



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 11, 2011

Mr. W. Lee Auvenshine
Assistant Ellis County and District Attorney
Ellis County
109 South Jackson
Waxahachie, Texas 75165

OR2011-11603

Dear Mr. Auvenshine:

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# 426645.

Ellis County (the "county") received a request for the draft of the Ellis County Emergency Operations Plan. You claim the requested 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.

Section 552.111 of the Government Code excepts from 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. 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 (1993), 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, and opinions that reflect 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). Moreover, 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).

We also have 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.

You state the information at issue consists of a draft of the Ellis County Emergency Operations Plan. Upon review, we agree the submitted draft document relates to policymaking. Although you state the Ellis County Commissioners Court has not yet approved the draft document, you do not state that the county will release the draft in its final form. Furthermore, you seek to withhold portions of the draft document under section 552.101 of the Government Code, thus indicating the draft will not be released in its final form. We find, therefore, that you have failed to establish that the information at issue consists of a draft version of a policymaking document intended for release in its final form. Accordingly, the county may not withhold the draft document in its entirety under section 552.111. You also have not demonstrated how any portion of the submitted information, which is purely factual information, consists of advice, opinions, or recommendations about a policymaking decision. Therefore, the county may not withhold any portion of the submitted information under section 552.111.

Next, section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that is made confidential by other statutes. You raise section 552.101 in conjunction with the Texas Homeland Security Act (the "HSA"). Sections 418.176 through 418.182 of the Government Code were added to chapter 418 of the Government Code as part of the HSA. Section 418.176 provides in part:

(a) Information is confidential if the information is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity and:

(1) relates to the staffing requirements of an emergency response provider, including a law enforcement agency, a fire-fighting agency, or an emergency services agency;

(2) relates to a tactical plan of the provider; or

(3) consists of a list or compilation of pager or telephone numbers, including mobile and cellular telephone numbers, of the provider.

Id. § 418.176(a). Section 418.177 provides that information is confidential if it:

(1) is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity; and

(2) relates to an assessment by or for a governmental entity, or an assessment that is maintained by a governmental entity, of the risk or vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity.

Id. § 418.177. The fact that information may be related to a governmental body's emergency response preparedness or security concerns does not make such information *per se* confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the HSA must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You seek to withhold portions of the submitted information, which you have marked, under section 418.176. Upon review, we have marked information related to tactical plans of emergency response providers that was collected, assembled, or maintained for the purpose of responding to an act of terrorism or related activity. *See id.* § 418.176(a)(2). The county must withhold the information we have marked under section 552.101 in conjunction with section 418.176 of the Government Code. However, we find the remaining information at issue does not relate to staffing requirements or tactical methods of an emergency response

provider, nor does it consist of a list or compilation of pager or telephone numbers of an emergency response provider. Therefore, none of the remaining information at issue may be withheld under section 552.101 in conjunction with section 418.176 of the Government Code.

You also seek to withhold portions of the submitted information, which you have marked, under section 418.177 of the Government Code. Upon review, we find you have demonstrated that some of the information at issue was collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity and relates to an assessment of the risk or vulnerability of persons or property to an act of terrorism or related criminal activity. Therefore, the county must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 418.177 of the Government Code. However, we find the county has failed to establish how any of the remaining information at issue relates to assessments of the risk or vulnerability of persons or property to an act of terrorism or related criminal activity. Consequently, the county may not withhold any of the remaining information at issue under section 552.101 in conjunction with section 418.177 of the Government Code.

In summary, in conjunction with section 552.101 of the Government Code, the county must withhold the information we have marked under sections 418.176 and 418.177 of the Government Code. The county must release the remaining information.

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,



Tamara H. Holland
Assistant Attorney General
Open Records Division

THH/tf

Ref: ID# 426645

Enc. Submitted documents

c: Requestor
(w/o enclosures)