



February 26, 2001

Ms. Janice Mullenix  
Associate General Counsel  
Texas Department of Transportation  
125 East 11<sup>th</sup> Street  
Austin, Texas 78701-2483

OR2001-0711

Dear Ms. Mullenix:

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# 144414.

The Texas Department of Transportation (the "department") received two requests for information. The first request seeks a copy of the preliminary report titled "Evaluation of Backfill Materials and Installation Methods for High Density Polyethylene Pipe." You have submitted for our review a copy of this report, comprising 293 pages and prepared for the department by employees of Texas Tech University. The second request is framed as a series of questions pertaining to high density polyethylene pipe. You indicate that the information in the submitted report is responsive to both requests.<sup>1</sup> You claim that the submitted report is excepted from disclosure under section 552.111 of the Government Code. The first requestor has also submitted comments to this office. *See Gov't Code* § 552.304. We have

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<sup>1</sup>It is implicit in several provisions of the Act that the Act applies only to information already in existence. *See Gov't Code* §§ 552.002, .021, .227, .351. The Act does not require a governmental body to prepare new information in order to respond to a request. Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975). The Act therefore does not require the department to prepare new information in order to answer the written questions that comprise the second request. Open Records Decision No. 555 at 1-2 (1990). On the other hand, the department has a good faith duty to relate a request to existing information held by it. Open Records Decision No. 561 at 8 (1990). We thus assume that the department, in performing this good faith duty, has determined that the submitted report is responsive to the second written request.

considered the submitted comments, the exception you claim, and we have reviewed the submitted information.

As you acknowledge, section 552.022 of the Government Code provides, in relevant part, that a "completed report" prepared for the department is not excepted from required public disclosure unless "expressly confidential under other law." Gov't Code § 552.022(a)(1). You do not dispute that the 293 page document submitted for our review is a "report" as that term is used in section 552.022(a)(1). You assert, however, that the report is not subject to section 552.022 because it is not completed:

[I]t is a draft prepared by consultants that has not been finally reviewed and approved by [the department], and thus is still very much a work in progress. [Department] personnel, both in Austin and in the districts, are currently in the process of editing the draft report. When it is completed and the final version is approved by [the department's] project director, [the department] will release it; until then, [the department] should be permitted to complete with intra-agency candor and free internal discussion.

The requestor's comments dispute the above representation that the report is not completed. In the open records rulings process, this office is unable to resolve disputes of fact, and accordingly we must rely on the factual representations made to this office by the requesting governmental body. Because your representations quoted above are unequivocal that the submitted report is not completed, we conclude that section 552.022(a)(1) is not applicable.

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 communications consisting of advice, recommendations, opinions, and other material reflecting the deliberative *policymaking* processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, No. 03-00-00219-CV, 2001 WL 23169, at \* 5 (Tex. App.--Jan. 11, 2001, no pet. h.). Section 552.111 does not generally except from disclosure purely factual information that is severable from the advice, opinion, or recommendations. Open Records Decision No. 615 at 4-5 (1993). But a 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).

The information at issue in the present requests was prepared for the department by a consultant. The section 552.111 exception may apply to communications prepared by

consultants of a governmental body. Open Records Decision Nos. 462 at 14 (1987), 298 at 2 (1981). In support of your contention that the information at issue pertains to policymaking by the department, you state that the report "is an effort to develop standard specifications that will apply to many contracts in the future. Thus, it is . . . a plan or course of action that will set a standard applicable to many millions of dollars worth of contracts over a period of years." Based on this representation and our review of the information at issue, we conclude the submitted information pertains to policymaking by the department. Because you further represent that the information is in draft form and that the document in final form will be released to the public, we further conclude that you may withhold the submitted draft document under section 552.111 of the Government Code. We rely on your representation that the document in final form will be released to the public.

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).

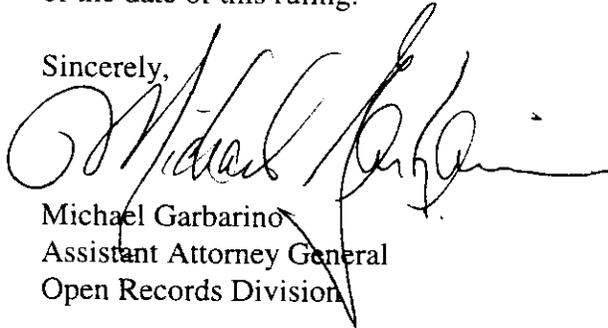
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,



Michael Garbarino  
Assistant Attorney General  
Open Records Division

MG/seg

Ref: ID# 144414

Encl. Submitted documents

cc: Mr. David Freireich, P.E.  
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(w/o enclosures)

Mr. Dave Brown  
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