



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 19, 2013

Ms. Molly Cost
Assistant General Counsel
Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR2013-14480

Dear Ms. Cost:

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# 496703 (PIR No. 13-1887).

The Texas Department of Public Safety (the "department") received a request for all e-mail correspondence between two named individuals during a specified time period.¹ You state the department is releasing some of the requested information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.106, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note a portion of the submitted information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2013-14110 (2013). As we have no indication the law, facts, and circumstances on which the prior ruling was based have changed, the department must continue to rely on that ruling as a previous determination and withhold or release the information at issue in accordance with Open Records Letter No. 2013-14110.² See Open Records Decision

¹You state the department sought and received clarification of the request. See Gov't Code § 552.222(b) (providing that if request for information is unclear, governmental body may ask requestor to clarify request); see also *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when governmental entity, acting in good faith, requests clarification or narrowing of unclear or overbroad request for public information, ten-day period to request attorney general ruling is measured from date request is clarified or narrowed).

²As our ruling is dispositive, we need not address your argument against disclosure of this information.

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).

Next, we note that one of the submitted e-mails, which we have marked, was responsive to this requestor's previous request in Open Records Letter No. 2013-14110, which asked for "all e-mail to or from the [department's] legislative director since February 1, 2013." Accordingly, we must address the department's obligations under the Act with respect to the marked document. Pursuant to section 552.301(e) of the Government Code, a governmental body is required to submit to this office within fifteen business days of receiving the request a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See* Gov't Code § 552.301(e)(1)(D). In your correspondence to this office related to Open Records Letter No. 2013-14110, you informed this office that the previous request was received by the department on May 10, 2013. The department timely submitted to this office a copy of the specific information requested and did not contend that the information it submitted was a representative sample. This office subsequently issued Open Records Letter No. 2013-14110 for the timely submitted information. However, you did not submit the marked e-mail, which existed and was responsive to the earlier request, until June 13, 2013. Consequently, we find the department failed to comply with the procedural requirements of section 552.301(e) with respect to the marked e-mail.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption the information is public and must be released. Information presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Although you seek to withhold the marked e-mail under section 552.106 of the Government Code, that section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 522 (1989) (discretionary exceptions in general). Because your claim under section 552.106 does not provide a compelling reason for non-disclosure under section 552.302, in failing to comply with section 552.301 you have waived that exception. Accordingly, the department may not withhold the marked e-mail on the basis of section 552.106. As you raise no further exceptions against its disclosure, the marked e-mail must be released.

Section 552.101 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 section 411.00755 of the Government Code. Open Records Letter No. 2010-12863 (2010) is a previous determination to the department authorizing it to withhold personnel records of commissioned officers of the department under section 552.101 of the Government Code in conjunction with section 411.00755(b) of the Government Code without the necessity of requesting an attorney general decision, unless the exceptions to confidentiality listed in subsections 411.00755(b)(1)-(12) or the release provisions listed in subsection 411.00755(c) are applicable. *See* ORD 673 at 7-8 (listing elements of second type of previous determination under section 552.301(a) of the Government Code). You state the information you have indicated under section 411.00755 consists of a personnel record of a commissioned officer of the department that is subject to section 411.00755. You also state this information does not contain the types of information listed in subsections 411.00755(b)(1)-(12), and there is no indication the release provisions in subsection 411.00755(c) are applicable. Therefore, based on your representations and our review, we conclude the department must withhold the information you have indicated under section 552.101 of the Government Code in conjunction with section 411.00755 of the Government Code pursuant to the previous determination issued to the department in Open Records Letter No. 2010-12863.³

Section 552.106 of the Government Code excepts from disclosure “[a] draft or working paper involved in the preparation of proposed legislation” and “[a]n internal bill analysis or working paper prepared by the governor’s office for the purpose of evaluating proposed legislation[.]” Gov’t Code § 552.106(a), (b). Section 552.106 ordinarily applies only to persons with a responsibility to prepare information and proposals for a legislative body. Open Records Decision No. 460 (1987). The purpose of section 552.106 is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body, and therefore, it does not except from disclosure purely factual information. *Id.* at 2. However, a comparison or analysis of factual information prepared to support proposed legislation is within the ambit of section 552.106. *Id.* A proposed budget constitutes a recommendation by its very nature and may be withheld under section 552.106. *Id.* Section 552.106 protects only policy judgments, advice, opinions, and recommendations involved in the preparation or evaluation of proposed legislation; it does not except purely factual information from public disclosure. *See* ORD 460 at 2.

You state the information you have indicated consists of communications between department employees, legislators’ offices, and other governmental bodies regarding the development, analysis, and evaluation of proposed legislation related to the department. Upon review, we find the information we have marked constitutes advice, opinion, analysis,

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

and recommendations regarding legislation related to the department. Therefore, the department may withhold the information we have marked under section 552.106 of the Government Code. However, we find you have failed to demonstrate how the remaining information at issue constitutes advice, opinion, analysis, or recommendations for purposes of section 552.106. Accordingly, the department may not withhold any of the remaining information at issue under section 552.106.

Section 552.108(a)(1) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* § 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state the information you have indicated relates to an ongoing criminal investigation. Based on this representation, we find the release of the information at issue would interfere with the detection, investigation, and prosecution of a crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Accordingly, the department may withhold the information you have indicated under section 552.108(a)(1) of the Government Code.

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. Section 552.111 encompasses the deliberative process privilege. *See Open Records Decision No. 615 at 2* (1993). The purpose of this exception 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, 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. *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 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 seek to withhold the information you have indicated, including the submitted draft document, under section 552.111. You contend the information at issue constitutes internal communications providing advice, opinion, and recommendations regarding policy matters regarding the department's operating budget. Additionally, you state the draft document at issue will be released to the public in its final form. Based on your representations and our review, we find the attachment we have indicated, which consists of the draft document at issue, constitutes policymaking advice, opinion, and recommendation. As such, the department may withhold the information we have indicated under section 552.111 on the basis of the deliberative process privilege. 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. Thus, you have failed to demonstrate how the remaining information is excepted under section 552.111. Accordingly, we find none of the remaining information at issue may be withheld on this basis.

In summary, the department must continue to rely on Open Records Letter No. 2013-14110 and withhold or release the information at issue, which we have marked, in accordance with that ruling. The department must withhold the information you have indicated under section 552.101 of the Government Code in conjunction with section 411.00755 of the Government Code pursuant to the previous determination issued to the department in Open Records Letter No. 2010-12863. The department may withhold the information we have marked under section 552.106 of the Government Code. The department may withhold the information you have indicated under section 552.108(a)(1) of the Government Code, and the information we have indicated 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.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

Ref: ID# 496703

Enc. Submitted documents

c: Requestor
(w/o enclosures)