



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 28, 1996

Ms. Rachael Rawlins
Staff Attorney, Legal Division
Texas Natural Resource Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR96-0273

Dear Ms. Rawlins:

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# 38011.

The Texas Natural Resource Conservation Commission (the "commission") received an open records request for information relating to the "Water Quality Plan for the Barton Creek Development Water Quality Protection Zone, Travis County, Texas." You state that you have made available to the requestor information which the commission believes is not excepted from disclosure. You contend, however, that certain documents are excepted under sections 552.107 and 552.111 of the Government Code, and have provided copies of these documents for our review.

Section 552.111 excepts from disclosure "only those internal agency communications consisting of advice, recommendations, opinions and other material reflecting the deliberative or policymaking processes of the governmental body at issue." Open Records Decision No. 615 (1993) at 5. This exception is intended to protect advice and opinions given on policy matters and to encourage frank and open discussions within an agency in connection with the agency's decision-making processes. *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 412 (Tex. App.--Austin 1992, no writ) (citing *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.)). The policymaking functions of an agency, however, do not encompass routine internal administrative and personnel matters. Open Records Decision No. 615 (1993) at 5. Furthermore, section 552.111 does not except purely factual information from disclosure. *Id.*

The documents that you submitted relate to the commission's review of a water quality plan under section 26.179 of the Water Code, and thus generally involve the

commission's policymaking mission and role. A number of these documents appear to be and are labeled as draft documents. Although a governmental body may not close documents merely by stamping "draft" on them, where a document is a genuine preliminary draft of a document concerning policy-making matters that has been released or is intended for release in final form, the draft necessarily represents the advice, opinion, and recommendation of the drafter. Open Records Decision No. 559 (1990), *see also* Open Records Decision No. 615 (1993) (section 552.111 protects advice, opinion, or recommendation relating to the policy-making functions of a governmental body). Therefore, such a draft document, including comments, underlining, deletions, and proofreading marks, is excepted by section 552.111 of the Government Code. Open Records Decision No. 559 (1990). This includes factual information that is contained in the draft document, as long as the factual information is also contained in the released final product. *Id.* You have indicated that the final versions of certain of these documents either have or will be released. You may withhold these draft documents in their entirety, assuming they do not contain factual information not included in the final released documents. If a draft contains factual information that was not included in the final released document, you must release this factual information. Finally, there were certain drafts for which you did not indicate whether a final document was or will be released. If no final document is released, you may not withhold these documents as draft documents.

You also submitted a number of other documents, which are not draft documents, that you assert are excepted under section 552.111. We agree that some of these documents contain advice, recommendation, or opinion relating to policy matters and thus, this information may be withheld. However, we have marked certain documents or portions of documents that contain factual information or other information that is not excepted from disclosure under section 552.111. This information must be released.¹ We note, also, that if any of the information that you assert is excepted under section 552.111 has been disclosed to a non-governmental party, section 552.111 does not apply and the information must be released. Open Records Decision No. 464 (1987) at 5.

¹Although you individually labeled and marked a number of documents that contain specific information that you believed to be excepted from disclosure, you claimed that a number of documents were excepted from disclosure in their entirety and did not mark specific information. For example, you submitted a number of pages of handwritten notes that you stated were "taken during internal meetings which were part of the policy making/deliberative process." You generally contended that these notes were excepted from disclosure under section 552.111 in their entirety, and did not mark specific information. Although the circumstances surrounding the creation or collection of specific information may determine whether the information is within section 552.111, Open Records Decision Nos. 525 (1989); 470 (1987), only advice, opinion, or recommendation relating to the policymaking function is excepted from disclosure. Open Records Decision No. 615 (1993); *see also* Open Records Decision No. 308 (1982) at 3-4 (discussing distinction between factual information and advise, opinion and recommendation). Because these hand written notes clearly contain a significant amount of factual information or other information that is not excepted from disclosure under section 552.111, and because we did not have sufficient information to determine that they were excepted in their entirety, we conclude these documents must be released in their entirety. The custodian of records has the burden of proving that records are excepted from public disclosure. Attorney General Opinion H-436 (1974). A general claim that section 552.111 applies to particular documents when it is clear that the exception does not apply to all of the information in the documents does not comport with the procedural requirements of the Open Records Act. Open Records Decision No. 419 (1984) at 3.

You also contend that certain information is excepted from disclosure under Section 552.107 of the Government Code. Section 552.107(1) excepts from disclosure

information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct.

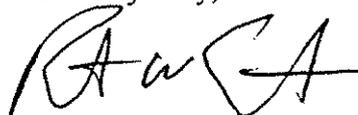
Information may be withheld under section 552.107(1) only to the extent that it documents confidences of a governmental representative to its attorney or reveals the attorney's legal advice and opinions. Open Records Decision Nos. 589 (1991), 574 (1990).

We have reviewed the information you contend is excepted under section 552.107 and agree that it contains either confidences of a governmental representative to its attorney or reveals an attorney's legal advice and opinions.² As with the information which we found to be excepted under section 552.111, we assume that none of the information that you claim is excepted under 552.107 has been disclosed to outside parties. Information exchanged with a third party is not excepted from disclosure under section 552.107. Open Records Decision No. 574 (1990) at 5-6.

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,



Robert W. Schmidt
Assistant Attorney General
Open Government Section

RWS/ch

Ref.: ID# 38011

Enclosures: Marked documents

²On a number of documents, you marked with a highlighter the portions of the documents that you claimed to be excepted from disclosure under section 552.107. You state that the information that was not highlighted will be released. Therefore, on these documents we do not consider the information that was not marked with highlighter and assume that you will release this information.

cc: Mr. William G. Bunch
SOS Legal Defense Fund
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(w/o enclosures)