



February 3, 2000

Ms. Janice Marie Wilson  
Assistant General Counsel  
Texas Department of Transportation  
125 E. 11<sup>th</sup> Street  
Austin, Texas 78701-2483

OR2000-0360

Dear Ms. Janice Wilson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 131904.

The Department of Transportation (the “department”) received a request for Draft SH130 Technical Report and the Appendices to the Draft Environmental Impact Statement for State Highway 130. The Texas Turnpike Authority (“TTA”), now a division of the Department of Transportation, because the TTA is a division of the department, for all intent and purposes, the department is in effect also claiming a section 522.111 interest, claims section 552.111 excepts the requested information from public disclosure.<sup>1</sup>

Before considering the TTA’s section 552.111 claim, we will address their claim that no document exists pertaining to the request for Draft SH130 Technical Report. The Public Information Act does not require a governmental body to prepare new information in response to open records requests. Open Records Decisions Nos. 452 (1986), 342 (1982). Furthermore, the Public Information Act does not ordinarily require a governmental body to obtain new information to comply with a request. Open Records Decision 561 (1990). The Act only applies to information already in existence. In this instance it appears that the TTA does not have the requested information. Thus, the TTA need not create any new documents to respond to the open records request.

The TTA claims that the requested document is excepted under section 552.111 of the Government Code. Section 552.111 excepts “an interagency or intra agency memorandum

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<sup>1</sup> The Seventy-fifth Legislature, in S.B. 370 created the Texas Turnpike Authority as a division of the Texas Department of Transportation. *See* Act of June 20, 1997, 75<sup>th</sup> Leg., R.S., ch.1171, § 1, 1997 Tex. Gen. Law Serv. 4427 (Vernon)

or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. 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. The draft of a document that has been released or is intended for release in final form necessarily represents the advice, opinion, and recommendation of the drafter as to the form and content of the final document, and may therefore be withheld under section 552.111 of the Government Code. *See* Open Records Decision No. 559 (1990). 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 at 5-6 (1993). Generally, 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. Yet, where a document is a genuine preliminary draft that has been released or is intended for release in final form, factual information in that draft which also appears in a released or releasable final version is excepted from disclosure by section 552.111. Open Records Decision No. 559 (1990). However, severable factual information appearing in the draft but not in the final version is not excepted by section 552.111. *Id.*

The TTA states that the requested information is a working draft that is still subject to comments, opinions, and recommendations by the department. The TTA states that as soon as the draft has reached final approval under the statutory procedure, the final completed report will be released to the public for hearings and continued comments. Based on the TTA’s representation and our review of the information we conclude that Draft Environmental Impact Statement is excepted under section 552.111.

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Noelle C. Letteri  
Assistant Attorney General  
Open Records Division

ncl/nc

Ref: ID# 131904

Encl. Submitted documents

cc: Mr. Joe Gorney  
1819 Indian Summer pass  
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(w/o enclosures)