ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 23, 2008

Mr. Terry Jacobson
Jacobson & Beard, P.C.
733 West Second Avenue
Corsicana, Texas 75110

OR2008-17484

Dear Mr. Jacobson:

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# 330682.

The City of Corsicana (the "city") and the County of Navarro (the "county"), both of which you represent, each received a request for all correspondence between the city and county and two companies proposing to build power plants in the county. You state that you have released most of the information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.111, and 552.131 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

You claim that the information in Category 2 is excepted from disclosure under the deliberative process privilege encompassed by section 552.111 of the Government Code. *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, 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 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* ORD 615 at 5. Section 552.111, however, does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5.

This office has also concluded a preliminary draft of a document 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 the information in Category 2 consists of draft tax abatement agreements for the proposed power plants drafted by the county's attorneys and Economic Development Director. You explain that the draft agreements contain the details of what the drafters believe should be involved in the transaction, including provisions for minimum capital investment, sustained taxable value and employment benchmarks, and various other provisions pertaining to economic incentives being offered by the county. You represent that the agreements will be released to the public in final form. After reviewing your arguments and the documents, we agree that the drafts reflect the internal deliberative discussions between the county's attorneys and the Economic Development Director regarding the tax abatements. Accordingly, you may withhold the draft tax abatement agreements in Category 2 under section 552.111. However, you have failed to demonstrate how the factual information contained in the accompanying e-mail communications constitutes advice, recommendations, opinions, or material reflecting the policymaking process. As you have raised no further arguments against the disclosure of the e-mail communications, they must be released.

You claim that the draft applications for tax abatements in Category 1 are excepted from disclosure under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This section encompasses information protected by other statutes. Section 312.003 of the Tax Code, entitled "Confidentiality of Proprietary Information," provides

> Information that is provided to a taxing unit in connection with an application or request for tax abatement under [the Property Redevelopment and Tax

> Abatement Act] and that describes the specific processes or business activities to be conducted or the equipment of other property to be located on the property for which tax abatement is sought is confidential and not subject to public disclosure until the tax abatement agreement is executed. That information in the custody of a taxing unit after the agreement is executed is not confidential under this section.

Tax Code § 312.003. Section 312.003 makes confidential only information that describes the specific processes or business activities to be conducted or the equipment or other property to be located on the property. *See id.* Thus, we do not construe section 312.003 to protect from public disclosure all records pertaining to applications or pending requests for tax abatements, but rather only those portions of the records that implicate the business' proprietary interests. The applications at issue list the planned investment, benefits, and other effects that the proposed plants will have on the community. You have not explained, and the documents do not reflect, how this information implicates the power plants' proprietary interests under section 312.003. Accordingly, we find that you have failed to demonstrate how any information in the tax abatement applications and accompanying communication in Category 1 are confidential under section 312.003 of the Tax Code.

You also claim that the tax abatement applications are excepted from disclosure under section 552.131(b) of the Government Code. Section 552.131(b) provides that "[u]nless and until an agreement is made with [a] business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure]." Gov't Code § 552.131(b). You state that the tax abatement applications relate to pending economic development negotiations involving the city, county, and the two companies. We note, however, that an application for tax abatement constitutes a proposed incentive requested by the applicant. Section 552.131(b) only excepts those incentives offered to the business prospect by a governmental body or another person; it does not except incentives requested by the business prospect. We, therefore, conclude that the you have failed to demonstrate the applicability of section 552.131(b) to the tax abatement applications in Category 1.

In summary, the draft tax abatement agreements in Category 2 may be withheld 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).

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,

Olivia A. Maceo
Assistant Attorney General
Open Records Division

OM/eeg

Ref: ID# 330682

Enc. Submitted documents

c: Requestor
(w/o enclosures)