



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 26, 2004

Ms. Jennifer Soldano
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2004-0560

Dear Ms. Soldano:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 194005.

The Department of Transportation ("TxDOT") received a request for "a copy of the draft rules and regulations" regarding the conversion of non-toll roads to toll roads under regional mobility authorities. You claim that the requested information is excepted from disclosure under section 552.111 of the Government Code. We have also received arguments against the release of the requested information from the Texas Workforce Commission ("TWC") and arguments for the release of the requested information from the requestor. *See Gov't Code § 552.304* (providing that member of public may submit written comments stating why information at issue in request for attorney general decision should or should not be released). We have considered all of the submitted arguments and reviewed the submitted information.¹

Initially, we consider whether the requested information is subject to section 552.022 of the Government Code, which provides that certain categories of information are expressly public and may be withheld from disclosure only if they are expressly confidential under other law. TxDOT and TWC contend that the requested information does not fall within any of the

¹We 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.

categories of information in section 552.022. The requestor contends that the requested information constituted a "completed document" upon TxDOT's submission of the information to the Texas Transportation Commission (the "commission"). The information at issue consists of drafts of proposed rules. The commission's review of these drafts does not bring the drafts within any of the enumerated categories of information in section 552.022. Therefore, the requested information is not subject to section 552.022, but is public information that must be released if it is not excepted from disclosure pursuant to one of the Act's exceptions.

Next, we address the requestor's contention that TxDOT has publicly disclosed the requested information and therefore must also make the information available to the requestor. Section 552.007 of the Government Code gives a governmental body the discretion to voluntarily release public information that is not confidential by law. *See* Gov't Code § 552.007(a). Section 552.007 requires that any such information a governmental body publicly discloses be made available to any member of the public. *See* Gov't Code § 552.007(b). The requestor asserts that TxDOT publicly released the requested information by providing it to the commission prior to the commission's October 30, 2003, meeting. We disagree. In considering what constitutes a release to the public that implicates section 552.007 of the Act, this office has long held that the intra-agency transfer of information within a governmental body does not constitute such a release. *See* Attorney General Opinion JM-119 at 2 (1983) (chancellor's disclosure of information to member of community college district's board of trustees does not amount to public disclosure); *see also* Open Records Decision Nos. 666 (2000) (municipality's disclosure to municipally-appointed citizen advisory board of information pertaining to municipally-owned power utility does not constitute release to public), 468 at 3 (1987) (allowing employee access to records does not constitute disclosure to public), 464 at 5 (1987) (distribution of evaluations by university faculty members among faculty members does not waive exceptions to disclosure with respect to general public) (overruled on other grounds by Open Records Decision No. 615 (1993)). The commission governs TxDOT and is charged with, among other things, the adoption of rules for the operation of TxDOT, the organization of TxDOT into divisions, and the election of TxDOT's executive director. *See* 43 T.A.C. §§ 1.1-1.2. Thus, TxDOT's provision of information to the commission constitutes the sharing of information within a governmental body and not a release of information to the public that implicates section 552.007.

As additional support for its position that TxDOT has voluntarily disclosed the requested information to the public, the requestor notes that the information relates to items on the commission's posted meeting agendas for October 30, 2003, November 24, 2003, and December 18, 2003. The requestor also states that the information was "discussed openly by TxDOT staff and Commission members during these meetings." TxDOT received the request for this information on October 24, 2003, and requested a ruling from this office on October 29, 2003. The October 30, 2003, meeting agenda had been posted when TxDOT received the request for information. However, this meeting agenda referenced the subject matter of the requested information in general terms only and therefore did not constitute a

public disclosure of that information. The commission agendas that were posted after TxDOT received the request for information and the proceedings of commission meetings that took place after TxDOT received the request for information are not relevant to the issue presented here, which is whether the requested information was excepted from disclosure on the date it was requested.²

Finally, we consider whether the requested information is excepted from 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.” 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.). This office has also concluded that a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter’s advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

TxDOT indicates that the information at issue consists of internal drafts of rules that it planned to propose at the October 30, 2003, meeting of the commission. In other words, the information at issue consists of drafts of proposed rules and not the proposed rules themselves. *See* Gov’t Code §§ 2001.023(b) (a state agency must file notice of a proposed rule with the secretary of state for publication in the Texas Register), .029(a), (b) (a state agency must give the public the opportunity to comment on a proposed rule). TxDOT also states that this information represents the advice, opinion and recommendation of TxDOT administration and attorneys regarding agency policy. Based upon these representations and our review of the submitted information, we find section 552.111 applicable to the requested information. The requestor asserts that at a minimum the factual matter in the requested

²We note, however, that if a governmental body voluntarily discloses information in a public meeting, the governmental body thereby waives the protection of the Act’s discretionary exceptions, such as section 552.111. In Open Records Decision No. 412 (1984), the State Securities Board (the “board”) asked whether letters containing information that had been made public in a board meeting held prior to its request for a ruling were excepted from disclosure under the predecessors to sections 552.107 and 552.111. *See* ORD 412 at 1-2. We advised generally that neither of the claimed exceptions would protect information that had been disclosed in the board meeting, but we did not have before us the relevant details necessary to determine the extent to which the exceptions had been waived. *See id.* at 2.

information must be released. 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. Therefore, purely factual matter, where severable, must be released. *See* ORD 559 at 2. However, with respect to the preliminary drafts of a document, we have consistently held that when such factual matter is contained in the final version of the document, the release of the final version satisfies this requirement. *See id.* at 2-3. Here, TxDOT's release of the final version of the proposed rules will satisfy the requirement to release factual information. Therefore, we conclude that TxDOT may withhold the requested information from disclosure in its entirety pursuant to section 552.111 of the Government Code. Because section 552.111 is a discretionary exception that TxDOT can waive, TxDOT may choose to release all or part of the information at issue. *See* Gov't Code § 552.007.

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,



Karen Hattaway
Assistant Attorney General
Open Records Division

KEH/sdk

Ref: ID# 194005

Enc. Submitted documents

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