



March 5, 2002

Ms. Cathy Bradford
Open Records Coordinator
Texas Department of Parks & Wildlife
4200 Smith School Road
Austin, Texas 78744-3291

OR2002-1080

Dear Ms. Bradford:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 158866.

The Texas Department of Parks & Wildlife (the "department") received a written request for "[d]ocuments having a bearing on the decision determining cultural affiliation of Kalpulli Tlalteca and Kalpulli Tonal Teokalli." You state that the department has released much of the requested information. You contend, however, that the information you submitted to this office, namely certain e-mail communications and draft transcripts of tape-recorded interviews, is excepted from disclosure under sections 552.101 and 552.111 of the Government Code.¹

Because your section 552.111 claim is the most inclusive, we will address it first. Section 552.111 of the Government Code excepts from required public disclosure "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. Generally, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. Open Records Decision No. 615 at 5 (1993).

¹You also seek to withhold all references to the Ojibwa Indian tribe contained in the draft transcripts. However, we could discern no such information from our review of the transcripts. Accordingly, we do not further address this issue.

Additionally, in Open Records Decision No. 429 (1985), this office indicated that to be protected by section 552.111 information must have been prepared by a person or entity with an official reason or duty to provide the information in question. *See also* Open Records Decision Nos. 283 (1981), 273 (1981). This requirement helps assure that the information plays a role in the deliberative process; if it does not, it is not entitled to protection under section 552.111. Open Records Decision No. 464 (1987). *See Wu v. National Endowment of the Humanities*, 460 F.2d 1030 (5th Cir.), *cert. denied*, 410 U.S. 926 (1972).

After reviewing the submitted e-mail communications, we agree that portions of those communications come within the protection of section 552.111, and we have marked those documents accordingly. The remaining portions of the communications must be released, with the following exceptions.

We note that the e-mail communications you submitted to this office contain various e-mail addresses. The Seventy-seventh Legislature recently added section 552.137 to chapter 552 of the Government Code. This new exception makes certain e-mail addresses confidential.² Senate Bill 694, as passed May 14, 2001, signed by the Governor May 26, 2001, and made effective immediately, provides in relevant part:

- (a) An e-mail address *of a member of the public* that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release. [Emphasis added.]

Among the e-mail addresses contained in the documents at issue are those of employees of the department; such addresses are not made confidential under section 552.137 and therefore must be released. However, the communications also contain e-mail addresses of outside consultants. It does not appear to this office that any of those individuals have authorized the release of their e-mail address. Accordingly, section 552.137 of the Government Code requires the department to withhold the e-mail addresses of those members of the public, unless the individual who provided the e-mail address has affirmatively consented to its release.

You also seek to withhold the draft transcripts in their entirety pursuant to section 552.111. This office has previously concluded that the draft of a document that has been released or is intended for release in final form necessarily represents the advice, opinion, and

²House Bill 2589, which also makes certain e-mail addresses confidential, took effect on September 1, 2001. *See* Act of May 22, 2001, 77th Leg., R.S., H.B. 2589, § 5. The language of section 552.136, as added by House Bill 2589, is identical to that of section 552.137.

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). Additionally, 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 draft transcripts you submitted to this office consist almost entirely of factual information, some of which, you inform us, has been incorporated into a report that the department released to the requestor. Furthermore, to the extent that the transcripts contain the researcher's opinions, that information does not reflect the formation of the department's policy decision concerning the Kalpulli, and therefore is not protected by section 552.111. We therefore conclude that no portion of the transcripts may be withheld under section 552.111.

You also contend that portions of the transcripts are excepted from public disclosure on privacy grounds. Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information protected by the right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85. The constitutional right to privacy includes the individual interest in independence in avoiding disclosure of personal matters, and involves a *balancing* of the individual's privacy interests against the public's need to know information of public concern; such information must concern the "most intimate aspects of human affairs." *See* Open Records Decision No. 455 at 5 (1987) (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985)).

You state that the draft transcripts "contain highly sensitive and confidential information concerning the spiritual/religious practices of various individuals and groups," and contend that such information should be withheld from the public pursuant to common-law or constitutional privacy. We note, however, that the descriptions of the religious practices and beliefs are more academic, as opposed to personal, in nature. We do not believe that the objective description of the Kalpulli belief system, in and of itself, implicates any individual's privacy interests. We additionally note that because the department gathered this information for the purpose of determining whether the Kalpulli are entitled to a special use permit at the Hueco Tanks State Park, there exists a legitimate public interest in the information that outweighs any privacy interest that might otherwise exist. We therefore conclude that the transcripts must be released in their entirety.

In summary, the department may withhold from the submitted e-mail communications the information we have marked as coming within the protection of section 552.111. However, the department must withhold the e-mail addresses of the department's outside consultants pursuant to section 552.137. The remaining information must be released.

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).

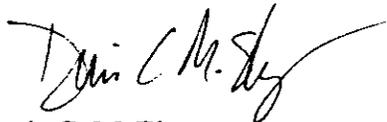
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/RWP/sdk

Ref: ID# 157866

Enc: Submitted documents

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