



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 26, 2012

Mr. Robert Martinez
Director
Environmental Law Division
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

OR2012-11637

Dear Mr. Martinez:

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# 458678 (TCEQ PIR No. 12.04.23.01).

The Texas Commission on Environmental Quality (the "commission") received a request for e-mails, instant messages, text messages, or other electronic communications sent or received by a named individual between March 1, 2012 and the date of the request, and memoranda drafted by the named individual for specified individuals between June 1, 2011 and the date of the request.¹ You state you have released some information to the requestor. You claim the remaining requested information is excepted from disclosure under sections 552.101, 552.110, 552.111, 552.128, and 552.137 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

¹The requestor clarified that he does not seek employment law items or the names of complainants who are private citizens.

²We note that although you also raise section 552.107 of the Government Code, you have provided no arguments to support this exception. Accordingly, we find the commission has waived its claim under this exception. See Gov't Code § 552.301(e) (governmental body must provide comments stating why exceptions raised should apply to information requested), .302.

³We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

Initially, we note the commission did not fully comply with section 552.301 of the Government Code. Section 552.301 requires a governmental body requesting an open records ruling from this office to “ask for the attorney general’s decision and state the exceptions that apply within a reasonable time but not later than the tenth business day after the date of receiving the written request.” Gov’t Code § 552.301(b). The commission did not raise section 552.128 until after the ten-business-day deadline had passed. Generally, if a governmental body fails to timely raise an exception, that exception is waived. *See id.* § 552.302; Open Records Decision No. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). However, mandatory exceptions to disclosure cannot be waived by a governmental body. *See* Gov’t Code § 552.352; Open Records Decision No. 574 at 3 n.4 (2001) (mandatory exceptions). Because section 552.128 is a mandatory exception, we will consider the commission’s argument under section 552.128 notwithstanding its violation of section 552.301(b) in raising that exception.

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. Section 552.101 of the Government Code encompasses information protected by the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. The MPA provides in relevant part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient’s behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(a)-(c). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has determined that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 at 2 (1987), 370 at 2 (1983), 343 at 1 (1982). Medical records may be released only as provided under the MPA. *See* ORD 598 (stating that statute governing access to a specific subset of information held by a governmental body prevails over generally applicable statute). Upon review, we find the medical record we have marked may only be released in accordance with the MPA.

Section 552.101 of the Government Code also encompasses section 382.041 of the Health and Safety Code, which provides “a member, employee, or agent of the commission may not disclose information submitted to the commission relating to secret processes or methods of manufacture or production that is identified as confidential when submitted.” Health & Safety Code § 382.041(a). This office has concluded section 382.041 protects information that is submitted to the commission if a *prima facie* case is established the information constitutes a trade secret under the definition set forth in the Restatement of Torts and if the submitting party identified the information as being confidential when submitting it to the commission. See Open Records Decision No. 652 (1997). You raise section 382.041 for an article regarding the trend evaluation of ambient concentrations of certain atmospheric pollutants that was published in a science journal and is available online. You note the information at issue bears the notation, “Provided for non-commercial research and educational use only. Not for reproduction or distribution or commercial use.” Upon review, we find you have not demonstrated how the information at issue relates to secret processes or methods of manufacture or production that was identified as confidential when submitted to the commission. Accordingly, the commission may not withhold the information at issue under section 552.101 of the Government Code in conjunction with section 382.041 of the Health and Safety Code.

Although the commission also raises section 552.110 of the Government Code for this information, that exception is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address the commission’s argument under section 552.110. We note an interested third party is allowed ten business days after the date of its receipt of the governmental body’s notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. See Gov’t Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from any third party explaining why its information should not be released. As we have not received any third party arguments, we have no basis to conclude any third party has a protected proprietary interest in the information at issue. See *id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the commission may not withhold any of the information at issue on the basis of any proprietary interest a third party may have in it.

Section 552.111 of the Government Code excepts from disclosure “[a]n 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, 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).

This office has also concluded 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 remaining information includes deliberative drafts as well as memoranda to commission management regarding developing policy. However, you do not inform us whether the commission will release the draft policymaking documents to the public in their final form. Based on your representations and our review of the information at issue, we find the commission has generally demonstrated the applicability of section 552.111 to the information we have marked in the e-mails at issue, and the draft policymaking documents. However, we find the commission may withhold the draft documents in their entirety under section 552.111 only to the extent such information will be released to the public in its final form. To the extent the draft documents will not be released to the public in their final form, the commission may withhold the information we have marked within the submitted draft documents under section 552.111 of the Government Code. However, the remaining information within the draft documents is purely factual in nature or does not pertain to policymaking. Thus, to the extent the draft documents will not be released in their final

form, no portion of the remaining information may be withheld under the deliberative process privilege of section 552.111 of the Government Code.

You claim portions of the remaining information are subject to section 552.128 of the Government Code. Section 552.128 is applicable to “[i]nformation submitted by a potential vendor or contractor to a governmental body in connection with an application for certification as a historically underutilized or disadvantaged business under a local, state, or federal certification program[.]” Gov’t Code § 552.128(a). However, you do not indicate the individuals at issue submitted their information in connection with an application for certification under such a program. Moreover, section 552.128(c) states:

Information submitted by a vendor or contractor or a potential vendor or contractor to a governmental body in connection with a specific proposed contractual relationship, a specific contract, or an application to be placed on a bidders list, including information that may also have been submitted in connection with an application for certification as a historically underutilized or disadvantaged business, is subject to required disclosure, excepted from required disclosure, or confidential in accordance with other law.

Id. § 552.128(c). In this instance, the individuals submitted the information in connection with a specific proposed contractual relationship. We therefore conclude the commission may not withhold any of the information at issue under section 552.128 of the Government Code.

Section 552.137 of the Government Code 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). *Id.* § 552.137(a)-(c). This exception is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. We have marked e-mail addresses the commission must withhold under section 552.137 of the Government Code unless the owners of the e-mail addresses have affirmatively consented to their public disclosure.⁴

We note 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

⁴This office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold 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 opinion.

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 medical records we have marked may only be released in accordance with the MPA. The commission may withhold the information we have marked in the submitted e-mails under section 552.111 of the Government Code. The commission may withhold the draft documents in their entirety under section 552.111 only to the extent such information will be released to the public in its final form. To the extent the draft documents will not be released to the public in their final form, the commission may withhold the information we have marked within the submitted draft documents under section 552.111 of the Government Code. The commission must withhold the e-mail addresses we have marked under section 552.137 of the Government Code unless the owners of the e-mail addresses have affirmatively consented to their public disclosure. The remaining information must be released; however, any information that is subject to copyright may be released only in accordance with applicable 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,



Lauren E. Kleine
Assistant Attorney General
Open Records Division

LEK/dls

Ref: ID# 458678

Enc. Submitted documents

c: Requestor
(w/o enclosures)