



September 10, 2002

Mr. Paul Elliot  
Director of Hearings  
State Office of Administrative Hearings  
P.O. Box 13025  
Austin, Texas 78711-3025

OR2002-5059

Dear Mr. Elliot:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 168397.

The State Office of Administrative Hearings ("SOAH") received a request for "all records maintained by [SOAH] related to the hearings conducted by [SOAH] on the application of the Texas Low Level Radioactive Waste Disposal Authority for a license to construct and operate a low-level radioactive waste disposal facility in Hudspeth County, Texas." You indicate that some responsive information has been released to the requestor. You claim that a portion of the requested information is not "public information" under sections 552.002 and 552.022 of the Public Information Act. Alternatively, you claim that the submitted information is excepted from disclosure under section 552.111 of the Government Code. We have considered your claims and reviewed the submitted representative sample of information.<sup>1</sup> We have also considered comments submitted to this office by a third party. Gov't Code §552.304.

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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.

Initially, you argue that the requested information is not subject to the provisions of the Public Information Act (the "Act"). The Act applies to information that is "collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business by a governmental body." Gov't Code § 552.002(a)(1). However, a "governmental body" under the Act "does not include the judiciary." Gov't Code § 552.003(1)(B). Information that is "collected, assembled or maintained by . . . the judiciary" is not subject to the Act but is "governed by rules adopted by the Supreme Court of Texas or by other applicable laws and rules." Gov't Code § 552.0035(a); cf. Open Records Decision No. 131 (1976) (applying statutory predecessor to judiciary exclusion under section 552.003(1)(B) prior to enactment of section 552.0035). As a general rule, the judiciary is exempt from the Act, see Gov't Code § 552.003(1)(B), but only when acting in a judicial capacity. See *Benavides v. Lee*, 665 S.W.2d 151 (Tex. App.--San Antonio 1983, no writ) (juvenile board not an extension of the judiciary); see also Open Records Decision No. 188 (1978) (applications held by a municipality for the position of municipal judge may not be withheld on the basis of the exemption for the judiciary). In *Holmes v. Morales*, 924 S.W.2d 920 (Tex. 1996), the Texas Supreme Court determined that the judiciary, for purposes of section 552.002, consists of courts in which judicial power is vested pursuant to article V, section 1 of the Texas Constitution. *Holmes v. Morales*, 924 S.W.2d at 922.

Article V, section 1, of the Texas Constitution provides that the judicial power of the State of Texas is to be vested in the particular courts enumerated by that section, and also provides that the "Legislature may establish such other courts as it may deem necessary. . . ." Tex. Const. Art. V, § 1 (1876, amended 1981). The Texas Supreme Court addressed the exercise of judicial power in *State v. Flag-Redfern Oil Company*:

"An administrative agency is not a 'court' and its contested case proceedings are not lawsuits, no matter that agency adjudications are sometimes referred to loosely as being 'judicial' in nature. Agency adjudications do not reflect an exercise of the judicial power assigned to the 'courts' of the State in Tex. Const. Ann. Art. V, § 1 (Supp.1991); they are simply executive measures taken in the administration of statutory provisions."

*State v. Flag-Redfern Oil Co.*, 852 S.W.2d 480, 485 n.7 (Tex. 1993) (quoting *Beyer v. E.R.S.*, 808 S.W.2d 622, 627 (Tex. App.--Austin 1991, no writ)). In addition, this office has found that SOAH is not a court. Attorney General Opinion No. JC-495 at 6 (2002).

Therefore, we find that SOAH is not a part of the judiciary, but instead meets the definition of a governmental body under section 552.003 of the Act. Thus, the requested information is "public information" under section 552.002 of the Act. We will therefore consider your remaining arguments.

You claim that the inclusion in section 552.022(a) of "final opinions, including concurring and dissenting opinions, and orders issued in the adjudication of cases" implies that a "non-

final” opinion or draft order is not public information. However, section 552.022(a) is not intended to be an exhaustive list of the types of information that are subject to the Act. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 359 (Tex. 2000). Rather, the section provides a list of the types of information that generally may only be withheld if they are expressly confidential under “other law.” Gov’t Code § 552.022(a). Thus, the submitted information is not excepted from public disclosure under section 552.022(a). *See also* Open Records Decision Nos. 551 (1990) (construing predecessor statute, held that information listed is illustrative, though not exhaustively so, of “public information”, and does not limit the applicability of enumerated exceptions), 460 (1987) (predecessor statute does not limit the meaning of other sections of the Act, therefore information may not be withheld solely because it is in incomplete form), 407 (1984) (although predecessor statute “specifically [makes] public” certain categories of information, including “investigations . . . upon completion,” information in possession of governmental body which has not yet become part of finalized investigative report may not be withheld simply because report not yet completed).

You also contend that the requested information is excepted from disclosure pursuant to section 552.111 of the Government Code, as attorney work product. You relate that the information at issue consists of the personal notes of the Administrative Law Judges (the “ALJs”) and drafts of their decisions. The work product doctrine protects only the information generated by the attorney representing the party claiming that privilege. While you state that the ALJs are attorneys, you do not adequately demonstrate that they represent SOAH as attorneys in the matter to which the submitted information pertains. Consequently, you may not withhold any of the requested information under section 552.111 as attorney work product.

Section 552.111 also 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.). 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. 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 160; ORD 615 at 4-5. We find that the ALJs’ handwritten or typed notes taken before, during, or after the hearing relating to the case and the marked portions of the memorandum from one of the ALJs to his supervisor concerning the case contain advice, opinion and

recommendation related to an agency's policymaking functions. This information is excepted from required public disclosure based on section 552.111.

The draft proposal for decision and proposed final order, as well as other draft orders, responses to exceptions, and certified questions are also excepted from required public disclosure pursuant to section 552.111. In considering the application of the statutory predecessor to section 552.111 of the Government Code to preliminary drafts of a document that is intended for release in a final form, a prior decision of this office concluded that such a draft necessarily represents the advice, opinion, and recommendation of the drafter as to the form and content of the final document. *See* Open Records Decision No. 559 (1990). Thus, section 552.111 excepts from required public disclosure a preliminary draft of a document. *See id.* Accordingly, SOAH may withhold from public disclosure the marked portions of the requested information under section 552.111 of the Government Code.

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).

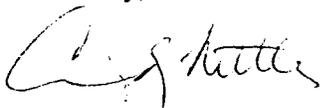
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/jh

Ref: ID# 168397

Enc. Submitted documents

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