



March 15, 2000

Mr. C. Robert Heath
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816 Congress Avenue
Austin, Texas 78701-2443

OR2000-1037

Dear Mr. Heath:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Texas Government Code. Your request was assigned ID#132773.

The Lower Colorado River Authority (“the LCRA”) received two requests for information relating to a project for the extension of the West Travis County Regional Water System. You claim that the requested information is excepted from disclosure under the Freedom of Information Act (“FOIA”) and Texas Government Code sections 552.101, 552.106, and 552.111. We have considered the exceptions you claim and reviewed the submitted information.

You claim that the two requests directly relate to a Memorandum of Understanding (“the MOU”) between the LCRA and the U.S. Department of the Interior’s Fish and Wildlife Service (“the USDI”). The MOU encompasses a number of documents relating to the environmental impact of a water pipeline project and the means of attenuating that impact. The documents at issue fall into four categories: 1) various drafts of an attachment to the MOU entitled, “Water Quality Protection Measures” (“Attachment”); 2) a draft Federal Register notice and comment posting (“Posting”); 3) a draft biological evaluation form (“Evaluation Form”); and 4) a cover sheet and informational sheet to a facsimile (“Facsimile”).

One of the requesters, Mr. Grant Godfrey, counsel for Save Our Springs Alliance, made a similar request to the USDI several months before, under FOIA. The USDI withheld the Attachment, the Posting, and the Evaluation Form pursuant to Title 5, USC Section 552(b)(5) and Title 43, C.F.R. Section 2.13(c). The USDI concluded that the federal

regulations permit nondisclosure of the documents because they consist of “predecisional information,” and therefore fall under FOIA’s interagency/intra-agency exception. United States Code Title 5, section 552 provides that “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency” are excepted from disclosure. 5 U.S.C. § 552(b)(5). Code of Federal Regulations Title 43, section 2.13 provides the same exception for the USDI information. 43 C.F.R. § 2.13(c)(5). In regard to your argument under section 552.101, it is your contention that the Attachment, the Posting, and the Evaluation Form should be withheld because they have been held to be confidential under federal law. Although the Facsimile was not in existence at the time of the previous FOIA request, you contend that this document is also excepted under section 552.101 because, under FOIA, it would enjoy the same confidentiality afforded those documents considered by the USDI.

Government Code section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov. Code § 552.101. This office has repeatedly held that the transfer of confidential information between governmental agencies does not destroy the confidentiality of that information. Attorney General Opinions H-917 (1976); H-836 (1974); Open Records Decision Nos. 561 (1990); 414 (1984); 388 (1983); 272 (1981); 183 (1978). These opinions recognize the need to maintain an unrestricted flow of information between state agencies. In Open Records Decision No. 561 we considered whether the same rule applied regarding information deemed confidential by a federal agency. In that decision, we noted the general rule that FOIA applies only to federal agencies and does not apply to records held by state agencies. ORD 561 at 6. Further, we stated that information is not confidential when in the hands of a Texas agency simply because the same information is confidential in the hands of a federal agency. *Id.* However, in the interests of comity between state and federal authorities and to ensure the flow of information from federal agencies to Texas governmental bodies, we concluded that:

“When information in the possession of a federal agency is ‘deemed confidential’ by federal law, such confidentiality is not destroyed by the sharing of the information with a governmental body in Texas. In such an instance, [section 552.101] requires a local government to respect the confidentiality imposed on the information by federal law.”

Id. at 7.

There is a distinction between information that is “deemed confidential by federal law,” however, and information that is simply exempt from public disclosure at the discretion of a federal agency. The policy espoused in Open Records Decision 561, on comity grounds, applies only to confidential information. The USDI determined that the Attachment, the Posting, and the Evaluation Form were not subject to disclosure pursuant to Title 5, Section 552(b)(5), the “interagency exemption.” This exemption is discretionary. Because the

information was not found to be confidential by law, the comity policy is not implicated. Therefore, we cannot conclude that the LCRA can withhold this information on this basis.

You also argue that the information responsive to the request is protected from disclosure pursuant to Government Code sections 552.106 and 552.111. Section 552.111 excepts "an interagency or intra[-]agency memorandum or letter that would not be available by law to a party in litigation with the agency." An information exchange between state and federal agencies does not qualify as an interagency transfer for the purposes of section 552.111 unless the agencies exchanging information share a privity of interest or common deliberative process with regard to the policy matter at issue. *See* Open Records Decision No. 561 at 9 (1990). The Attachment, Posting, Evaluation Form, and Facsimile are each documents that have been transferred between the LCRA and the USDI. However, a review of the documents indicates no privity of interests between the LCRA and the USDI. Therefore, the requested documents are not exempt from disclosure pursuant to section 552.111.

Section 552.106(a) of the Government Code protects drafts and working papers involved in the preparation of proposed legislation. The purpose of the exception is similar to that of section 552.111: to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the legislative body; it protects the internal "deliberative" or policy-making processes of a governmental body. Open Records Decision No. 460 at 2 (1987), *see also Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.). Because the policies and objectives of each exception are the same, some decisions applying section 552.111 are helpful in determining how section 552.106 should be construed. Open Records Decision No. 482 at 9 (1987). Neither section 552.106 nor 552.111 excepts purely factual material. Rather, section 552.106 excepts only policy judgments, recommendations, and proposals involved in the preparation of proposed legislation. *Id.* Although the provisions protect the same type of information, section 552.106 is narrower in scope because it applies specifically to the legislative process. *See* Open Records Decision Nos. 460 at 3 (1987), 429 at 5 (1985).

Assuming *arguendo* that the LCRA has a legislative rule-making function and that the ongoing negotiations between the LCRA and the USDI constitute "rule-making," we do not find section 552.106 applicable here for reasons similar to those applied to our analysis of section 552.111. First, as stated in your letter to this office, the documents in question were prepared by the USDI, not the LCRA.¹ Documents created by a federal agency can hardly reveal the deliberative processes of a state agency. Further, the legislative exception is designed to protect the internal deliberative and policy-making process employed in the preparation of legislation. To the extent the LCRA was involved in the production of the documents in question, they were not prepared by the LCRA for internal use or for the

¹"The Documents were prepared by the [USDI] for the purpose of discussion and with the understanding that a final version will ultimately be approved as the official policy of the LCRA and the [USDI]." Letter to the Atty. Gen. at 4.

purpose of rule-making by the LCRA. Rather, our review indicates the documents are part of an ongoing dialogue between the LCRA and the USDI for the purpose of generating federal regulations. The LCRA has cited no authority for the proposition that it has the duty to propose federal legislation. Finally, the USDI and LCRA serve as neither subordinate nor advisor to one another for the purposes of their respective rule-making functions, assuming such exist. Under these circumstances, we conclude section 552.106 is inapplicable.

In summary, the requested information is not confidential and is therefore not excepted from disclosure by section 552.101. Furthermore, neither section 552.106 nor 552.111 permits you to withhold the documents in question. You must release the requested information.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



E. Joanna Fitzgerald
Assistant Attorney General
Open Records Division

EJF/CHS/ljp

Ref: ID# 132773

Encl. Submitted documents

cc: Mr. Grant Godfrey
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(w/o enclosures)