



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 29, 2004

Ms. Noelle C. Letteri
Attorney, Legal Services Division
Texas General Land Office
P.O. Box 12873
Austin, Texas 78711-2873

OR2004-0649

Dear Ms. Letteri:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 195328.

The Texas General Land Office (the "GLO") received two requests from the same requestor for information relating to the settlement of *State of Texas v. Sierra Blanca Ranch Associates, et al.*, 261st Judicial District, Travis County, Texas. The first request is for the settlement agreement, any other contracts between the GLO and Sierra Blanca Ranch Associates, now known as Sentinel Mountain Associates, L.P. ("Sentinel"), and a document submitted to the School Land Board on October 21, 2003. The second request is for all documents exchanged between the GLO and Sentinel or between the State of Texas and any person who owns, operates, or works with the "State Far West Ranch" or the "West Ranch" or who participated in the settlement negotiations. You inform us that the GLO has released a copy of the settlement agreement, as well as other documents and correspondence exchanged with or involving the requestor. You claim that the remaining requested information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.

Initially, we address the GLO's obligations under section 552.301 of the Government Code. Section 552.301 prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires the governmental body to ask for the attorney general's decision and state the exceptions to disclosure that it claims not later than the tenth business day after

the date of its receipt of the written request for information. *See* Gov't Code § 552.301(b). Section 552.301(e) requires the governmental body to submit to the attorney general, not later than the fifteenth business day after the date of its receipt of the request, (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request, or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples of the information if it is voluminous. *See id.* § 552.301(e)(1)(A)-(D). If a governmental body does not request an attorney general decision as prescribed by section 552.301, the information requested in writing is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold the information. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ).

You indicate that the GLO received the first request for information on October 27, 2003. You indicate that the GLO received the second request on November 3, 2003. You submitted your request for this decision on November 18, 2003. With respect to the second request, you have complied with section 552.301 in seeking this decision. With regard to the first request, however, you have failed to seek our decision within the ten-business-day period prescribed by section 552.301(b) and also have failed to fully comply with section 552.301(e). The submitted information that is responsive to the first request is therefore presumed to be public and must be released under section 552.302, unless there is a compelling reason to withhold any of the information from the public. The presumption that information is public under section 552.302 can generally be overcome when the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982).

You inform us that the information submitted as Exhibit C is responsive to the first request. You seek to withhold that information under section 552.107 of the Government Code. We note, however, that section 552.107 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Open Records Decision No. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived). The GLO's claim under section 552.107(1) does not provide a compelling reason for non-disclosure under section 552.302. In failing to comply with section 552.301, the GLO has waived its claim under section 552.107. *See* Gov't Code § 552.007; Open Records Decision No. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). Therefore, you may not withhold any of the information submitted as Exhibit C under section 552.107. As you raise no other exception to the disclosure of that information, it must be released to the requestor.

Next, we address your claim with regard to the rest of the submitted information under section 552.103 of the Government Code. This exception provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) that the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

You seek to withhold the information submitted as Exhibits D and E under section 552.103 as information relating to pending litigation. You state that this information relates to the *State of Texas v. Sierra Blanca* litigation. You explain that the GLO has settled with two of the other named parties to the case, Sentinel and Martin Marietta Minerals, Inc. ("Martin Marietta").¹ We note that the GLO's settlement agreement with Sentinel provides for the dismissal, with prejudice to their refiling, of the claims that the GLO and Sentinel asserted against each other in the lawsuit. You also inform us that the GLO has assigned its rights against Martin Marietta and Meridian to Sentinel and the lawsuit is still pending between Sentinel and Martin Marietta. On the basis of the GLO's assignment of its rights to Sentinel and the ongoing litigation between Sentinel and Martin Marietta, you claim that section 552.103 is applicable to the information submitted as Exhibits D and E. We disagree. Section 552.103 requires that the governmental body that raises this exception be a party to the pending or reasonably anticipated litigation to which the information at issue relates. *See* Gov't Code § 552.103(a); Open Records Decision Nos. 575 at 2 (1990), 392 at 3 (1983).

¹You explain that Martin-Marietta is the successor in interest of the other named party to the case, Meridian Aggregates Company ("Meridian"). You inform us that the GLO entered into a settlement agreement with Martin-Marietta in March, 2003.

Furthermore, section 552.103 is not applicable if the information at issue relates only to concluded litigation to which the governmental body was, but no longer is, a party. *See* Open Records Decision Nos. 556 at 2-3 (1990), 551 at 4 (1990). You do not inform us, and it is not otherwise clear to this office, that the GLO remained a party to the *Sierra Blanca* lawsuit when the GLO received the request for the information that you seek to withhold under section 552.103. Likewise, you do not inform us that the information at issue relates to any other litigation that the GLO reasonably anticipated when the request for this information was received. We therefore conclude that you have not demonstrated that any of the information submitted as Exhibits D and E is excepted from disclosure under section 552.103.

You also seek to withhold the information submitted as Exhibit D under section 552.111 of the Government Code. This section excepts from required public disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Section 552.111 encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615 (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, and opinions that reflect the policymaking processes of the governmental body. *See* Open Records Decision No. 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (Gov't Code § 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995). Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* Open Records Decision No. 615 at 5. But, if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

This office also has concluded that a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2

(1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses 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. *See id.* at 2.

You inform us that Exhibit D contains preliminary drafts of the settlement agreement between GLO and Sentinel and documents related to the settlement. We note, however, that many of the documents in Exhibit D were obtained from or provided to representatives of Sentinel. You indicate that the GLO and Sentinel were still opposing parties to the *Sierra Blanca* lawsuit when the documents in Exhibit D were being exchanged with Sentinel's representatives. Consequently, the GLO and Sentinel also were opposing parties in the settlement negotiations. Section 552.111 of the Government Code is not applicable to information that a governmental body has exchanged with a private party with which the governmental body has no privity of interest or common deliberative process. *See Open Records Decision No. 561 at 9 (1990)*. Thus, to the extent that the entire contents of any document in Exhibit D were obtained from or provided to Sentinel, that document may not be withheld under section 552.111. On the other hand, it appears that some of the documents in Exhibit D were not obtained from or provided to Sentinel during the settlement negotiations. These would include any documents that representatives of GLO prepared, but did not provide to any representative of Sentinel, and documents obtained from representatives of Sentinel that also contain the hand-written notations of representatives of GLO. We have marked the types of documents that appear to be protected from disclosure under section 552.111. We emphasize, however, that the GLO may not withhold any such document, *the entire contents of which were obtained from or provided to a representative of Sentinel*. The unmarked documents in Exhibit D are those whose entire contents appear to have been obtained from or provided to Sentinel. Those types of documents are not protected by section 552.111 under any circumstances and must be released to the requestor.

Lastly, we note that the documents in Exhibit E contain an e-mail address that the GLO may be required to withhold under section 552.137 of the Government Code. As amended by the 78th Legislature, section 552.137 provides as follows:

- (a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.
- (c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Act of June 2, 2003, 78th Leg., R.S., ch. 1089, § 1, 2003 Tex. Sess. Law Serv. 3124 (to be codified as amendment to Gov't Code § 552.137).

Section 552.137 excepts from public disclosure certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with a governmental body, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. Likewise, section 552.137(c) does not make confidential the types of e-mail addresses that are encompassed by section 552.137(c). If section 552.137(c) is applicable to the e-mail address that we have marked, then it may not be withheld from the requestor under section 552.137. Otherwise, the GLO must withhold the marked e-mail address under section 552.137, unless the person to whom this e-mail address belongs has affirmatively consented to its public disclosure.

In summary: (1) the GLO may withhold those documents in Exhibit D, the entire contents of which were not obtained from or provided to a representative of the opposing party to the settlement negotiations, under section 552.111 of the Government Code; and (2) the GLO may be required to withhold the marked e-mail address in Exhibit E. The rest of the submitted information is not excepted from disclosure and must be released to the requestor in its entirety.

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).

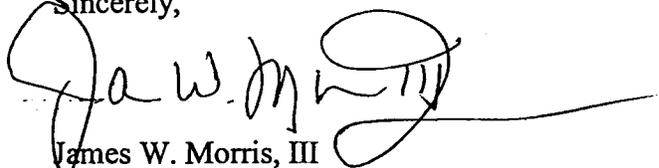
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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 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,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is fluid and cursive, with a long horizontal line extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 195328

Enc: Submitted documents

c: Mr. W. Wade Porter
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(w/o enclosures)