



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 9, 2004

Ms. Susan C. Rocha
Denton, Navarro, Rocha & Bernal
2517 N. Main Avenue
San Antonio, Texas 78212

OR2004-0957

Dear Ms. Rocha:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 195742.

The San Antonio Water System (the "system"), which you represent, received a request for the results of all polygraph examinations of system executives during a specified time period and all reports detailing the results of system employee surveys in 2003.¹ You claim that the submitted polygraph report is not "public information" under the Public Information Act (the "Act"). Additionally, you claim that the requested information is excepted from disclosure under sections 552.101, 552.111, and 552.116 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.²

Section 552.002(a) of the Government Code defines "public information" as:

¹You state that the system has provided the requestor with "the raw data of the first 300 surveys."

²You state that you have notified the person to whom the submitted polygraph information relates of this request for information and of his right to submit arguments to this office as to why the information should not be released. See Gov't Code §§ 552.304, .305; Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). As of the date of this decision, we have received no correspondence from this individual.

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body; or

(2) for a governmental body and the governmental body owns the information or has a right of access to it.

Thus, information is generally “public information” under the Act when it relates to the official business of a governmental body or is maintained by a public official or employee in the performance of official duties. Although you state that the system did not order the polygraph examination and that the results have not been used to conduct any transaction of official business, the submitted report concerns the conduct of a system employee in the performance of his official duties and is maintained by the system. Accordingly, we conclude that the polygraph report is subject to disclosure under the Act and must be released to the requestor, unless an exception to disclosure applies. *See* Gov’t Code § 552.002(a).

You assert section 552.101 of the Government Code in regard to the submitted information relating to the polygraph examination in question. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information made confidential by other statutes. Section 1703.306(b) of the Occupations Code provides that “[a] governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.” You inform us that the requestor is not one of persons authorized to receive this report under section 1703.306. Therefore, the system must withhold the submitted polygraph examination information under section 552.101 of the Government Code in conjunction with section 1703.306(b) of the Occupations Code.

In regard to the remaining submitted information, you assert section 552.111 of the Government Code. This section 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. The 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).

You state that the information in question “consists of a 32 page draft report prepared for [the system] by an outside consulting firm.” Upon review of this information, we find that the draft report concerns purely internal administrative or personnel matters and does not reflect the policymaking processes of the system. Consequently, section 552.111 of the Government Code is inapplicable to the remaining submitted information, and it may not be withheld on this basis.

You also assert section 552.116 of the Government Code. This section provides in pertinent part:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, or a municipality is excepted from [public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public disclosure] by this section.

(b) In this section:

(1) ‘Audit’ means an audit authorized or required by a statute of this state or the United States and includes an investigation.

(2) ‘Audit working paper’ includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

A governmental body that invokes section 552.116 must demonstrate that the audit working papers are from an audit authorized or required by statute by identifying the applicable statute. Here, you have not identified the applicable statute, if any. Thus, you have not demonstrated that the remaining submitted information was prepared or maintained by the system in conducting an audit authorized or required by a statute of this state or the United States. *See Gov’t Code §§ 552.116(a), (b)(1), (b)(2)*. Therefore, none of the remaining submitted information may be withheld under section 552.116 of the Government Code, and it must be released.

In summary, we conclude that the system must withhold the submitted polygraph information under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code. All remaining submitted 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 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,



W. Montgomery Meitler
Assistant Attorney General
Open Records Division

WMM/lmt

Ref: ID# 195742

Enc: Submitted documents

c: Mr. Roddy Stinson
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