



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 23, 2012

Ms. Tiffany N. Evans
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2012-11411

Dear Ms. Evans:

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# 459612 (Houston GC No. 19659).

The Houston Airport System (the "system") received a request for any and all e-mails sent between a named individual and four other named individuals over a specified period of time. You claim the submitted information is excepted from disclosure under sections 552.111 and 552.131 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note the requestor seeks only specified e-mails. A portion of the information you have submitted, which we have marked, is not responsive to the instant request. This ruling does not address the public availability of that information, and the system need not release any non-responsive information.

Next, we address the requestor's contention the system did not comply with the procedural requirements of the Act. The requestor asserts the system failed to comply with its ten-business-day deadline in submitting a request for a ruling from this office under section 552.301(b) of the Government Code. Section 552.301 of the Government Code prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state

the exceptions that apply within ten business days of receiving the written request. *Id.* § 552.301(b). Pursuant to section 552.302, a governmental body's failure to comply with section 552.301 results in the presumption that the information is public. The system states it received the request for information on April 30, 2012. Therefore, the ten-business-day deadline to request a ruling from this office pursuant to section 552.301(b) was May 14, 2012. We note the system's request for a decision to this office was timely submitted on May 14, 2012. Thus, we find the system complied with the procedural requirements of section 552.301(b) in requesting a decision from this office.

You assert the responsive information is excepted from disclosure under section 552.111 of the Government Code, which excepts "[a]n interagency or intraagency 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, orig. proceeding); 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, orig. proceeding). 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. ORD 615 at 5; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). 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). However, 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. ORD 615 at 5-6; *see also Dallas Morning News*, 22 S.W.3d at 364 (section 552.111 not applicable to personnel-related communications that did not involve policymaking).

Further, section 552.111 does not generally except from disclosure facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 157; 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). When determining if an interagency memorandum is excepted from disclosure under section 552.111, we must consider whether the entities between which the memorandum is passed share a privity of interest or common deliberative process with regard to the policy matter at issue. *See id.* 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.

This office has also concluded a preliminary draft of a document 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 responsive information contains interagency memoranda and communications consisting of advice, opinions, and recommendations regarding matters of broad scope that affect governmental policy. You have identified the parties to the communications. You indicate the communications between the City of Houston employees and system employees pertain to the potential expansion of airport and airline services. Based on your representations and our review, we conclude the system may withhold the information we have marked under section 552.111 of the Government Code. However, the remaining responsive information either consists of factual information or was communicated with parties you have not identified as sharing a privity of interest or common deliberative process with the system. Therefore, we conclude you have failed to demonstrate this remaining responsive information constitutes internal communications containing advice, recommendations, or opinions reflecting the policymaking processes of the system. Consequently, the system may not withhold any of the remaining responsive information under section 552.111 of the Government Code.

Section 552.131 of the Government Code relates to economic development information and provides, in relevant part:

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].

Gov't Code § 552.131(b). Section 552.131(b) of the Government Code protects information about a financial or other incentive that is being offered to a business prospect by a

governmental body or another person. You assert the remaining responsive information relates to ongoing economic development negotiations between the system and a business prospect regarding the expansion of airline services. You state there is no final contract in place with the business prospect. Upon review, we find none of the remaining responsive information consists of information about financial or other incentives being offered to a business prospect by the system. Accordingly, the system may not withhold any of the remaining responsive information under section 552.131(b) of the Government Code.

In summary, the system may withhold the information we have marked under section 552.111 of the Government Code. The remaining responsive 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,



Michelle R. Garza
Assistant Attorney General
Open Records Division

MRG/som

Ref: ID# 459612

Enc. Submitted documents

c: Requestor
(w/o enclosures)