ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 12, 2006

Ms. Karen Rabon
Assistant Attorney General
Public Information Coordinator
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2006-14581

Dear Ms. Rabon:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 266736.

The Office of the Attorney General (the "OAG") received a request for information "related to the distribution of public funds to NewDay Services for Children & Families ["NewDay"]." As a result of the requestor's narrowing of the request to exclude some confidential information, the OAG has released most of the information. The OAG claims Exhibit B is excepted from disclosure under section 552.111 of the Government Code. In addition, because NewDay may have an interest in withholding Exhibit C, the OAG notified NewDay of the request pursuant to section 552.305 of the Government Code. Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances). We have considered the OAG's arguments and have reviewed the submitted sample of information.[1] We have also received and considered

[1]We assume that the "sample" records submitted to this office are 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.

comments from the requestor. Gov't Code § 552.304 (person may submit written comments regarding release of information).

The OAG asserts Exhibit B, a draft document, is excepted under section 552.111 because it discusses specific policy issues. Section 552.111 excepts from public disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." The purpose of this exception 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 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) (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. 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 may also 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. Therefore, if the OAG will release a copy of the document represented by Exhibit B in its final form to the public, then the OAG may withhold the draft document in its entirety under section 552.111 as advice, opinion, or recommendations concerning a policymaking matter. However, if the OAG does not release a final version of the document, we have marked the factual information that is

not excepted under section 552.111 and must be released. The OAG may withhold the rest of Exhibit B under section 552.111 if it does not release a final version.

Next, NewDay contends that revealing the names of the church and persons who contribute their property, time, and services to NewDay and its services and programs would violate their First Amendment rights to freedom of association. Thus, NewDay asserts the names are excepted from disclosure under section 552.101 of the Government Code, which protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. The First Amendment guarantees the freedom of association for the purpose of advancing ideas and airing grievances. U.S. Const. amend. I; *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). The party asserting the right of association bears the initial burden of making a prima facie showing of harm to its First Amendment right. *In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d 371, 376 (Tex. 1998). Such a burden is a light one. *Id.* The party "need show only a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Buckley v. Valeo*, 424 U.S. 1, 74 (1976). Such proof includes "specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself." *Id.*

NewDay is a faith-based, non-profit organization under section 501(c)(3) of the Internal Revenue Code. NewDay has received public grants to provide services to county courts, community supervision units, and detention centers through its various programs. NewDay seeks to withhold the names of instructors in such programs as well as the name of the church that provided it with classroom space for a certain program. NewDay contends "[i]t is reasonably probable that the compelled disclosure of NewDay's contributors will subject them to threats, harassment, or reprisals from either Government officials or private parties who are antagonistic to the beliefs held by and services performed by NewDay." Further, NewDay asserts "[c]ompelled disclosure of NewDay's contributors may have a chilling effect on the willingness of contributors to associate with NewDay and on the organization's own activities." NewDay has not offered any specific evidence of past or present harassment of its contributors due to their associational ties or of harassment against NewDay itself. Rather, NewDay's assertions are entirely conclusory. Accordingly, we conclude the OAG may not withhold the names of NewDay's contributors under the right of association.

In summary, the OAG may withhold Exhibit B under section 552.111 and must release Exhibit C.

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).

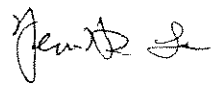
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,



Yen-Ha Le
Assistant Attorney General
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YHL/sdk

Ref: ID# 266736

Enc: Submitted documents

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