



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 7, 1998

Mr. Kevin McCalla
Director, Legal Division
Texas Natural Resource
Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR98-0892

Dear Mr. McCalla:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 114467.

The Texas Natural Resource Conservation Commission (the "commission") received a request for information pertaining to the Big Bend Region air quality study. You have submitted two draft reports as a representative sample of the requested information.¹ You claim that the information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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." 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.

¹In reaching our conclusion here, we assume that 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.

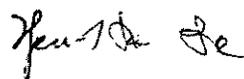
Generally, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5. Yet, where a document is a genuine preliminary draft that has been released or is intended for release in final form, factual information in that draft which also appears in a released or releasable final version is excepted from disclosure by section 552.111. Open Records Decision No. 559 (1990). However, severable factual information appearing in the draft but not in the final version is not excepted by section 552.111. *Id.*

The submitted records consist of intraagency and interagency memoranda. When determining if an interagency memorandum is excepted from disclosure under section 552.111, we must consider whether the agencies between which the memorandum is passed share a privity of interest or common deliberative process with regard to the policy matter at issue. *See* Open Records Decision No. 561 (1990) at 9.

You assert that the draft reports are “not in their final form,” and that they “should be released in the near future.” Furthermore, you explain that the commission received “a draft report from the National Parks Service as part of a cooperative analysis project of the Big Bend area entered into by the United States Environmental Protection Agency, the National Parks Service, the [commission], and the Mexican government. The [commission] has agreed to participate in this project as a co-investigator.” After reviewing the submitted records, we conclude that the records relate to the commission’s policymaking functions, and that the commission and the National Parks Service share a privity of interest and common deliberative process with regard to the policy matter at issue. Therefore, you may withhold the records under section 552.111.

As we have resolved the matter under section 552.111, we need not address your other claimed exception to public disclosure. 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 on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/rho

Ref: ID# 114467

Enclosures: Submitted documents

cc: Ms. Fran Sage
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P.O. Box 564
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(w/o enclosures)