



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 5, 2012

Mr. Warren M. S. Ernst
Chief of the General Counsel Division
City of Dallas
1500 Marilla Street, Room 7DN
Dallas, Texas 75201

OR2012-14025

Dear Mr. Ernst:

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# 463904.

The City of Dallas (the "city") received a request for all correspondence between a specified city employee and anyone at the U.S. Army Corps of Engineers (the "Army") during the past year that contains the words "levee," "levees," or "floodway." You claim the submitted 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 representative sample of information.¹ We have also received and considered comments from the Army. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This office has repeatedly held that the transfer of confidential information between governmental agencies does not destroy the confidentiality of that information. Attorney General Opinions H-917 (1976), H-836 (1974), Open Records Decision Nos. 561 (1990), 414 (1984), 388 (1983), 272 (1981), 183 (1978). These opinions recognize

¹We 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.

the need to maintain an unrestricted flow of information between state agencies. In Open Records Decision No. 561, we considered whether the same rule applied regarding information deemed confidential by a federal agency. In that decision, we noted the general rule that section 552 of title 5 of the United States Code, the federal Freedom of Information Act ("FOIA"), applies only to federal agencies and does not apply to records held by state agencies. ORD 561 at 6. Further, we stated that information is not confidential when in the hands of a Texas agency simply because the same information is confidential in the hands of a federal agency. *Id.* However, in the interests of comity between state and federal authorities and to ensure the flow of information from federal agencies to Texas governmental bodies, we concluded that: "when information in the possession of a federal agency is 'deemed confidential' by federal law, such confidentiality is not destroyed by the sharing of the information with a governmental body in Texas. In such an instance, [section 552.101] requires a local government to respect the confidentiality imposed on the information by federal law." *Id.* at 7.

You assert the Army considers the submitted information to be confidential under the trade secrets and personal financial information privilege found in section 552(b)(4) of title 5 of the United States Code, the deliberative process privilege found in section 552(b)(5) of title 5 of the United States Code, and the personal privacy provisions found in sections 552(b)(6) and 552(b)(7)(c) of title 5 of the United States Code. *See* 5 U.S.C. § 552(b)(4), (5), (6), (7)(c). Upon review, we find that some of the information at issue was provided to the city by the Army. Therefore, based on the city's representations and our review, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with federal law. *Cf.* Open Records Decision No. 564 at 2 (1990) (this office will accept a governmental body's good-faith determination with respect to questions of fact, which cannot be resolved in the formal decision process).

However, the remaining e-mails and documents you seek to withhold on this basis appear on their face to be records of the city, not the Army. As discussed above, information is not confidential under the Act simply because the same information would be protected from disclosure in the hands of a federal agency. *See* ORD 561 at 6. We therefore conclude the remaining information does not consist of confidential records of a federal agency transferred to the city, but rather are records of the city. Thus, the city may not withhold any of the remaining information based on federal law.

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); *see also* 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 only those internal communications that consist of advice, opinions, recommendations 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. See *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).

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 assert the information in Exhibit D consists of opinions, advice, and recommendations related to an ongoing study being conducted by the city and the Army. You state the communications are between city staff, consultants for the city, and the Army. Based on your representations and our review, we find the city may withhold the information in Exhibit D under section 552.111 of the Government Code.

In summary, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with federal law. The city may withhold the information in Exhibit D under section 552.111 of the Government Code. The remaining 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,

A handwritten signature in cursive script, reading "Kathryn R. Mattingly". The signature is written in black ink and is positioned above the typed name and title.

Kathryn R. Mattingly
Assistant Attorney General
Open Records Division

KRM/bhf

Ref: ID# 463904

Enc. Submitted documents

c: Requestor
(w/o enclosures)