



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 16, 2014

Ms. Kathleen Decker
Director
Litigation Division
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

OR2014-08438

Dear Ms. Decker:

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# 522974 (TCEQ PIR No. 15540).

The Texas Commission on Environmental Quality (the "commission") received 12 requests from two requestors for all correspondence between the commission and 15 named individuals related to the regulation of the oil and gas industry during a specified time period. You state you have released some information to the requestors. You claim the remaining requested information is excepted from disclosure under sections 552.111 and 552.116 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we must address the commission's obligations under the Act. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(b) of the Government Code, the governmental body must request a ruling from this office and state the exceptions to disclosure that apply within ten business days after receiving the request. Gov't Code § 552.301(b). While you raised section 552.111 of the Government Code within

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.

the ten-business-day time period as required by section 552.301(b), you did not raise section 552.116 of the Government Code until after the ten-business-day deadline had passed. Consequently, we find the commission failed to comply with the procedural requirements of section 552.301(b) of the Government Code with respect to its claim under section 552.116 of the Government Code.

Generally, a governmental body's failure to comply with section 552.301 results in the waiver of its untimely claim, unless that claim is a compelling reason for withholding information from disclosure. *See generally 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, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also generally* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). We note section 552.116 of the Government Code is discretionary in nature. This exception serves only to protect a governmental body's interests, and may be waived; as such, it does not constitute a compelling reason to withhold information for purposes of section 552.302. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (waiver of discretionary exceptions). Thus, no portion of the information at issue may be withheld under section 552.116 of the Government Code. However, we will consider the applicability of section 552.111 of the Government Code, which you timely raised.

Next, we note some of the submitted information, which we have marked, was published on the commission's website. The Act does not permit the selective disclosure of information. *See* Gov't Code §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). Section 552.007 of the Government Code provides that if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. Gov't Code § 552.007(a); Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Although you seek to withhold this information under the deliberative process privilege encompassed by section 552.111 of the Government Code, this section does not prohibit the release of information or make it confidential under law. *See* Gov't Code § 552.007; Open Records Decision Nos. 665 at 2 n. 5, 470 at 7 (1987) (governmental body may waive statutory predecessor to section 552.111 deliberative process). Thus, the commission has waived its claim under section 552.111 for this previously released information and may not withhold it on the basis of section 552.111. As you raise no other exceptions for this information, it must be released.

Next, we note the information at issue was released by the commission to a state senator. The documents themselves reflect that some of the information may have been released

pursuant to section 552.008 of the Government Code. *See* Gov't Code § 552.008 (providing that a governmental body, by providing public information under this section that is confidential or otherwise excepted from required disclosure under law to a legislator who states the information is requested for a legislative purpose, does not waive or affect the confidentiality of the information for purposes of state or federal law or waive the right to assert exceptions to required disclosure of the information in the future). However, it is not clear to what extent the information at issue was released to the state senator pursuant to section 552.008. Therefore, we must rule conditionally. Accordingly, to the extent the release of the information at issue to the state senator was not in accordance with section 552.008 of the Government Code, we find the commission has voluntarily released such information, and may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See id.* § 552.007. As noted above, the deliberative process privilege encompassed by section 552.111 of the Government Code does not prohibit the release of information or make it confidential under law. *See id.*; ORDs 665 at 2 n. 5, 470 at 7. Thus, to the extent the release of the information at issue to the state senator was not in accordance with section 552.008 of the Government Code, the commission has waived its claim under section 552.111 for this previously released information and may not withhold it on the basis of section 552.111. However, to the extent the release of the information at issue to the state senator was in accordance with section 552.008 of the Government Code, then the commission did not waive its claim under section 552.111 of the Government Code, and we will address your arguments under this exception.

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 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, writ ref'd n.r.e.); 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 section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, 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 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.

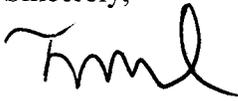
You claim the deliberative process privilege under section 552.111 for the information at issue. You state the information at issue contains "draft data and information responsive to requests from certain Texas government officials regarding the methodologies, technical status, and plans of [commission] activities related to . . . the implementation of agency policy on a variety of substantive issues." You state the information at issue contains advice, recommendation, or opinion regarding commission procedures. We also note the information at issue contains a draft document which we understand has been released in final form to the public. Based on your representations and our review, we find you have established the deliberative process privilege is applicable to some of the information at issue. Accordingly, to the extent the release of the information at issue to the state senator was in accordance with section 552.008 of the Government Code, the commission may withhold the information we have marked, including the draft document in its entirety, under section 552.111 of the Government Code. However, we find the remaining information at issue consists of general administrative and purely factual information. Thus, we find you have failed to show how the remaining information at issue consists of internal communications containing advice, opinions, or recommendations on the policymaking matters of the commission. Accordingly, the remaining information at issue may not be withheld under section 552.111 of the Government Code.

In summary, if the release of the information at issue to the state senator was in accordance with section 552.008 of the Government Code, then the commission may withhold the information we have marked, including the draft document in its entirety, under section 552.111 of the Government Code. However, if the release of the information at issue to the state senator was not in accordance with section 552.008 of the Government Code, the commission may not withhold the information we have marked under section 552.111 of the Government Code, and must release this information. In either case, the commission 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 "Tim Neal". The signature is fluid and cursive, with the first name "Tim" and last name "Neal" clearly distinguishable.

Tim Neal
Assistant Attorney General
Open Records Division

TN/bhf

Ref: ID# 522974

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)