



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 14, 2011

Mr. Michael G. Young
Assistant General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

OR2011-08387

Dear Mr. Young:

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# 420533 (DSHS File 18753-2011).

The Texas Department of State Health Services (the "department") received a request for several categories of information related to Planned Parenthood of West Texas ("Planned Parenthood"), including information pertaining to specified audits. You state the department will release some of the requested information to the requestor upon his response to a billing estimate. You claim some of 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.

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.

You state the information you have marked in the submitted meeting briefings and attachments and the entire submitted draft report consist of internal communications and staff notes relating to opinions and recommendations involving the decision making process concerning Planned Parenthood. You indicate the parties to the communications are department employees and consultants hired by the department. Upon review, we agree the submitted draft report relates to policymaking. However, you do not state whether this document will be released to the public in its final form. Thus, to the extent the submitted draft report will be released to the public in its final form, the department may withhold it under section 552.111 of the Government Code. To the extent the draft report will not be released in its final form, it may not be withheld in its entirety under section 552.111. In that instance, we have marked the portions of the draft report that consist of advice, opinion, or

recommendation regarding policy matters. We have also marked the portions of the meeting briefings and attachments containing advice, opinions, and recommendations related to policymaking. The department may withhold this information under section 552.111 of the Government Code. However, we find the remaining information at issue 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 how this information is excepted under section 552.111. Accordingly, we find none of the remaining information may be withheld under section 552.111 of the Government Code.

Section 552.111 also encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as:

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

Tex. R. Civ. P. 192.5. A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *Id.*; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that

a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7.

You assert some of the remaining information is excepted under section 552.111 on the basis of the attorney work product privilege. However, you provide no arguments explaining how the information at issue constitutes material prepared or mental impressions developed, or communications made, in anticipation of litigation or for trial. Thus, because you have

provided no arguments explaining the applicability of the work product privilege to the information at issue, none of the remaining information may be withheld on that basis. *See* Gov't Code § 552.301(e)(1)(A).

In summary, if the submitted draft report will be released in its final form, then the department may withhold this document in its entirety under section 552.111 of the Government Code. If the draft report will not be released to the public in its final form, the department may withhold the information we have marked in it under section 552.111 of the Government Code. In either instance, the department may withhold the information we have marked in the meeting briefings and attachments under section 552.111 of the Government Code. The department must release the remaining information from the submitted meeting briefings and attachments.

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,



Paige Lay
Assistant Attorney General
Open Records Division

PL/dls

Ref: ID# 420533

Enc. Submitted documents

c: Requestor
(w/o enclosures)