



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 4, 2014

Mr. William Clay Harris  
Staff Attorney  
Office of Agency Counsel  
Legal Section MC 110-1C  
Texas Department of Insurance  
P.O. Box 149104  
Austin, Texas 78714-9104

OR2014-21918

Dear Mr. Harris:

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# 546441 (TDI# 154855).

The Texas Department of Insurance (the "department") received a request for a specified line of duty death report. You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that did not result in conviction or deferred adjudication. *See* Gov't Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). You state the submitted information pertains to a criminal investigation conducted by the department's State Fire Marshal's Office (the "fire marshal's office") that concluded in a result other than conviction or deferred adjudication. We note, for purposes of section 552.108, the fire marshal's office is considered a law enforcement

unit. *See id.* § 417.006. Based on this representation and our review, we agree section 552.108(a)(2) is applicable to the submitted information.

However, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. *Id.* § 552.108(c). Basic information refers to the basic “front-page” offense and arrest information held to be public in *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). *See* Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Thus, with the exception of the basic information, the department may withhold the submitted information under section 552.108(a)(2) of the Government Code.

The department claims the basic information is confidential under section 552.101 of the Government Code in conjunction with section 417.0075 of the Government Code. Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 417.0075 relates to investigations of firefighter fatalities conducted by the fire marshal’s office, and provides in part:

(b) If a firefighter dies in the line of duty or if the firefighter’s death occurs in connection with an on-duty incident in this state, the state fire marshal shall investigate the circumstances surrounding the death of the firefighter, including any factors that may have contributed to the death of the firefighter.

...

(f) Information gathered in an investigation conducted under [section 417.0075] is subject to Section 552.108 [of the Government Code].

*Id.* § 417.0075(b), (f). For information to be confidential under section 552.101, a statute must explicitly require confidentiality; confidentiality will not be inferred. *See* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (as general rule, statutory confidentiality requires express language making information confidential), 465 at 4-5 (1987). Section 417.0075(f) of the Government Code states information gathered in an investigation conducted under section 417.0075 is subject to section 552.108 of the Government Code. *See* Gov’t Code § 417.0075(f). However, section 417.0075(f) does not expressly provide for the confidentiality of information gathered in firefighter fatality investigations or any other information. Accordingly, the department may not withhold any of the basic information under section 552.101 in conjunction with section 417.0075 of the Government Code.

You assert the basic information is confidential under section 552.101 of the Government Code in conjunction with the section 6.3 of the fire marshal's office's firefighter fatality investigation policy (the "policy"), which we understand provides policies for the fire marshal's office's maintenance of records pertaining to firefighter fatality investigations. We understand section 6.3 of the policy prohibits a person participating in the investigation directed by the fire marshal's office or a member of the investigation panel from communicating any portion of the investigation with a person not participating in the investigation or the news media unless authorized by the state fire marshal or the department's public information office. You seek to withhold the basic information because it pertains to an investigation of a firefighter fatality. We note a governmental body may not promulgate a rule that designates information as being confidential, so as to bring the information within the scope of section 552.101 of the Government Code, unless the governmental body has been given specific statutory authority to do so. *See* Open Records Decision Nos. 594 at 3 (1991) (requiring statutory authority before governmental body may deem information confidential), 484 at 2 (1987) (governmental bodies may not by rule or contract render information confidential for purposes of Act); *see also Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976); *City of Brookside Village v. Comeau*, 633 S.W.2d 790, 796 (Tex. 1982). You have not directed our attention to any law, nor are we aware of any, that authorizes the department to make information confidential for purposes of the Act. Thus, the department has failed to demonstrate how section 6.3 of the policy makes information confidential for purposes of section 552.101 of the Government Code, and none of the basic information may be withheld on that basis.

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, no writ); 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 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.

We note section 552.111 can encompass communications between a governmental body and a third party. *See* Open Records Decision Nos. 631 at 2 (Gov't Code § 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 561 at 9 (1990) (Gov't Code § 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (Gov't Code § 552.111 applies to memoranda prepared by governmental body's consultants). In order 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* ORD 561 at 9.

You state the submitted information consists of a draft document prepared and submitted by the Dallas Fire-Rescue Department ("Dallas FRD") to the department for the fire marshal's office's investigation of a firefighter fatality. You contend the basic information reflects the policymaking process of Dallas FRD and the fire marshal's office. However, upon review, we find the basic information is purely factual in nature. Therefore, you have failed to demonstrate how the information at issue consists of internal communications for purposes of the deliberative process privilege. Accordingly, you may not withhold the basic information under section 552.111 of the Government Code.

In summary, with the exception of basic information, the submitted information may be withheld under section 552.108(a)(2).

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](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 that reads "Paige Thompson". The signature is written in a cursive, flowing style.

Paige Thompson  
Assistant Attorney General  
Open Records Division

PT/eb

Ref: ID# 546441

Enc. Submitted documents

c: Requestor  
(w/o enclosures)