



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 15, 2008

Mr. Robert Martinez
Director
Environmental Law Division
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

OR2008-12664

Dear Mr. Martinez:

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# 320529.

The Texas Commission on Environmental Quality (the "commission") received a request for any and all documents regarding any water rights, bodies of water, and dams within the Crown Oaks subdivision in Montgomery County, Texas for a specified time period, including all reports, water rights reports, testing results, protocols, correspondence sent to or received from named parties, recording of any meetings held concerning the bodies of water, all photographs relating to the bodies of water, all communications with named engineers, and any transcription of any meeting or hearing concerning the bodies of water. You state that you will release some of the requested information. You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the commission's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See Gov't Code § 552.301(e)(1)(D)*. You state that you

received the request on June 12, 2008. However, you did not submit a portion of the requested information for our review until September 3, 2008.¹ Accordingly, we conclude that the commission failed to comply with the procedural requirements mandated by section 552.301 of the Government Code for that information.

A governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Normally, a compelling reason is demonstrated when some other source of law makes the information at issue confidential or third-party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Because section 552.101 can provide a compelling reason to withhold information, we will address the applicability of this exception to the untimely submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information made confidential by other statutes. *See* Gov't Code § 552.101. Section 552.101 encompasses the Texas Homeland Security Act. We understand you to claim that portions of the submitted information are subject to sections 418.177 and 418.181 of the Government Code. Section 418.181 provides:

Those documents or portions of documents in the possession of a governmental entity are confidential if they identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism.

Id. § 418.181. The fact that information may relate to a governmental body's security concerns does not make the information *per se* confidential under the Texas Homeland Security Act. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the Texas Homeland Security Act must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov't

¹In its brief, the commission asserted that the information that it did not originally submit to this office was subject to previous determinations issued by this office in Open Records Decision Nos. 2005-05284 (2005) and 2005-1303 (2005). However, as the information responsive to the present request is not the same information that was at issue in those previous decisions, and as those rulings do not conclude that this specific, clearly delineated category of information is excepted from disclosure, those rulings are not previous determinations for the information at issue in the present request. *See* Open Records Decision No. 673 (2001) (setting out requirements for two types of previous determinations recognized by this office).

Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You explain that the submitted information contains “data sheets which contain the hazard classifications of the two dams.” You assert that “[i]nformation regarding the name and designated hazard level of a dam by itself would provide a terrorist or terrorist group with the opportunity to maximize its damage/impact on life and property with a minimum of effort.” After reviewing your arguments and the information at issue, we agree that the hazard classifications contained in the submitted “TCEQ Dam Information Sheets” for Crown Dam and Majestic Lake Dam identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. *See generally* Gov’t Code § 421.001 (defining critical infrastructure to include “all public or private assets, systems, and functions vital to the security, governance, public health and safety, and functions vital to the state or the nation”). Thus, we conclude that the hazard classifications are confidential under section 418.181 of the Government Code, and the commission must withhold them under section 552.101 of the Government Code.

Section 552.111 of the Government Code 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.” Gov’t Code § 552.111. Section 552.111 encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). 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, 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, and opinions that reflect the policymaking processes of the governmental body. *See* ORD 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. Dallas Morning News*, 22 S.W.3d 351, 364 (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). Furthermore, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* ORD 615 at 5. But, if 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 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.

You assert that the information at issue reflects opinion and advice among staff members related to policy issues involved in applications submitted to the commission concerning the dams at issue. After reviewing the information at issue, we agree that some of this information consists of preliminary drafts and records that represent the advice, opinions, and recommendations of commission personnel. However, we find that some of the information at issue consists of purely factual information that is not excepted under section 552.111. Accordingly, the commission may withhold the information you have marked, except where we have marked for release, under section 552.111 of the Government Code.²

In summary, the hazard classifications contained in the submitted "TCEQ Dam Information Sheets" are confidential under section 418.181 of the Government Code, and the commission must withhold them under section 552.101 of the Government Code. Except where we have marked for release, the commission may withhold the information you have marked under section 552.111 of the Government Code. The remaining 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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).

²As our ruling for this information is dispositive, we need not address your remaining argument against disclosure.

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 challenge 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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/jh

Ref: ID# 320529

Enc. Submitted documents

c: Ms. Erin Bush
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(w/o enclosures)