



July 5, 2002

Mr. Craig H. Smith
Deputy General Counsel
Texas Workers' Compensation Commission
4000 South IH-35
Austin, Texas 78704-7491

OR2002-3645

Dear Mr. Smith:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 165490.

The Texas Workers' Compensation Commission (the "commission") received a request for copies of five categories of information relating to commission audits of insurance carriers. You claim that the requested information is excepted from disclosure pursuant to sections 552.108 and 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted representative sample documents.¹

Initially, we note that one of the documents is subject to section 552.022 of the Government Code. Section 552.022(a) makes certain information public, unless it is expressly confidential under other law. *See* Gov't Code § 552.022(a). One category of public information under section 552.022 is "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]" Gov't Code § 552.022(a)(1). This document constitutes a completed audit performed by the commission that must be released to the requestor, unless it is confidential under other law or is excepted from disclosure under section 552.108 of the Government Code. Although

¹ 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.

the commission claims that this audit is excepted from disclosure pursuant to section 552.111 of the Government Code, we note that this exception to disclosure is a discretionary exception under the Public Information Act and, as such, does not constitute "other law" that makes information confidential.² Accordingly, we conclude that the commission may not withhold the completed audit from disclosure under section 552.111 of the Government Code.

However, you also claim that this audit, as well as the remaining submitted information, is excepted from disclosure under section 552.108 of the Government Code in conjunction with the principles set out by the Texas Supreme Court in *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668 (Tex. 1995). Section 552.108 provides in pertinent part that an internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from disclosure if release of the internal record or notation would interfere with law enforcement or prosecution. See Gov't Code § 552.108(b)(1). Generally, a governmental body claiming section 552.108 as an exception to disclosure of requested information must demonstrate, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement or prosecution. See Gov't Code §§ 552.108(a), (b), .301(e)(1)(A); see also *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

In *A & T Consultants*, the Texas Supreme Court held that the comptroller could withhold certain information relating to audits from disclosure under section 552.108 in order to protect the comptroller's interest in enforcing the tax laws. See *A & T Consultants*, 904 S.W.2d at 677-81. However, we note that section 552.108 only applies to records characterized as records of law enforcement agencies or prosecutors. Thus, section 552.108 applies to the records created by an agency, or a portion of an agency, whose primary function is to investigate crimes and enforce the criminal laws. See Open Records Decision Nos. 493 at 2 (1988), 287 at 2 (1981). It generally does not apply to the records created by an agency whose chief function is essentially regulatory in nature. See Open Records Decision No. 199 (1978). Accordingly, we conclude that the commission may not withhold any portion of the completed audit or the remaining submitted information from disclosure pursuant to section 552.108 of the Government Code.

However, you also claim that the remaining submitted information is excepted from disclosure pursuant to the deliberative process privilege in section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the

² Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. See, e.g., Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

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. See *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); see also *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.-- Austin, 2001, no pet.). The purpose of section 552.111 is “to protect from public disclosure advice and opinions on policy matters and to encourage frank and open discussion within the agency in connection with its decision-making processes.” *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref’d n.r.e.). Based on our review of your arguments and the remaining submitted information, we do not agree that any portion of this information constitutes internal communications among agency staff consisting of advice, opinions, and recommendations reflecting the policymaking processes of the commission. Accordingly, we conclude that the commission may not withhold any portion of the remaining submitted information from disclosure pursuant to section 552.111 of the Government Code.

In summary, the commission must release the entirety of the submitted information to the requestor.

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

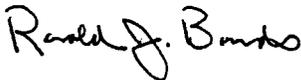
that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/seg

Ref: ID# 165490

Enc. Submitted documents

cc: Mr. Christopher H. Trickey
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(w/o enclosures)