



May 20, 2002

Mr. Jason Martinson  
Open Records Coordinator  
Texas Parks and Wildlife Department  
4200 Smith School Road  
Austin, Texas 78744-3291

OR2002-2691

Dear Mr. Martinson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 163187.

The Texas Parks and Wildlife Department ("TPWD") received a request for information relating to a proposed container port. You indicate that TPWD will release some of the responsive information. However, you claim that the remainder of the requested information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

We begin by addressing your argument under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other law. You do not raise any specific provision of law, nor are we aware of any, that makes the submitted information confidential. Therefore, you may not withhold the submitted information under section 552.101.

You also contend that the submitted information is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only

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<sup>1</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

“privileged information,” that is, information that reflects either confidential communications from the client to the attorney or the attorney’s legal advice or opinions; it does not apply to all client information held by a governmental body’s attorney. Open Records Decision No. 574 at 5 (1990). A governmental body that raises section 552.107 bears the burden of explaining how the particular information requested is protected by the attorney-client privilege. Here, you do not explain, nor is it apparent from the face of the documents, whether the submitted information was communicated with an attorney. Consequently, we find that you have not adequately demonstrated that the requested information consists of either confidential client communications or attorney advice or opinion. See Gov’t Code § 552.301(e)(1)(A) (a governmental body must submit to this office, among other information, written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld); *In re Monsanto Co.*, 998 S.W.2d 917, 926 (Tex. App.—Waco 1999, orig. proceeding). Therefore, you may not withhold the submitted information under section 552.107 of the Government Code.

Finally, you contend that the submitted information is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 provides that “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency is excepted from [required public disclosure].” This section encompasses the deliberative process privilege. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000). The deliberative process privilege, as incorporated into the Act by section 552.111, protects from disclosure interagency and intra-agency communications consisting of advice, opinion, or recommendations on policymaking matters of a governmental body. See *id.*; Open Records Decision No. 615 at 5 (1993). An agency’s policymaking functions 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. ORD 615 at 5-6. Additionally, the deliberative process privilege does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5. Furthermore, while section 552.111 is most commonly used to withhold information generated by the personnel of a governmental body, section 552.111 also encompasses information created by an outside consultant for a governmental body acting on behalf of the governmental body in an official capacity. Open Records Decision Nos. 462 at 14 (1987), 298 at 2 (1981).

You state that the information in Attachment B-2 consists of “correspondence between TPWD employees, other agency employees, and third party consultants concerning TPWD’s decision-making process regarding its policy stance on the proposed container port and the [Army Corps of Engineer’s Draft Environmental Impact Statement (“DEIS”)].” You further state that the information in Attachment B-3 “contains notes written by various TPWD employees concerning the container port and DEIS.” Based on your arguments and our review of the submitted information, we agree that Attachments B-2 and B-3 contain interagency and intra-agency communications consisting of advice, opinion, or

recommendations on policymaking matters of a governmental body. We have marked this information, which you may withhold under section 552.111. However, it does not appear, nor do you adequately explain, that other information in Attachment B-2 consists of interagency or intra-agency communications. Furthermore, some of the information in both Attachment B-2 and B-3 is purely factual. TPWD may not withhold this information under section 552.111.

Nevertheless, we note that some of the remaining information is excepted from disclosure under section 552.137 of the Government Code. Section 552.137 provides that “[a]n 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 [the Public Information Act].”<sup>2</sup> Therefore, unless the relevant individuals have affirmatively consented to the release of their e-mail addresses, TPWD must withhold the e-mail addresses in the submitted information that we have marked under section 552.137.

In summary, TPWD may withhold some of the information, which we have marked, under section 552.111 of the Government Code. TPWD must withhold the marked e-mail addresses under section 552.137 of the Government Code unless the individuals to whom the e-mail addresses belong have consented to their release. TPWD must release the remainder of the submitted information.

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

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<sup>2</sup>The identical exception has been added as section 552.136 of the Government Code.

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); *Tex. Dep't of Pub. 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,



Nathan E. Bowden  
Assistant Attorney General  
Open Records Division

NEB/sdk

Ref: ID# 163187

Enc: Submitted documents

c: Mr. Harvill E. Weller  
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(w/o enclosures)