# Office of the Attorney General
## State of Texas

DAN MORALES
ATTORNEY GENERAL

June 24, 1994

Mr. Bob Schmidt
Assistant Attorney General
General Counsel Division
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR94-258

Dear Mr. Schmidt:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 24460.

The Office of the Attorney General (the "OAG") received an open records request for "a copy of the Texas Attorney General's files regarding its investigation of George S. Goldberg, GSG Publishing and/or FACES International." You state that the OAG has released to the requestor all of the requested documents except for certain records that you contend come under the protection of sections 552.107 and 552.111 of the Government Code.

Section 552.107(1) of the Government Code protects "information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Rules of the State Bar of Texas." *See* Open Records Decision No. 574 (1990) (copy enclosed). In instances where an attorney represents a governmental entity, the attorney-client privilege exception of the Open Records Act protects only an attorney's legal advice and confidential attorney-client communications. *Id.*

Section 552.111 of the Government Code excepts interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's policymaking process. Open Records Decision No. 615 (1993). The purpose of this section is "to protect from public disclosure advice and opinions *on policy matters* and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.)

(emphasis added). Section 552.111 does not protect facts and written observation of facts and events that are severable from advice, opinions, and recommendation; however, if the factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make separation of the factual data impractical, that information may be withheld. Open Records Decision No. 615.

This office generally agrees that the documents you have marked come under the protection of either section 552.107(1) or 552.111 and thus may be withheld pursuant to those sections. We have indicated those records that do not come under the protection of either of these exceptions and that the OAG therefore must release. We particularly note that an attorney's highlighting of certain portions of published state statutes, court decisions, and other materials is not protected by section 552.107(1). *See* Open Records Decision No. 574 at 5 (limiting application of section 552.107(1) to privileged communications under rule 1.05 of the Texas State Bar Disciplinary Rules of Professional Conduct). This "information" actually constitutes attorney work product. In the context of open records requests, the work product doctrine merely represents one aspect of section 552.103(a) of the Open Records Act: attorney work product may be withheld only if it "relates" to pending or reasonably anticipated litigation to which the governmental entity is or may be a party. *See* Open Records Decision No. 574. In this instance, you have made no showing that the requested notes in any way relate to pending or reasonably anticipated litigation. Consequently, the highlighted documents are not excepted from required public disclosure.

However, some of these materials are protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body normally must allow *inspection* of copyrighted materials unless another exception applies to the information. *Id.* Because in this instance no exception applies to these documents, the OAG must allow the requestor to inspect these records. If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

Because case law and prior published open records decisions resolve your request, we are resolving this matter with an informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,

Kay Hamilton Guajardo
Assistant Attorney General
Open Government Section

KHG/RWP/rho

Ref.: ID# 24460

Enclosures: Open Records Decision No. 574
Marked documents

cc: Ms. Karen A. Estilo
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(w/o enclosures)