



August 16, 2001

Ms. Constance Allison
Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2001-3618

Dear Ms. Allison:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 150789.

The Office of the Governor (the “governor”) received a request for information relating to an audit of the policies and expenditures in the Texas Narcotics Control Program. You claim that the submitted responsive information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

We first address your argument under section 552.107. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only “privileged information,” that is, information that reflects either confidential communications from the client to the attorney or the attorney’s legal advice or opinions; it does not apply to all client information held by a governmental body’s attorney. Open Records Decision No. 574 at 5 (1990). Section 552.107(1) does not except purely factual information from disclosure. *Id.* Section 552.107(1) does not except from disclosure factual recounting of events or the documentation of calls made, meetings attended, and memos sent. *Id.* at 5. You contend that one of the submitted documents consists of an attorney’s notes of conversations between the attorney and the governor’s staff for the purpose of reviewing the legal position of the governor. Based on your

¹You seek to withhold information responsive to only a portion of the request. To the extent you have other responsive information that you do not seek to withhold, we assume you have released the information to the requestor. *See* Gov’t Code § 552.021, .301, .302.

argument and our review of the submitted document, we agree that the document in question reflects confidential client communications and may therefore be withheld under section 552.107(1). We have marked the document that may be withheld under section 552.107(1).

Next, we address your section 552.111 argument with respect to the remainder of the submitted information. 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. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152, 158 (Tex. App.--Austin 2001, no pet. h.). 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. However, an agency's policymaking functions do include administrative and personnel matters that affect the governmental body's policy mission. Open Records Decision No. 631 at 3 (1995). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 159-60; ORD 615 at 4-5.

Furthermore, in Open Records Decision No. 559 (1990), this office concluded that a preliminary draft of a document that is intended for public release in its final form necessarily represents the advice, opinion, and recommendation of the drafter with regard to the form and content of the final document, so as to be excepted from public disclosure under the statutory predecessor to section 552.111. This office further concluded that section 552.111 excepts factual information in the draft to the extent the factual information also will be included in the final version of the document. *Id.* Thus, section 552.111 excepts from disclosure the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *Id.*

You indicate that most of the submitted information consists of internal documents reflecting the advice, opinions, and recommendations of employees concerning the audit in question. Specifically, you contend that the submitted information was used in determining whether an audit was appropriate, in deciding on the direction of the audit, and in framing the issues to be addressed in the audit. Based on your arguments and our review of the information, we agree that all of the submitted information relates to the policymaking functions of the governor. Furthermore, we agree that the information

you have marked as being excepted under section 552.111 reflects the advice, opinion, and recommendations of the governor's staff. Therefore, you may withhold the information you have marked under section 552.111 in addition to the document we have marked under section 552.107. You must release the remainder of the submitted 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).

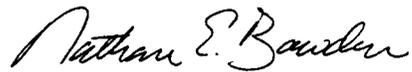
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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



Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/sdk

Ref: ID# 150789

Enc: Submitted documents

c: Mr. Juan B. Elizondo Jr.
Capitol Bureau Chief
Austin American-Statesman
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(w/o enclosures)