



Office of the Attorney General
State of Texas

DAN MORALES
NEY GENERAL

January 11, 1995

Mr. Robert Giddings
The University of Texas System
Office of General Counsel
201 West Seventh Street
Austin, Texas 78701-2981

Open Records Decision No. 631

Re: Whether a consultant's report concerning a university's overall faculty hiring and retention policies is excepted from required public disclosure by section 552.111 of the Government Code (formerly V.T.C.S. article 6252-17a, section 3(a)(11)) (RQ-589)

Dear Mr. Giddings:

On behalf of The University of Texas at Arlington (the "university"), you have asked this office to determine whether a particular report is excepted from required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code (formerly V.T.C.S. article 6252-17a).¹ The report was produced by an outside consultant hired by the university, rather than an officer or employee of the university, and addresses allegations of systematic discrimination against Black and Hispanic faculty members in the retention, tenure, and promotion process at the university and allegations of discrimination against one particular faculty member. You assert that the report contains "confidential interviews, 'findings' that are really the opinions of the consultant, as well as advice, opinions and recommendations to the university for future action." You ask whether this information is excepted from disclosure by section 552.111 in light of the court's decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ).

Your request requires us to consider whether, in light of the court's decision in *Gilbreath* and our decision in Open Records Decision No. 615 (1993), section 552.111 may be applicable to information created for a governmental body by an outside consultant.² This office first concluded that the language now in section 552.111 may encompass information prepared by an outside consultant in Open Records Decision No. 192 (1978) at 2. In *Gilbreath*, however, the court criticized our interpretation of section

¹The Seventy-third Legislature codified the Open Records Act as chapter 552 of the Government Code and repealed article 6252-17a, V.T.C.S. See Acts 1993, 73d Leg., ch. 268, §§ 1, 46. The codification of the Open Records Act in the Government Code is a nonsubstantive codification. *Id.* § 47.

²By "outside consultant," we mean a person other than an officer or employee of the governmental body.

552.111 as narrowing the scope of the Open Records Act. *Gilbreath*, 842 S.W.2d at 413. Following *Gilbreath*, this office re-examined our interpretation of the language in section 552.111 and concluded that it must be construed in the same manner as exemption 5 of the federal Freedom of Information Act ("FOIA") was construed by Congress and the federal courts at the time the Texas Open Records Act was passed by the Texas Legislature. Open Records Decision No. 615 (1993) at 3.

We conclude that section 552.111 may apply to information created for a governmental body by an outside consultant when the outside consultant is acting at the request of the governmental body and performing a task within the authority of the governmental body. We base this conclusion on two early federal cases interpreting exemption 5 of FOIA that deal specifically with material prepared by a consultant to the governmental body. See *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971); *Wu v. National Endowment for Humanities*, 460 F.2d 1030 (5th Cir. 1972), *cert. denied*, 410 U.S. 926 (1973).

In both *Soucie* and *Wu*, the courts concluded that exemption 5 may apply to information created by persons other than agency officers or employees. In *Soucie*, 448 F.2d at 1078, the court held that portions of the Garwin report could be withheld under exemption 5. The Garwin Report was written by a panel of experts convened by the Director of the Office of Science and Technology to evaluate the program for developing a supersonic transport ("SST"). The director convened the panel after being asked by the president to provide an independent assessment of the SST program. In *Wu*, 460 F.2d at 1032, the court held that the evaluations of certain specialists hired by the National Endowment for the Humanities to evaluate the plaintiff's proposal were intra-agency memoranda under exemption 5 even though the specialists were not agency employees. The court quoted the following footnote from *Soucie*:

The rationale for the exemption for internal communications [exemption (5)] indicates that the exemption should be available in connection with the Garwin report even if it was prepared for an agency by outside experts. The Government may have a special need for the opinions and recommendations of temporary consultants, and those individuals should be able to give their judgments freely without fear of publicity. A document like the Garwin Report should therefore be treated as *an intra-agency memorandum of the agency which solicited it*. [Emphasis added.]

Id. (quoting *Soucie*, 448 F.2d at 1078 n.44). The court also noted that extending exemption 5 to outside consultants is especially appropriate when Congress specifically authorizes an agency to use consultants. *Wu*, 460 F.2d at 1032.

We believe that the facts and the courts' statements in these cases restrict the application of exemption 5 to information created by persons acting at the request of the

governmental body and performing a task within the authority of the governmental body. Both cases involved situations in which outside experts were hired by the agency to assist the agency in performing some function entrusted to the agency. Neither case involved unsolicited information or advice, and neither case involved a governmental body asking outside persons to perform a task outside of the governmental body's authority. Furthermore, the court in both cases specifically noted that a document created by an outside consultant should "be treated as an intra-agency memorandum of the agency which solicited it." *Soucie*, 448 F.2d at 1078 n.44; *Wu*, 460 F.2d at 1032.

Accordingly, we conclude that section 552.111 may apply to the report you provided for review. The report itself indicates that the university solicited it. Furthermore, investigating allegations of discrimination and the faculty retention, tenure, and promotion process is clearly within the authority of the university. Therefore, the report may be excepted from disclosure under section 552.111.

Section 552.111 excepts from required public disclosure "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 at 5, this office concluded that information excepted from disclosure under section 552.111 "must be related to the *policymaking* functions of the governmental body." This information includes advice, recommendations, and opinions on matters involving the agency's policy mission. We indicated, on the other hand, that an agency's policymaking functions do not encompass information that pertains solely to internal administrative or personnel matters. Furthermore, section 552.111 does not except from disclosure purely factual information that is severable from the advice and opinion portions of internal memoranda. *Id.* Therefore, severable factual information may not be withheld under section 552.111.

We conclude that the report you submitted for review is related to the policymaking functions of the university. We believe that the policymaking functions of a governmental body include advice, recommendations, and opinions regarding administrative and personnel matters of broad scope that affect the governmental body's policy mission. The report you submitted for review does not pertain solely to the internal administration of the university. Instead, the scope of the report is much broader and involves the university's educational mission: it relates to the university's policies concerning affirmative action and how it will meet the needs of a diverse student body. Accordingly, you may withhold the portions of the report that constitute advice, recommendations, or opinions. We have examined the portions of the report you marked as excepted from disclosure by section 552.111 and identified those portions that may be withheld. The portions of the report that we have not marked are the portions containing severable factual information, which you must release.

S U M M A R Y

Section 552.111 of the Government Code may apply to information created for a governmental body by an outside consultant when the outside consultant is acting at the request of the governmental body and performing a task within the authority of the governmental body. Information created by an outside consultant for a governmental body may constitute an intra-agency memorandum that may be withheld under section 552.111. Under section 552.111, a governmental body may withhold information that relates to the *policymaking* functions of the governmental body. This information includes advice, recommendations, and opinions regarding administrative and personnel matters of broad scope that affect the governmental body's policy mission.

Yours very truly,

A handwritten signature in black ink that reads "Dan Morales". The signature is written in a cursive, slightly slanted style.

DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

SARAH J. SHIRLEY
Chair, Opinion Committee

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