



January 24, 2002

Mr. Michael Jay Burns
Supervising Attorney
Information Release
Texas Workforce Commission
101 East 15th Street
Austin, Texas 78778-0001

OR2002-0355

Dear Mr. Burns:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 157745.

The Texas Workforce Commission (the "commission") received a request for several categories of information regarding work search requirements. You submitted to this office correspondence from the requestor clarifying his request. You inform us that some of the responsive information will be released to the requestor, but you claim that the remaining information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We first address your uncertainty regarding what information is responsive to the request for information. You explain that the commission received the request on November 1, 2001, but that it was not fully clarified until November 6, 2001. During the time the request was being clarified, you further explain, additional documents were created. You state that you are unclear whether the information generated after November 1, 2001 is responsive, and you further state that if such information is, in fact, unresponsive then you wish to withhold the information on that basis. In response, we note that chapter 552 of the Government Code does not require a governmental body to make available information which did not exist at the time the request was received. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision

No. 452 (1986); Open Records Decision No. 362 (1983) (document not within purview of chapter 552 if not in existence at time of request). Here, you represent that the commission received the request on November 1, 2001; thus, information that was not in existence on that day is not responsive to the request. Accordingly, this ruling only addresses the information that was in existence on November 1, 2001.

Next, we note that section 552.022 of the Government Code makes certain information public, unless it is expressly confidential under other law. One category of public information under section 552.022 is all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate. *See* Gov't Code § 552.022(a)(5). Several of the submitted documents, which we have marked, appear to be working papers used to estimate the expenditure of public funds by a governmental body. If the estimate associated with these documents has been completed, the documents are public under section 552.022(a)(5). You claim that these apparent estimates are excepted from disclosure pursuant to section 552.111 of the Government Code. However, we have previously concluded that section 552.111 is a discretionary exception that does not make information confidential.¹ *See* Open Records Decision No. 473 (1987) (governmental body may waive section 552.111). Accordingly, you may not withhold the marked documents pursuant to section 552.022(a)(5) of the Government Code, if the estimates associated with these documents have been completed. If, on the other hand, the estimates have not been completed and section 552.022(a)(5) is therefore not applicable, then we will address your claim that the information is excepted under section 552.111.

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 (Tex. App.--Austin 2001, no pet.). 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 160; ORD 615 at 4-5. You claim that the submitted information concerns the commission's policymaking process with respect to work search requirements. After

¹ Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

reviewing the submitted documents, we agree that some of them contain internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the commission concerning work search requirements and that information may be withheld under section 552.111. On the other hand, some of the information does not consist of advice, recommendations, or opinions and therefore may not be withheld under section 552.111. We have marked the documents accordingly.

Section 552.107(1) excepts information that an attorney of a political subdivision cannot disclose because of a duty to the client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107(1) 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. When communications from attorney to client do not reveal the client's communications to the attorney, section 552.107(1) protects them only to the extent that such communications reveal the attorney's legal opinion or advice. ORD 574 at 3.

The submitted information contains communications between the commission and its attorneys. You represent that these communications reveal the commission's confidences and consist of legal advice and opinions rendered for the commission as the client. Having reviewed these communications, we agree that, in some instances, they reveal the commission's confidences or the attorney's legal opinion or advice. Therefore, you may withhold the information we have marked under section 552.107(1).

We note that section 552.117 may also be applicable to some of the submitted information. Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the commission may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. For those employees who timely elected to keep their personal information confidential, the commission must withhold the employees' home addresses and telephone numbers, social security numbers, and any information that reveals whether these employees have family members. The commission may not withhold this information under section 552.117 for those employees who did not make a timely election to keep the information confidential. We have marked possible 552.117 information with a green flag.

In sum, the information we have marked under section 552.022(a)(5) must be released unless the estimates to which the marked documents relate have not been completed. If the

estimates have not been completed, then the marked documents may be withheld under section 552.111. The remaining information we have marked under sections 552.111 and 552.107 may be withheld. The information we have marked with green flags may have to be withheld under section 552.117. The remaining information must be released.

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).

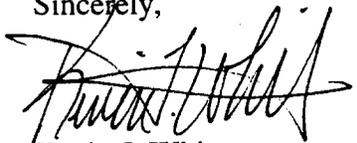
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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



Kevin J. White
Assistant Attorney General
Open Records Division

KJW/seg

Ref: ID# 157745

Enc. Submitted documents

c: Mr. Richard Levy
Deats & Levy, PC
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(w/o enclosures)