



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 10, 2009

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

OR2009-11130

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# 351505 (PIR No. 09.05.21.11).

The Texas Commission on Environmental Quality (the "commission") received a request for information relating to the promulgation of the air quality standard permit for thermoset resin facilities. We understand that some of the requested information has been released. You claim that other responsive information is excepted from disclosure under section 552.111 of the Government Code. We have considered the exception you claim and reviewed the information you submitted.¹ We also have considered the comments that we received from the requestor.²

The requestor contends, among other things, that the commission did not timely comply with section 552.301 of the Government Code in requesting this decision. The commission informs us that it received this request for information on May 21, 2009. The commission

¹To the extent that the submitted information consists of representative samples, this letter ruling assumes that the submitted information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the commission to withhold any information that is substantially different from the submitted information. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

²See Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

requested this decision on June 5 and submitted the remaining materials prescribed by section 552.301 on or before June 12. We note that if May 21 was the date of the commission's receipt of this request, then its correspondence with this office was timely for the purposes of section 552.301. *See* Gov't Code § 552.301(b), (e) (prescribing deadlines with which governmental body must comply in requesting attorney general's decision pursuant to Gov't Code § 552.301(a)). The requestor contends, however, that the date of his request for information was May 18, 2009. If that was the date of the commission's receipt of the request, then it did not comply with section 552.301 and has waived section 552.111 of the Government Code. *See id.* § 552.302; Open Records Decision No. 663 at 5 (1999).

The requestor has submitted documentation reflecting that his initial communication with the commission was an e-mail dated May 18. The documentation submitted by the commission reflects that the commission asked the requestor to "please resend the open records portion of [his] email to [the commission's] open records mail box[.]" The commission's documentation reflects that the requestor did so on May 21. We note that, under section 552.301(c), "a written request [for information] includes a request made in writing that is sent *to the officer for public information, or the person designated by that officer, by electronic mail or facsimile transmission.*"³ Gov't Code § 552.301(c) (emphasis added). Having considered the commission's representations and supporting documentation, as well as the requestor's comments and documents, we find that the requestor's May 18 e-mail was not sent to the commission's public information officer or the officer's designee. We therefore conclude that the commission received the instant request for information on May 21. Thus, the commission complied with section 552.301 in requesting this decision, and we will consider its claim under section 552.111.

Section 552.111 of the Government Code 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. This exception encompasses the deliberative process privilege. *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 (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 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. A

³We note that the commission's public information policies provide for the submission of a request sent by facsimile or electronic mail to the commission's public information officer at openrecs@tceq.state.tx.us. *See* http://www.tceq.state.tx.us/files/06-18_opp.pdf_4467215.pdf and <http://www.tceq.state.tx.us/admin/data/reqinfo.html>.

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). Moreover, 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.

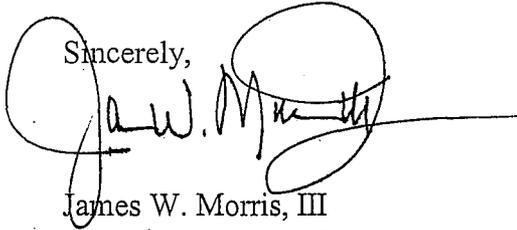
You contend that section 552.111 is applicable to all of the submitted information. You state that the information at issue consists of internal communications, draft documents, and other records relating to the development of the air quality standard permit for thermoset resin facilities. You assert that this information contains advice, opinions, and recommendations relating to the commission's policymaking process. Based on your representations and our review of the submitted information, we conclude that the commission may withhold the information that we have marked under section 552.111 of the Government Code. We find that the rest of the submitted information does not fall within the scope of section 552.111 and may not be withheld under that exception. As you claim no other exception to disclosure, the remaining information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free,

at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is written in a cursive style with a large, looping initial "J".

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/cc

Ref: ID# 351505

Enc: Submitted documents

c: Requestor
(w/o enclosures)