ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 20, 2004

Mr. Peter G. Smith
Nichols, Jackson, Dillard, Hager & Smith, L.L.P
500 North Akard, Suite 1800
Dallas, Texas 75201

OR2004-3207

Dear Mr. Smith:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 199844.

The Dallas Central Appraisal District (the "district"), which you represent, received a request for a copy of the "FDAMFTAP file with current data." You contend that the requested information is in "active use" and therefore not subject to disclosure at this time. Further, you claim that the requested information is excepted from disclosure under section 552.111 of the Government Code. Lastly, you assert that in the event our office determines the requested information must be released, the district "will have to write a program" in order to create a version of the Master File as of the date of the request. We have considered all of your claims and reviewed the submitted representative sample of information.[1]

First, the district objects that the request is "ongoing" and thus constitutes an improper "standing request." You argue that therefore the district need not furnish the requested information. This office has previously ruled that a governmental body need not honor a standing request. A "standing request" refers to a request to provide information "on a periodic basis," *see* Open Records Decision No. 465 (1987); a weekly basis, *see* Open Records Decision No. 476 (1987); or to provide information that has not yet been recorded, *see* Open Records Decision No. 452 (1986). In this instance, the district acknowledges that

[1] 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.

the requestor wants a copy of the file as of the date of her request on January 28, 2004. Thus, the request is not a standing request. Therefore, the district must comply with the request.

Next, you assert that the requested information is in active use and therefore unavailable pursuant to section 552.221 of the Government Code. Section 552.221(a) provides that a governmental body must promptly produce public information to a requestor for inspection, duplication, or both to the extent that the information is not subject to an exception to disclosure under the Act and to the extent that the information is not in immediate active use. *See* Gov't Code § 552.221(a); *see also* Open Records Decision No. 467 at 6 (1987). If requested information is temporarily unavailable because it is in active use or in storage, the officer for public information shall certify this fact in writing to the requestor and set a date and hour within a reasonable time when the information will be made available for inspection or duplication. *See* Gov't Code § 552.221(c).

Upon review, we do not agree with the district's assertion that the requestor may not be allowed to view the responsive information because the file is updated daily by the district and thus is in active use. This office has never stated that the fact that information is subject to being updated means that the information is in active use. Thus, we disagree that the requested information is in "active use."

You claim that the submitted information is excepted from disclosure pursuant to section 552.111 of the Government Code. Section 552.111 of the Government Code 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." This exception 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, opinions, and other material reflecting 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) (section 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. If, however, the 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 has also 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.

Upon careful consideration of your arguments and the submitted information, we conclude that the submitted information constitutes purely factual information and does not consist of advice, recommendations, opinions, or other material reflecting the policymaking processes of the district. Accordingly, we conclude that the submitted information may not be withheld under section 552.111.

The district asserts that if it is required to release the requested information, the district must "write a program" in order to create the requested version of the Master File. We note that section 552.231 of the Government Code sets out the procedures a governmental body must follow if responding to a request for information would require programming or manipulation of data. Section 552.231 provides in part:

> (a) A governmental body shall provide to a requestor the written statement described by Subsection (b) if the governmental body determines:
>
> > (1) that responding to a request for public information will require programming or manipulation of data; and
> >
> > (2) that:
> >
> > > (A) compliance with the request is not feasible or will result in substantial interference with its ongoing operations; or
> > >
> > > (B) the information could be made available in the requested form only at a cost that covers the programming and manipulation of data.

(b) The written statement must include:

(1) a statement that the information is not available in the requested form;

(2) a description of the form in which the information is available;

(3) a description of any contract or services that would be required to provide the information in the requested form;

(4) a statement of the estimated cost of providing the information in the requested form, as determined in accordance with the rules established by the General Services Commission under Section 552.262; and

(5) a statement of the anticipated time required to provide the information in the requested form.

Gov't Code § 552.231(a), (b). According to section 552.003(2), "manipulation" means "the process of modifying, rendering, or decoding of information with human intervention." Section 552.231(a)(2) provides that the district must provide a statement to the requestor as described in section 552.231(b) if the compliance with the request is either: (1) not feasible or will result in substantial interference with its ongoing operations *or* (2) the information could be made available in the requested form only at a cost that covers the programming and manipulation of data. However you assert both section 552.231(a)(2)(A) and (B). You state that the request "is not feasible and would cause substantial interference with on going operations." You also state that the district "will provide the requestor with a detailed estimate of the costs of making such information available[.]" The district makes contradictory statements in regard to the programming required to respond to this request. If the district is able to provide the requestor an estimate of the programming costs, it must do so in accordance with section 552.231. Once the governmental body provides the required statement to the requestor, the governmental body has no obligation to provide the requested information in the requested form until the requestor responds to the district in writing. *Id.* § 552.231(d).

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,

Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/seg

Ref: ID# 199844

Enc. Submitted documents

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(w/o enclosures)