



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 13, 1995

Mr. Paul M. Shinkawa
Acting General Counsel
Texas Parks and Wildlife Department
4200 Smith School Road
Austin, Texas 78744

OR95-1413

Dear Mr. Shinkawa:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act. Your request was assigned ID# 29926.

The Texas Parks and Wildlife Department (the "department") received a request for:

all information related to the effluent emerging from the A. E. Wood Fish Hatchery on the San Marcos River. . . . This information should include . . . impacts such as colored or turbid discharge, water temperature impacts, vegetative impacts (i.e. endangered wild rice) and cumulative impacts associated with other waste water discharges into the San Marcos River. This information should only include documents produced between October 1, 1993 and [October 10, 1994].

. . . information on the approximate annual production, in pounds if available or in numbers of fish and approximate weight at the time removed from the hatchery, for much of the last four calendar years[,] . . . [and] copies of any federal aid applications for projects at the hatchery for the last four fiscal years and copies of any correspondence, memoranda, biological assessments, or biological opinions relating to those applications. . . . This information should include the sources used in determining biological opinions.

We understand that in response to this request the department has offered to make available to the requestor 184 pages of relevant documents. We also understand from your letter of November 28, 1994, that the department made available to the requestor all of the typewritten documents submitted to this office with the hand-written notes and interlineations redacted.¹ The one typewritten document not made available in a redacted form, submitted to this office as document number 00076, has been withheld in its entirety. We assume that documents entirely in hand-writing, document numbers 00001, 00003, 00018, 00028, and 00072, were also not made available to the requestor. Therefore, we address only whether the hand-written interlineations and notes and document numbers 00001, 00003, 00018, 00028, 00072, and 00076, are excepted from disclosure under section 552.111.

Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." 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). In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 (1993) at 5-6. In addition, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5.

In the past, this office has concluded that a draft of a document:

necessarily represents the advice, opinion, and recommendation of the drafter as to the form and content of the final document. . . . The release of an edited version of the preliminary draft that includes only material incorporated into the final draft would not make more of the subject matter available to the public. It would, however, reveal something about the deliberative process by indicating where

¹Your initial request for an opinion indicates that all of the documents you submitted to this office were withheld from the requestor in their entirety. We are relying on your subsequent representation that "the Department . . . has already provided all of the typewritten documents from page 00001 to page 00075 without the 'interlineations' to the requestor" in making this ruling.

additions and deletions were made in the preliminary draft as it was reviewed. . . . Thus, the draft itself, as well as comments made on the draft, underlining, deletions, and proofreading marks would qualify for exception under section [552.111].

Open Records Decision No. 559 (1990) at 2. Accordingly, we find that most of the notes and interlineations consist of advice, opinion, and recommendation that pertain to policy functions of the department and may be withheld. However, some of the notes and documents contain only facts and must be disclosed. Finally, some of the documents appear to contain a mixture of facts and advice and the facts must be disclosed.

The following numbered documents contain advice, opinion and recommendation in the interlineations and hand-written notes and, accordingly, the interlineations and hand-written notes on these documents may be withheld: 00002, 00004-00008, 00014-00017, 00019-00022, 00023-00027, 00034-00036, 00038, 00039-00043, 00046-00049, 00054-00058, 00059-00061, 00062, 00067-00068, 00070-00071, and 00073-00075.

The following numbered documents either do not contain any interlineations or hand-written notes, or the hand-written notes consist of facts that apparently were not meant to be incorporated into the drafting of the substance of the document, for example, routing slips, and, therefore, these documents must be released in their entirety: 00003, 00009-00012, 00013, 00028, 00029-00032, 00033, 00044, 00045, 00050-00053, 00063-00066, 00069, and 00072.² Document number 00018 appears to contain a mixture of facts and advice. The portions that may be withheld have been marked on the document. The remainder of the document must be released. Additionally, the entirety of document number 00076 may be withheld.

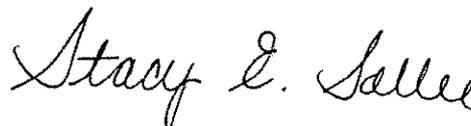
Based on the information provided to this office, it is impossible to ascertain whether document number 00001 contains fact or advice. As the burden is on the governmental body to establish the application of a particular exception to information sought to be withheld and that burden has not been met, any exception to releasing document 00001 has been waived. Open Records Decision Nos. 542 (1990), 532 (1989). Therefore, the document must be produced in its entirety.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records.

²The document numbered 00037 is a blank page. For the sake of completeness, it can also be released.

If you have questions about this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee
Assistant Attorney General
Open Records Division

SES/LRD/rho

Ref.: ID# 29926

Enclosures: Marked documents

cc: Mr. Scott Royder
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(w/o enclosures)