



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 24, 2013

Mr. Chris Sterner
Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2013-18556

Dear Mr. Sterner:

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# 503336 (OOG# 224-13).

The Office of the Governor (the "governor's office") received a request from a Texas legislator under section 552.008 of the Government Code for information concerning a specified line item veto. You state the governor's office has released some of the information. You argue, with respect to this particular requestor, the governor's office need not comply with section 552.008 of the Government Code. You further claim the submitted information is excepted from disclosure under sections 552.106 and 552.111 of the Government Code. We have considered your arguments and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments to this office stating why the information at issue should or should not be released).

As you acknowledge, the requestor is the chief of staff for State Representative Harold Dutton Jr. ("Representative Dutton") and makes the request on Representative Dutton's behalf. Section 552.008(b) of the Government Code provides in part:

A governmental body on request by an individual member, agency, or committee of the legislature shall provide public information, including confidential information, to the requesting member, agency, or committee for

inspection or duplication in accordance with this chapter if the requesting member, agency, or committee states that the public information is requested under this chapter for legislative purposes.

Id. § 552.008(b). Disclosure of information to a member of the legislature under section 552.008 does not waive or affect the confidentiality of the information or the right to assert exceptions in the future regarding that information. *Id.* Section 552.008 prescribes specific procedures relating to the confidential treatment of shared information. *See id.* We understand Representative Dutton makes the request for legislative purposes. Accordingly, we must address your argument that release of the submitted information under section 552.008 violates the separation of powers doctrine under the Texas Constitution and unduly interferes with the constitutional power of the governor to approve or disapprove bills passed by the legislature.

The Texas Constitution divides the legislative, executive, and judicial powers of the state's government into three distinct departments, and no department shall exercise any powers assigned to either of the others unless expressly permitted to do so. Tex. Const. art. II, § 1. A violation of this separation of powers occurs when one department of state government unduly interferes or threatens to unduly interfere with another department's effective exercise of its constitutionally assigned powers. *Armadillo Bail Bonds v. State*, 802 S.W.2d 237, 239 (Tex. Crim. App. 1990). In considering whether the release of information under section 552.008 would violate the separation of powers, the Third Court of Appeals articulated a two-part inquiry to determine whether a violation has occurred due to undue influence between the constitutional departments. *Tex. Comm'n on Env'tl. Quality v. Abbott*, 311 S.W.3d 663, 672 (Tex. App.—Austin 2010, pet. denied). Under the first part of that inquiry, we must look to the scope of the powers constitutionally assigned to the governor's office. *Id.* at 672. Second, we must consider the impact releasing the information to Representative Dutton would have on the exercise of those powers by the governor. *Id.* In doing so, we must determine whether the release of the requested information to this requestor under section 552.008 unduly interferes with the governor's exercise of constitutional authority. *Id.* at 674.

Representative Dutton seeks "copies of all information, documents, and communication sent and received [by the governor's office] in regards to line item veto Section 55 of House Bill No. 1025." You argue the submitted information reflects the internal deliberations that occurred as part of the veto power exercised by the governor under the Texas Constitution. The governor is a member of the Executive Department of the state. *See* Tex. Const. art. IV, § 1. The Constitution assigns the governor the exclusive power to approve or disapprove bills, also known as veto power, as well as the power to veto line-items in appropriations bills. *See id.* § 14. Thus, as to the first part of the standard articulated by the Third Court of Appeals in the *TCEQ v. Abbott* case, we conclude the Texas Constitution confers a specific veto power on the governor.

Next, we must consider whether the release of the information at issue would unduly interfere with the governor's exercise of his constitutionally assigned veto power. *See Tex. Comm'n on Envtl. Quality*, 311 S.W.3d at 674-75. As part of this consideration, we note Representative Dutton is a member of the House of Representatives, which is a part of the state's Legislative Department. *See Tex. Const. art. III § 1*. You state the submitted information was developed by the governor's office in its exercise of the governor's veto power. You argue that release of this information to Representative Dutton would "have a chilling effect on the free flow of ideas, frank communications, and robust deliberations necessary for the Governor to make the decision to approve or disapprove a bill." You state such a release would inhibit "analysts and advisors from rendering candid advice and recommendations to the Governor regarding bills passed by the legislature." Based on these representations and our review of the information at issue, we agree the required disclosure of internal deliberations by the governor's office concerning the governor's veto of certain bills to a member of the Legislative Department would unduly interfere with the veto power constitutionally delegated to the governor as part of the Executive Department. If the governor and his staff had to decide whether to veto legislation while knowing their veto-related work could later be accessed by legislators, they could not freely and frankly deliberate about the governor's exercise of his constitutional veto power. This kind of undue interference with a constitutional duty is prohibited by the separation of powers provisions in the Texas Constitution. *See Armadillo*, 802 S.W.2d at 239. Accordingly, the governor's office need not provide the submitted information to Representative Dutton pursuant to section 552.008 of the Government Code. Because section 552.008 cannot be invoked with respect to the information in question, we must determine whether, notwithstanding the requestor's legislative capacity, the information at issue may be withheld from this requestor as a member of the public. Thus, we will determine whether the governor's office may withhold the submitted information under its asserted exceptions.

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.

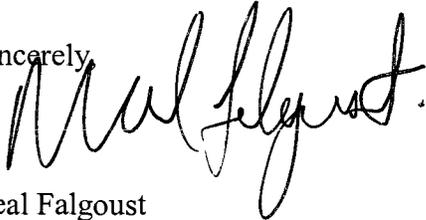
You state the information submitted in Exhibit B consists of draft policymaking documents and an internal bill analysis. You explain these communications relate to recommended policy actions, potential policy statements, and advice and opinion on policy issues including legislation under review by the governor's office. You further state the staff members involved in the communications are tasked with the responsibility of formulating policy recommendations on behalf of the governor's office with respect to the pending legislation. You state the draft documents were released to the public in final form. You also state the internal bill analysis was prepared by the governor's office to evaluate proposed legislation and contains opinions, advice, and recommendations on the bill at issue. Based on your representations and our review, we find you have established the deliberative process privilege is applicable the information submitted in Exhibit B. Accordingly, the governor's office may withhold the information submitted in Exhibit B under section 552.111 of the Government Code.¹

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.

¹As our ruling is dispositive, we do not address your remaining argument against disclosure.

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,

A handwritten signature in black ink, appearing to read "Neal Falgoust". The signature is written in a cursive, flowing style.

Neal Falgoust
Assistant Attorney General
Open Records Division

NF/ag

Ref: ID# 503336

Enc. Submitted documents

c: Requestor
(w/o enclosures)