



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

May 15, 2003

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

OR2003-3268

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# 181107.

The Texas Parks and Wildlife Department (the "department") received a request for documents and correspondence in the department's possession pertaining to ethnographic and archeological surveys conducted at Hueco Tanks Historical Park ("Hueco Tanks"). You state that the department has released some responsive information, but maintain that other information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹ We have also considered the comments submitted to this office by the requestor. *See* Gov't Code § 552.304.

First, you argue that Attachment B is excepted from required disclosure under 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 agency." This exception applies not only to internal memoranda,

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.

but also to memoranda prepared by consultants of a governmental body. Open Records Decision Nos. 462 at 14 (1987), 298 at 2 (1981). 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. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). 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, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; ORD 615 at 4-5. The preliminary draft of a policymaking document that has been released or is intended for release in final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document. Open Records Decision No. 559 at 2 (1990). However, severable factual information appearing in the draft but not in the final version is not excepted by section 552.111. *Id.*

Attachment B is a letter from the Rio Grande Foundation for Communities and Cultural Landscapes ("RGF") to the department concerning an ethnographic study commissioned by the department. RGF is a paid consultant to the department. You seek to withhold Attachment B in its entirety as a "draft copy of the most recent version of the study." You inform us that the letter was attached to a preliminary draft of a section of the ethnographic study, and that "the letter was integrated into an early version of the draft, and will reflect the final version of the ethnographic study. . . ." You also state that "the letter contains advice, recommendations and opinions which were ultimately integrated into the most recent draft, and which will form the basis of a final report." We agree that Attachment B contains advice, opinions, and recommendations concerning the policymaking process of the department. However, we find you have not established that the letter at issue is in itself a draft of a document intended for release in final form. Therefore, we find that you may not withhold the letter in its entirety. We have marked the information within Attachment B that may be withheld under section 552.111 of the Government Code.

Next, you argue that all of the information in Attachment C concerning the archeological survey is confidential pursuant to section 191.004 of the Natural Resources Code, and must therefore be withheld from disclosure 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 statutes. Section 191.004 provides:

(a) Information specifying the location of any site or item declared to be a state archeological landmark under Subchapter D² of this chapter is not public information.

(b) Information specifying the location or nature of an activity covered by a permit or an application for a permit under this chapter is not public information.

(c) Information specifying details of a survey to locate state archeological landmarks under this chapter is not public information.

Nat. Res. Code § 191.004(a), (b), (c). You state that the department conducted the archeological survey at Hueco Tanks under the authority of Texas Antiquities Permit No. 2150, and that this Permit runs through March 2004, after which time the department will produce a final report. You also inform us that Hueco Tanks is a state archeological landmark. Upon careful review of the information in Attachment C, we find that all of the documents in Attachment C qualify as "information specifying the location or nature of an activity covered by a permit" for the purposes of section 191.004. Therefore, we conclude that the department may withhold the documents in Attachment C under section 191.004(b) of the Natural Resources Code in conjunction with section 552.101 of the Government Code.³

Lastly, the requestor has asked to inspect any pottery and earthenware recovered from Hueco Tanks. This office has ruled that tangible physical items are not the type of information contemplated under the Act. *See, e.g.,* Open Records Decision No. 581 (1990). Thus, we agree that the requested pottery and earthenware is not public information as that term is defined in section 552.002 of the Government Code. We, therefore, determine that these tangible physical items are not information made public by section 552.021 of the Government Code.

To summarize, we have marked the information in Attachment B that may be withheld under section 552.111. The information in Attachment C must be withheld in its entirety under section 552.101 in conjunction with section 191.004 of the Natural Resources Code. The remaining submitted information must be released.

² Section 191.091 of the Natural Resources Code reads "Sunken or abandoned pre-twentieth century ships and wrecks of the sea, and any part or the contents of them, and *all treasure imbedded in the earth, located in, on, or under the surface of land belonging to the State of Texas*, including its tidelands, submerged land, and the beds of its rivers and the sea within jurisdiction of the State of Texas, are declared to be state archeological landmarks and are eligible for designation. (Emphasis added).

³ Because your section 552.101 claim is dispositive, we need not address your section 552.111 claim with regards to Attachment C.

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 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,

A handwritten signature in cursive script that reads "Robert F. Maier".

Robert F. Maier
Assistant Attorney General
Open Records Division

RFM/seg

Ref: ID# 181107

Enc. Submitted documents

c: Mr. Ronald L. Jackson
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(w/o enclosures)