



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 15, 2004

Ms. Carrie S. Kenward  
Executive Director  
Public Utility Commission of Texas  
1701 North Congress Avenue, Suite 9-180  
Austin, Texas 78711

OR2004-5884

Dear Ms. Kenward:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 205228.

The Public Utility Commission of Texas (the "commission") received a request for information sent to and received from its Low Income Discount Administrator ("NECA") between January 1, 2004 and April 27, 2004.<sup>1</sup> The request was amended, and you assert that you will make some of the responsive information available to the requestor in accordance with the amended request. You claim that some of 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.

You claim that the information in Exhibits I, J and K is excepted from disclosure pursuant to section 552.111 of the Government Code, which excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in

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<sup>1</sup> The requestor asks for information for the entire month of April, 2004; however, the request was received on April 27, 2004. We note that the Public Information Act (the "Act") does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request for information. See *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983). A governmental body must make a good faith effort to relate a request for information to any responsive information that is within its custody or control. See Open Records Decision No. 561 at 8-9 (1990).

litigation with the agency.” This exception applies not only to internal memoranda, but also to memoranda prepared by consultants of a governmental body. Open Records Decision Nos. 462 at 14 (1987), 298 at 2 (1981). 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. Open Records Decision No. 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; Open Records Decision No. 615 at 4-5. Moreover, 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).

In this instance, you claim that information in Exhibits I, J and K reflects the deliberative or policymaking processes of the commission and its consultant regarding the administration of a Low Income Telephone and Electric Utility Program, pursuant in part to sections 39.903(j) and 55.015(b) of the Public Utility Regulatory Act. You also claim that the memoranda in Exhibit K are protected by section 552.111 because these “draft memoranda reveal the Commission’s group thinking during the process of formulating agency policy and do not constitute the final policy adopted... as expressed in the published material distributed [by the Commission].” Lastly, you note that all marked third party correspondence contained in Exhibits J and K will be released in accordance with the requestor’s amended request.

Upon review of the submitted information, we agree that all of the information in Exhibits I and K, as well as some of the information in Exhibit J, may be withheld under section 552.111 of the Government Code.<sup>2</sup> However, in addition to the previously addressed third party correspondence, some of the documentation in Exhibit J contains severable factual information or communications with third party regulated entities. See Open Records Decision No. 561 at 9 (1990) (stating that for Gov’t Code § 552.111 to apply, agencies between which memorandum is passed must share privity of interest or common deliberative process with regard to policy matter at issue). Accordingly, we have marked the information

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<sup>2</sup> Because we reach this conclusion under section 552.111, we need not address your additional argument against the disclosure of Exhibit I.

that cannot be withheld under section 552.111, and this information must be released to the requestor.<sup>3</sup>

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

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<sup>3</sup> Some of the information subject to release are personal e-mail addresses of members of the public which are generally excepted from disclosure under section 552.137 of the Government Code. In this instance, however, the requestor has stated that he does not seek these e-mail addresses. Therefore, such information need not be released in response to this request.

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 "Marc A. Barenblat", with a long horizontal flourish extending to the right.

Marc A. Barenblat  
Assistant Attorney General  
Open Records Division

MAB/sdk

Ref: ID# 205228

Enc. Submitted documents

c: Mr. Randall Chapman  
Texas Legal Services Center  
815 Brazos, Suite 1100  
Austin, Texas 78701  
(w/o enclosures)