2). Therefore, the governor may withhold Exhibit B under section 552.116.

In summary, the governor may withhold the information you have marked in Exhibit C under section 552.111 of the Government Code. The governor may withhold Exhibit B under section 552.116 of the Government Code. 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,

A handwritten signature in black ink, appearing to read "Mack T. Harrison". The signature is fluid and cursive, with a prominent initial "M" and a long, sweeping underline.

Mack T. Harrison
Assistant Attorney General
Open Records Division

MTH/em

Ref: ID# 394759

Enc. Submitted documents

c: Requestor
(w/o enclosures)