



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 6, 2010

Mr. Gary A. Scott
Assistant City Attorney
City of Conroe
P.O. Box 3066
Conroe, Texas 77305

OR2010-18229

Dear Mr. Scott:

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# 402018.

The City of Conroe (the "city") received a request for communications related to digital or LED billboards and City Code Section 90-18. You claim that the requested information is excepted from disclosure under sections 552.106, 552.111, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.111 of the Government Code 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, 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 ORD 561 at 9. We note that a governmental body does not have a privity of interest or common deliberative process with a private party with which the governmental body is engaged in contract negotiations. See *id.* (section 552.111 not applicable to communication with entity with which governmental body has no privity of interest or common deliberative process).

You assert the information at issue reveals advice, opinions, and recommendations concerning the city's digital billboard ordinance and a related agreement with a third party. We have marked the information containing advice, opinions, and recommendations related to policymaking of the city. The city may withhold this information under section 552.111 of the Government Code, provided that the draft documents will be released to the public in their final form.¹ However, we find some of the remaining information consists of either general administrative information that does not relate to policymaking or information that is purely factual in nature. You have failed to demonstrate, and the information does not reflect on its face, how this information is excepted under section 552.111. Additionally, some of the information has been communicated with third parties. You have not demonstrated how the city shares a privity of interest or common deliberative process with these third parties. *See id.* Accordingly, we find none of the remaining information may be withheld under section 552.111 of the Government Code.

You contend that the remaining information in Exhibit A is excepted from disclosure under section 552.106 of the Government Code. Section 552.106 excepts from disclosure "[a] draft or working paper involved in the preparation of proposed legislation[.]" Gov't Code § 552.106(a). Section 552.106 resembles section 552.111 in that both exceptions protect advice, opinion, and recommendation on policy matters, in order to encourage frank discussion during the policymaking process. *See Open Records Decision No. 460 at 2 (1987)*. However, section 552.106 applies specifically to the legislative process and is narrower than section 552.111. *Id.* Therefore, section 552.106 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. *Id.* Section 552.106 does not protect purely factual information from public disclosure. *See id. at 2; see also Open Records Decision No. 344 at 3-4 (1982)* (for purposes of statutory predecessor, factual information prepared by State Property Tax Board did not reflect policy judgments, recommendations, or proposals concerning drafting of legislation). However, a comparison or analysis of factual information prepared to support proposed legislation is within the scope of section 552.106. *See ORD 460 at 2.*

You assert the remaining information in Exhibit A represents drafts, working papers, and e-mail correspondence involved in the preparation of proposed legislation. You assert that the information at issue demonstrates the deliberative process of the city as it moved toward enacting legislation in the form of a municipal ordinance. However, most of the information at issue is factual in nature and does not reveal advice, opinion, analysis, or recommendation regarding proposed legislation. In addition, the remaining information at issue consists of communications between the city and employees or representatives of Clear Channel Communications ("Clear Channel"). You do not inform us that Clear Channel had any

¹As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

official responsibility to provide legislative advice to the members of the city council. Likewise, you have not established that the city and Clear Channel share a privity of interest or common deliberative process with respect to any potential city ordinance. We therefore conclude that the city may not withhold any of the remaining information in Exhibit A under section 552.106 of the Government Code.

You assert that some of the remaining information is excepted from public disclosure under section 552.137 of the Government Code. Section 552.137 provides that "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). Subsection 552.137(c)(1) states that subsection 552.137(a) does not apply to an e-mail address "provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent" and subsection 552.137(c)(2) states that subsection 552.137(a) does not apply to an e-mail address "provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent[.]" *Id.* § 552.137(c)(1), (2). We have marked e-mail addresses that are not of the types specifically excluded by section 552.137(c) of the Government Code. Accordingly, the marked e-mail addresses must be withheld under section 552.137 of the Government Code, unless the owners consent to disclosure.² The remaining e-mail addresses are among the types specifically excluded by section 552.137(c) of the Government Code. Therefore, the city may not withhold any of the remaining e-mail addresses of members of the public under section 552.137 of the Government Code.

Finally, we note that some of the materials at issue may be 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. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). 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.

In summary, the city may withhold the information we have marked under section 552.111 of the Government Code, provided that the draft documents will be released to the public in their final form. The marked e-mail addresses must be withheld under section 552.137 of the Government Code, unless the owners consent to disclosure. The remaining information

²Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies which authorizes withholding of ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

must be released to the requestor; however, any information that is protected by copyright may only be released 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, 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 402018

Enc. Submitted documents

c: Requestor
(w/o enclosures)