



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 29, 1995

Ms. Raenell Silcox
Attorney
Resource Protection Division
Texas Parks and Wildlife Department
4200 Smith School Road
Austin, Texas 78744

OR95-1614

Dear Ms. Silcox:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 34696.

The Texas Parks and Wildlife Department (the "department") received a request for eight categories of documents regarding the Barton Springs salamander. You claim that a portion of the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claimed and have reviewed the documents at issue.¹

Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of

¹You did not explain how any claimed exception other than section 552.111 applies to the requested documents. A governmental body has the burden of establishing how a claimed exception applies to specific documents. Gov't Code § 552.301(b). As you have not explained how sections 552.103 and 552.107 apply to the submitted documents, we consider these exceptions waived. Additionally, we do not find that section 552.101 applies to the submitted documents, as they are not excepted from disclosure by a right of privacy, statute, or judicial decision.

the governmental body. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 (1993) at 5-6. In addition, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5.

You have submitted as Attachment IV documents that you claim are interagency and intraagency communications that constitute advice, opinion, and recommendations. While most of the documents pertain to the department's policy functions, some of the information contained in these documents is purely factual. Also, some the requested information relates to a personnel matter, *i.e.*, a disciplinary action taken against one of the department's employees; section 552.111 does not except this information from required public disclosure. We have marked those documents that may be withheld from required public disclosure under section 552.111. The remaining information in Attachment IV may not be withheld.²

Section 552.111 also excepts from required public disclosure a preliminary draft of a letter or document related to policymaking matters, since drafts represent the advice, opinion, and recommendation of the drafter as to the form and content of the final document. Open Records Decision No. 559 (1990). You have submitted for review Attachments III and V, which you claim are draft documents that are excepted from disclosure under section 552.111. You state that members of the Aquatic Biological Advisory Team ("ABAT") individually drafted reports that were considered "drafts," which would then be compiled and edited into a final report by the department. We have previously determined that information created for a governmental body by an outside consultant when the outside consultant is acting at the request of the governmental body and performing a task within the authority of the governmental body may be excepted under section 552.111. Open Records Decision No. 631 (1995) at 2. Some of the submitted documents in Attachment III are from consultants acting at the department's request and performing a task within the department's authority. You state that the final report into which these draft documents will be edited will soon be available to the public. Therefore, the department may withhold these documents. We have reviewed the other draft documents at issue and conclude that they relate to the policymaking processes of the governmental body. Therefore, the department may withhold the documents in Attachment III and Attachment V.

²We note that there are two documents in Attachment IV that do not appear to be responsive to the request. We have marked those documents for your information. Additionally, one of these two documents appears to be part of another report. If that report was previously disclosed to the public, it may not now be withheld from disclosure. Open Records Decision No. 435 (1986) (section 552.111 waived by release of information to public).

We note that one of the drafts was distributed to other scientists, including a biologist working for the City of Austin, the entity that contracted with the department for this study to be done, and an employee of the U.S. Fish and Wildlife Service. We understand that this draft was sent to these scientists for peer review. We conclude that the distribution of this information to these few scientists at other governmental bodies was a distribution to consultants for their input on a matter within the department's authority and therefore was not a public disclosure. *See* Open Records Decision No. 631 (1995).

The documents contained in Attachment VI involve an administrative matter -- an internal disciplinary proceeding. This is a personnel matter that this office has previously concluded does not fall within the section 552.111 exception. Open Records Decision No. 615 (1993). However, some of the information in these documents relates to the policymaking processes of the department and some of the information reveals the contents of the draft documents that we have concluded may be withheld under section 552.111. Therefore, the department may withhold portions of the documents in Attachment VI. We have marked the portions of the documents that the department may withhold. The department may not withhold the remainder of the information in Attachment VI.³

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee
Assistant Attorney General
Open Records Division

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Ref.: ID# 34696

³You request that you be allowed to redact the information contained in the documents in Attachment VI relating to employees other than the employee who is the subject of the internal grievance and the person complaining of the employee. However, you have not claimed any exception to disclosure for this information. Therefore, the department may not withhold this information.

Enclosures: Marked documents

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