



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 2, 2010

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

OR2010-16580

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# 398768 (PIR No. 10.08.13.06).

The Texas Commission on Environmental Quality (the "commission") received a request for four categories of information related to the presence of formaldehyde, ketones, methanal, aldehydes, or the organic compound CH₂O in the Barnett Shale area during a specified time period. You state you have released a portion of the requested information. You claim the submitted 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 have submitted.

Initially, we note the requestor states the instant request is "being submitted pursuant to the legislative purpose special right of access under [s]ection 552.008 of the . . . Government Code." Section 552.008 grants access to information held by a governmental body, including confidential information, to individual members, agencies, or committees of the Texas Legislature to be used for legislative purposes. *See* Gov't Code § 552.008(a) (Act does not grant authority to withhold information from individual members, agencies, or committees of legislature to use for legislative purposes). We note the requestor is a member of the media, and the requestor does not inform us how he is an individual to which section 552.008 grants access. Thus, we find section 552.008 is not applicable to the instant request.

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.” *Id.* § 552.111. Section 552.111 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, 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. 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 (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). Additionally, section 552.111 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 will also 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.

The commission contends the submitted information consists of “intra-agency draft policy documents that discuss decisions regarding monitoring projects in the Barnett Shale area.” You state release of the submitted information would “discourage frank and open discussions within the commission in connection with the decision making process relating to the regulatory strategies in the Barnett Shale area.” Upon review, we find the submitted information consists of drafts of policymaking documents that are internal to the commission. The commission does not inform us whether it intends to release these documents in their final form. Therefore, to the extent the submitted draft documents will

be released to the public in their final form, the commission may withhold them in their entirety under section 552.111. To the extent these draft documents will not be released to the public in their final form, they may not be withheld in their entirety under section 552.111 of the Government Code. In that instance, however, we find the commission has demonstrated portions of the submitted information consist of advice, opinions, or recommendations regarding policy matters of the commission. Therefore, to the extent the submitted draft documents will not be released to the public in their final form, the commission may withhold the information we have marked under section 552.111 of the Government Code. However, we find the remaining information consists of either general administrative information that does not relate to policymaking or information that is purely factual in nature. You do not explain how the remaining administrative and factual information consists of the advice, opinion, or recommendation of the commission related to its policy. Thus, you have failed to demonstrate that this remaining information is protected by the deliberative process privilege, and it may not be withheld under section 552.111.

In summary, to the extent the submitted draft documents will be released to the public in their final form, then the commission may withhold them in their entirety under section 552.111 of the Government Code. To the extent the submitted draft documents will not be released to the public in their final form, then the commission may withhold the information we have marked under section 552.111 of the Government Code and must release the remaining information.

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, toll free, at (888) 672-6787.

Sincerely,



Melanie J. Villars
Assistant Attorney General
Open Records Division

MJV/tp