



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 7, 2012

Ms. Sarah Irwin Swanson
Deputy Director of General Law
Public Utility Commission of Texas
P.O. Box 13326
Austin, Texas 78711

OR2012-12368

Dear Ms. Swanson:

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# 461472 (PUC No. 2012-05-013).

The Public Utility Commission of Texas (the "commission") received a request for information pertaining to the viability of a buyout of Oncor or TXU Electric Delivery during a specified time period. You claim 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.

Initially, we note the submitted information may have been the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2009-11886 (2009) and 2007-12897 (2007). In those rulings, this office ruled, in part, that the commission could withhold portions of the requested information under section 552.111 of the Government Code. As we have no indication that the law, facts, or circumstances on which these prior rulings were based have changed, to the extent the submitted information is identical to the information previously requested and ruled upon by this office, the commission may continue to rely on those rulings as previous determinations and withhold or release any previously ruled upon information in accordance with the prior rulings. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was

addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, to the extent the submitted information is not encompassed by the previous decisions, we will address your arguments against disclosure.

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 submitted information “implicate[s] the policy-making functions of the [commission] in that [it] reflect[s] advice, recommendations, and opinions of [commission] officials and employees with respect to larger policy matters of the [commission], specifically with respect to the scope of the [commission’s] authority under section 14.101 of [the Public Utility Regulatory Act] and the formulation of the [commission’s] position with respect to the transaction.” You further state the correspondence also addresses how the commission will handle similar transactions in the future. You explain portions of the submitted information were created in preparation for responding to questions from a United States Congressman. You state the original letter to the commission and the commission’s response have been released, and the information at issue consists of a draft of the commission’s response containing the advice, recommendations, and opinions of a commission employee regarding how the commission should respond to the Congressman’s questions.

Upon review, we find that portions of the submitted information, which we have marked, are excepted from disclosure under section 552.111 of the Government Code. However, we note that most of the remaining information consists of purely routine administrative matters or factual information. Because the commission has failed to demonstrate how the remaining information constitutes internal communications consisting of advice, opinion, or recommendation that reflect the policymaking processes of the commission, we find that the none of the remaining information is excepted from disclosure under section 552.111. Accordingly, no portion of the remaining information may be withheld on this basis.

In summary, to the extent the requested information is the same information that was previously ruled upon in Open Records Letter Nos. 2009-11886 and 2007-12897, the commission may continue to rely upon those ruling and withhold or release the information in accordance with those rulings. To the extent the information was not previously ruled upon, the commission may withhold the information we have marked under section 552.111 of the Government Code. The commission 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,

A handwritten signature in black ink that reads "Cynthia G. Tynan". The signature is written in a cursive, slightly slanted style.

Cynthia G. Tynan
Assistant Attorney General
Open Records Division

CGT/ag

Ref: ID# 461472

Enc. Submitted documents

c: Requestor
(w/o enclosures)