ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 20, 2011

Mr. B. Chase Griffith
Brown & Hofmeister, L.L.P.
740 East Campbell Road, Suite 800
Richardson, Texas 75081

OR2011-07171

Dear Mr. Griffith:

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# 418149.

The City of McKinney (the "city"), which you represent, received a request for (1) the contract between the city and an employment search firm; (2) any communications from city staff or city council members pertaining to the employment of a named individual or communications received from the employment search firm; (3) a copy of the invoice from the employment search firm for services rendered; (4) the employment contract between the city and a named individual; and (5) all documents sent to or received by city council members and city staff from a named individual. You state you have released most of the requested information. We note you have redacted a personal e-mail address pursuant to Open Records Decision No. 684 (2009).[1] You claim that the submitted information is excepted from disclosure under section 552.111 of the Government Code. We have considered the exception you claim and reviewed the submitted information. We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information).

[1]Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137, without the necessity of requesting an attorney general decision.

Initially, in his comments submitted to this office, the requestor suggests the city did not comply with the procedural requirements of the Act in requesting our decision because the city did not request a ruling by the statutory deadline. We understand the requestor to assert the city failed to comply with section 552.301(b) of the Government Code, which requires a governmental body to ask for a decision from this office and state which exceptions apply to the requested information by the tenth business day after receiving the request. *Id.* § 552.301(b). The city states it received the request for information on March 1, 2011. Accordingly, the city's ten-business-day deadline was March 15, 2011. The envelope in which the city submitted its request for a ruling request bears a postmark of March 15, 2011. *See id.* § 552.308 (providing ten-day requirement met if request bears post office cancellation mark indicating time within ten-day period). Therefore, we find the city's request for a decision was timely. *See id.* § 552.301(b).

Section 552.111 of the Government Code excepts from disclosure "an interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency." *Id.* § 552.111. This exception 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 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. 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. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *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 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 id.*

You contend the submitted information is excepted from disclosure under section 552.111. You state the information at issue consists of e-mails between the current mayor and the incoming city manager detailing the performance of current city department managers and recommendations for city department level management positions of various city departments. You assert the city department managers will be depended upon to guide the long-term policy making decisions of the city and, thus, the placement and performance of the policy managers is an administrative matter of such broad scope as to affect the city's policy mission. Based on your representations and our review, we agree the city may withhold the information we have marked under section 552.111 of the Government Code and the deliberative process privilege. However, we find the remaining information in the submitted e-mails pertains to administrative and personnel matters. You have failed to demonstrate this information concerns city matters that rise to the level of policymaking. Therefore, you have not demonstrated the applicability of section 552.111 to the remaining information, and none of it may be withheld on this basis.

We note some of the submitted information is subject to section 552.137 of the Government Code, which excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c).[2] *See* Gov't Code § 552.137(a)-(c). The e-mail address at issue is not excluded by subsection (c). Therefore, the city must withhold the personal e-mail address we have marked under section 552.137 of the Government Code, unless its owner affirmatively consents to its public disclosure.

In summary, the city may withhold the information we have marked under section 552.111 of the Government Code. The city must withhold the personal e-mail address we have marked under section 552.137 of the Government Code, unless its owner affirmatively consents to its public disclosure. The remaining information must be released.

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[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. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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,

Jonathan Miles

Jonathan Miles
Assistant Attorney General
Open Records Division

JM/em

Ref: ID# 418149

Enc. Submitted documents

c: Requestor
(w/o enclosures)