



January 26, 2001

Ms. Margaret Hoffman  
Director  
Environmental Law Division  
Texas Natural Resource Conservation Commission  
P.O. Box 13087  
Austin, Texas 78711-3087

OR2001-0319

Dear Ms. Hoffman:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 143101.

The Texas Natural Resource Conservation Commission ("TNRCC") received a request for documents pertaining to the New Business Process Review Policy for Pending Permit Applications. You claim that the requested information is excepted from disclosure under sections 552.106, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

We first note that some of the submitted documents appear to be completed reports that are made public by section 552.022(a)(1) of the Government Code.<sup>2</sup> Section 552.022(a)(1) provides:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are

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<sup>1</sup>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.

<sup>2</sup>You have not provided any information to indicate that the reports that are expressly made public by section 552.022(a)(1) are not in fact completed or final reports.

public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

We are not aware of any other law that makes these reports expressly confidential, and the law enforcement exception under section 552.108 does not apply. We have marked the completed reports that are made public by section 552.022(a)(1). You must release these reports and all other completed or final reports that are responsive to the request.

Section 552.106 excepts from disclosure drafts or working papers involved in the preparation of proposed legislation. The purpose of section 552.106 is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body, and therefore, it does not except from disclosure purely factual information. Open Records Decision No. 460 at 2 (1987). Section 552.106 excepts only policy judgments, recommendations, and proposals involved in the preparation of proposed legislation. *Id.* However, a comparison or analysis of factual information prepared to support proposed legislation is within the ambit of section 552.106. *Id.*

You inform us that some of the submitted documents pertain to reviews conducted by TNRCC attorneys and agency staff of existing statutory and regulatory authority on TNRCC permitting procedures. You also inform us that some of the documents include suggested changes to provisions of the Texas Water Code and the Texas Health and Safety Code relating to air, water, and waste permitting procedures. In this case, we believe that TNRCC's legislative proposals relate to its primary function as the regulatory agency charged with implementing these permitting procedures. *See, e.g.*, Open Records Decision No. 367 (1983) (statutory predecessor of section 552.106 applies to except Texas State Board of Public Accountancy's recommendations for amendments to Public Accountancy Act). Based on your representations and our review of the submitted documents, we have marked the information you may withhold under section 552.106.

Section 552.111 excepts from disclosure "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. An agency's policymaking functions 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. ORD 615 at 5-6. Section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion

portions of internal memoranda. ORD 615 at 4-5. Section 552.111 applies not only to internal memoranda, but also to memoranda prepared by consultants of a governmental body. Open Records Decision Nos. 462 at 14 (1987), 298 at 2 (1981).

You inform us that some the submitted documents are drafts of reports, memoranda, and notes exchanged by TNRCC technical and legal staff. You inform us that some of the documents contain detailed discussions of legal, policy, administrative, and practical reasons for changing TNRCC's permitting procedures. You also inform us that these documents contain advice and opinions on policy matters that discuss the advantages and disadvantages of proposed changes. We note that the preliminary draft of a policymaking document that has been released or is intended for release in final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document. Open Records Decision No. 559 at 2 (1990). Based on your representations and our review of the submitted documents, we have marked the information you may withhold under the deliberative process privilege protected by section 552.111.

You also claim that some of the submitted information is excepted from disclosure under section 552.111 as attorney work product. A governmental body may withhold attorney work product from disclosure under section 552.111 if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. Open Records Decision No. 647 (1996). You do not indicate whether any of the submitted information was created for trial or in anticipation of civil litigation. Because you have failed to meet the first prong of the test for attorney work product, you may not withhold any of the information under section 552.111 as attorney work product.

You also claim that some of the submitted information is protected under section 552.107. We find that all of the information that you claim is excepted under 552.107 is already excepted under the deliberative process privilege protected by section 552.111. *See* Open Records Decision No. 574 at 2 (1990) (any protection under section 552.111 will usually be no greater or less than the protection offered under section 552.107). Therefore, we need not address your claim under section 552.107. You must release all of the remaining information that is not otherwise excepted from disclosure under sections 552.106 and 552.111.

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 Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

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,



Stephen P. Agan  
Assistant Attorney General  
Open Records Division

SPA/seg

Ref: ID# 143101

Encl: Marked documents

cc: Ms. Michelle A. McFaddin, J.D.  
Attorney at Law  
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(w/o enclosures)