



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 28, 2004

Mr. J. Kevin Patteson
Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2004-8228

Dear Mr. Patteson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 210307.

The Office of the Governor (the "governor") received a request for (1) records of communications between the governor, the Texas Commission on Environmental Quality, the Texas Department of Health, the Office of the Attorney General, and/or the State of Nebraska that pertain to the possible disposal of low-level radioactive waste from Nebraska, Oklahoma, Arkansas, Louisiana, or Kansas at a future facility in Texas; and (2) a legal brief sent by the governor to our office in response to a request for information that was made by another requestor.¹ Although the governor originally sought to withhold all of the requested information, you inform us that the governor is withdrawing his request for a decision with respect to some of the requested information because he has released it to the requestor. Accordingly, this ruling does not address the information that has been released. You claim that the information that has not been provided to the requestor is excepted from disclosure pursuant to section 552.111 of the Government Code. We have considered the exception you claim and have reviewed the submitted information.

¹We note that the request was submitted to the governor by State Representative Lon Burnam. Representative Burnam has informed this office that he does not seek the requested information for legislative purposes as authorized by section 552.008 of the Government Code. Therefore, we will treat his request as one received from a member of the public.

Initially, we note that you did not submit a copy of the requested legal brief for our review. Further, you have not indicated that such information does not exist or that you wish to withhold any such information from disclosure. Therefore, to the extent information responsive to this aspect of the request exists, we assume that you have released it to the requestor. If you have not released any such information, you must release it to the requestor at this time. *See Gov't Code* §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

We also note that most of the submitted information, which we have marked, is subject to a previous determination of this office issued as Open Records Letter No. 2004-8097 (2004) on September 22, 2004. *See* Open Records Decision No. 673 (2001) (governmental body may rely on previous determination when 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D); 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Public Information Act (the "Act"); and 4) the law, facts, and circumstances on which the prior ruling was based have not changed since the issuance of the ruling). Based upon your representations and our review of the submitted information, we determine that the present request arises under the same facts and circumstances at issue in Open Records Letter No. 2004-8097. Consequently, we determine that the governor may continue to follow our ruling in Open Records Letter No. 2004-8097 with respect to the marked information on which this office previously ruled.

You assert that the remaining submitted information is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 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." Gov't Code § 552.111. 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, and opinions reflecting the policymaking processes of the governmental body. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *see also Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin, 2001, no pet.). The purpose of section 552.111 is "to protect from public disclosure advice and opinions on policy matters and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.). 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. *See* Open Records Decision No. 615 at 5-6 (1993). Further, a 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. *See* Open Records Decision No. 559 at 2 (1990).

Based on your arguments and our review of the remaining submitted information, we agree that the portions of this information that we have marked constitute communications consisting of advice, opinions, and recommendations reflecting the policymaking processes of the governor. Accordingly, we conclude that the governor may withhold the marked portions of the remaining submitted information pursuant to section 552.111 of the Government Code. As the governor claims no other exceptions to disclosure, the remaining submitted information must be released to the requestor.

In summary, the governor may continue to follow our ruling in Open Records Letter No. 2004-8097 for the marked portions of the submitted information. The governor may withhold the information we have marked under section 552.111. The remaining submitted information must be released to the requestor.

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,



Amy D. Peterson
Assistant Attorney General
Open Records Division

ADP/sdk

Ref: ID# 210307

Enc. Submitted documents

c: The Honorable Lon Burnam
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910
(w/o enclosures)