



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 7, 2013

Mr. Steven M. Kean
Deputy City Attorney
City of Tyler
P.O. Box 2039
Tyler, Texas 75710-2039

OR2013-19493

Dear Mr. Kean:

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# 505171 (City File No. [LegalDesk #NSE-728060]).

The City of Tyler (the "city") received a request for three categories of information related to leaks in and proposed repairs to the Tyler Dam from 2003 to the present. You state the city will release most of the responsive information. 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 representative sample of information.¹

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

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 that those records contain substantially different types of information than that submitted to this office.

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. *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 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 claim the deliberative process privilege under section 552.111 for the information at issue, which consists of a preliminary design report prepared for the city by a consultant employed by the city. You also state the draft report contains notes and comments made by city staff.

Based on your representations and our review, we find the district shares a privity of interest with the consultant regarding the information at issue. However, you do not state whether the draft document will be released to the public in its final form. Thus, to the extent the draft document will be released to the public in its final form, the city may withhold it in its entirety under section 552.111. If the draft document will not be released to the public in its final form, then the city may not withhold it in its entirety under section 552.111. However, we find the information we have marked, including information within the draft document if it will not be released in final form, consists of advice, opinions, and recommendations pertaining to a policymaking matter. Accordingly, the city may withhold the information we have marked under section 552.111. However, we find the remaining information at issue consists of information that is purely factual in nature. Thus, we find you have failed to demonstrate how the remaining information at issue is excepted under section 552.111. Accordingly, the remaining information at issue may not be withheld under section 552.111 of the Government Code.

In summary, if the submitted draft document will be released to the public in its final form, the city may withhold it in its entirety under section 552.111 of the Government Code. If the draft document will not be released to the public in its final form, then the city may not withhold it in its entirety under section 552.111 but may withhold the information we have marked under section 552.111 of the Government Code and 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.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 "Cindy Nettles". The signature is fluid and cursive, with the first name "Cindy" written in a larger, more prominent script than the last name "Nettles".

Cindy Nettles
Assistant Attorney General
Open Records Division

CN/bhf

Ref: ID# 505171

Enc. Submitted documents

c: Requestor
(w/o enclosures)