



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 11, 2013

Ms. Mariví Gambini
City Attorney's Office
City of Irving
P.O. Box 152288
Irving, Texas 75015-2288

OR2013-09782

Dear Ms. Gambini:

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# 489960 (City ID No. PI-13-782).

The City of Irving (the "city") received a request for several categories of information pertaining to the city and the Sulphur River Basin Authority. You state the city has made some of the requested information available to the requestor. You claim the submitted information is exempted from disclosure under sections 552.105 and 552.111 of the Government Code.¹ You also state release of the submitted information may implicate the proprietary interests of third parties. Accordingly, you have notified the affected third parties of the request and of their right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the circumstances). We have received comments from the Tarrant Regional Water District. We have considered the submitted arguments and reviewed the submitted information.

Section 552.111 of the Government Code exempts 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

¹Although you also raised sections 552.101, 552.103, and 552.110 of the Government Code, you have not submitted arguments explaining how these exceptions apply to the submitted information. Therefore, we presume you have withdrawn these exceptions. *See* Gov't Code §§ 552.301, .302.

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).

This office also has 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.

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 id.*

You contend the submitted information reflects the advice, recommendations, and opinions of city staff members and representatives of entities with which the city shares a privity of interest.² You explain the city and those entities are working together to develop water resources in the Sulphur River Basin. You further explain the information at issue, including an attached draft agreement, pertains to water resource policymaking matters affecting the city and the entities in privity with the city. You state the draft agreement will be released to the public in its final form. Based on your representations and our review of the submitted information, we conclude the city may withhold the information we have marked under section 552.111 of the Government Code.³ However, we find the remaining information consists of either general administrative information that does not relate to policymaking, or information that is purely factual in nature. Therefore, you have failed to demonstrate how the deliberative process privilege applies to the remaining information. Consequently, the city may not withhold any of the remaining information at issue under section 552.111 of the Government Code. As you raise no further exceptions to disclosure, 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Britni Fabian
Assistant Attorney General
Open Records Division

BF/dls

²You inform us the entities participating in the advance funding include the city, City of Dallas, North Texas Municipal Water District, Sulphur River Basin Authority, Tarrant Regional Water District, and Upper Trinity Regional Water District.

³As our ruling is dispositive for this information, we need not address your remaining argument against disclosure.

Ref: ID# 489960

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Tarrant Regional Water District
c/o Mr. Kyle T. Gray
Pope, Hardwicke, Christie, Schell, Kelly & Ray, L.L.P.
500 West 7th Street, Suite 600
Fort Worth, Texas 76102
(w/o enclosures)

Sulpher River Basin Authority
c/o Mr. Kirk Patton
3512 Texas Boulevard
Texarkana, Texas 75503
(w/o enclosures)

Upper Trinity Regional Water District
North Texas Municipal Water District
c/o Ms. Lauren Kalisek
Lloyd Gosselink
816 Congress Avenue, Suite 1900
Austin, Texas 78701
(w/o enclosures)

Mr. Milton Henderson
Assistant City Attorney
City of Dallas
1500 Marilla Street
Dallas, Texas 75201
(w/o enclosures)