



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

February 15, 1996

Ms. Margo M. Kaiser  
Assistant General Counsel  
Texas Department of Commerce  
P.O. Box 12728  
Austin, Texas 78711-2728

OR96-0194

Dear Ms. Kaiser:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your requests were assigned ID# 33030 and ID# 38059.

The Department of Commerce (the "department") received two requests for related information. The first request is for:

1. All documents, affidavits, tapes, transcripts of tapes, and anything else used by your department to arrive at [a final decision concerning a charge by Jeanetta Brown];
2. The correlation between issues allegedly found to have been shown by a preponderance of the evidence on pages 2 and 3 of the decision, and the finding of discrimination; [and]
3. The articulation of the factors used in determining that race was the causal factor in the alleged conduct of the ADO.

The second request was for all documents concerning the investigation of any claims made to the department by Jeanetta Brown, Anita DeGraw, or Ronald J. Fleming. You state that the department has released some of the requested information to both requestors. However, you claim that some of the requested information is excepted from disclosure under federal law, the informer's privilege as incorporated by section 552.101 of the Government Code, and section 552.111 of the Government Code. We have considered the exceptions you claimed and have reviewed the documents at issue.

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 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. The memorandum submitted to this office for review relates to a personnel matter. Therefore, the department may not withhold the memorandum under section 552.111 of the Government Code.

You state that the department is the state-level administrative entity for the federal Job Training Partnership Act program ("JTPA"). Federal law prohibits discrimination on the basis of race, religion, sex, national origin, age, disability, or political affiliation or belief in programs under the JTPA. 29 U.S.C. § 1577(a)(2). Programs under the JTPA are required to designate an Equal Opportunity Officer and to assign sufficient staff and resources to that officer to ensure compliance with the nondiscrimination and equal opportunity provisions of the JTPA. 29 C.F.R. § 34.22(a), (b). Further, the regulation provides:

The identity of any person who furnishes information relating to, or assisting in, an investigation or a compliance review shall be kept confidential to the extent possible, consistent with a fair determination of the issues. A person whose identity it is necessary to disclose shall be protected from retaliation (see § 34.8).

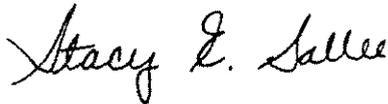
*Id.* § 34.24(d). Section 34.8 of part 29 of the Code of Federal Regulations provides:

A recipient shall not discharge, intimidate, retaliate, threaten, coerce or discriminate against any person because such person has: filed a complaint; opposed a prohibited practice; furnished information; assisted or participated in any manner in an investigation, review, hearing or any other activity related to administration of, or exercise of authority under, or privilege secured by, the nondiscrimination and equal opportunity provisions of the JTPA or this part; or otherwise exercised any rights and privileges under the nondiscrimination and equal opportunity provisions of JTPA or this part. The sanctions and penalties contained in section 167 of the JTPA or this part may be imposed against any recipient that engages in any such proscribed activity or fails to take appropriate steps to prevent such activity.

*Id.* § 34.8. You claim that although the recipient organization who may retaliate against the witnesses knows their identities, the organization does not know the content of the witnesses' statements and accordingly does not know which of the witnesses may have reported violations of the nondiscrimination provisions. You further claim, "The only way to protect the witnesses in this investigation is to withhold the tape recordings of their statements." We believe that if the department releases the statements of these witnesses, the department may be liable for "fail[ing] to take appropriate steps to prevent" discharge, intimidation, retaliation, threats, coercion or discrimination. Therefore, we conclude that the department must withhold the tape-recorded statements under federal law as applied through section 552.101 of the Government Code.

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

SES/ch

Ref: ID# 33030  
ID# 38059

Enclosures: Submitted documents

cc: Ms. Alejandra I. Villarreal  
Escamilla & Poneck  
1200 South Texas Building  
603 Navarro  
San Antonio, Texas 78205-1826  
(w/o enclosures)

Ms. Rochel J. Lemler  
Thornton, Summers, Biechlin, Dunham & Brown, L.C.  
Airport Center, Suite 300  
10100 Reunion Place  
San Antonio, Texas 78216-4128  
(w/o enclosures)