



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 30, 2007

Mr. Robert Martinez  
Director Environmental Law Division  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

OR2007-14234

Dear Mr. Martinez:

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# 293495.

The Texas Commission on Environmental Quality (the "commission") received a request for all documents pertaining to a specified application filed by the Lower Neches Valley Authority ("LNVA"). You state that some of the requested information is the subject of previous open records letter rulings. You claim that some of the requested information may be excepted from disclosure under section 552.111 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

You inform us that some of the requested information was at issue in two previous requests by the commission for decisions from this office under the Act. In Open Records Letter No. 2007-04723 (2007), we ruled that the commission was required to refer the request for information to the United States Transportation Security Administration ("TSA") for its decision concerning disclosure of the information at issue. *See* 49 U.S.C. §§ 114(a), (b)(1); *see also* 49 C.F.R. §§ 1520.5(a), 1520.9(a). You explain that the commission requested an opinion from the TSA and was ultimately directed to the United States Coast Guard (the "Coast Guard"), a division of the United States Department of Homeland Security. You further explain that the Coast Guard reviewed the information at issue and determined that portions of the responsive information constitute sensitive security information. You state that this information will be withheld from the requestor. *See* Open Records Letter No. 2007-04723 (2007). However, you state that for five particular documents, the Coast

Guard indicated that it could not make a determination. Thus, in Open Records Letter No. 2007-12023 (2007), we ruled that a portion of these five documents was confidential under section 411.181 of the Government Code and must be withheld under section 552.101 of the Government Code. You do not indicate that there has been any change in the law, facts, and circumstances on which these previous rulings are based. Therefore, with regard to information encompassed by the current request that is identical to the information previously requested and ruled upon by the Coast Guard and this office, we conclude that the commission must continue to rely on those rulings as previous determinations.<sup>1</sup> See Gov't Code § 552.301(a); Open Records Decision No. 673 at 6-7 (2001) (listing elements of first type of previous determination under Gov't Code § 552.301(a)).

You claim that the four submitted documents not subject to the previous rulings are 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." Gov't Code § 552.111. This exception encompasses the deliberative process privilege. See Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and ~~recommendation in the deliberative process and to encourage open and frank discussion in the~~ deliberative process. See *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. See ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; see also *City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. See Open Records Decision No. 631 at 3 (1995).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. See ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual

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<sup>1</sup>You indicate that you have released portions of the application deemed public by the Coast Guard and the previous rulings of this office in Open Records Letter Nos. 2007-04723 and 2007-12023.

information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

You have marked the information in the submitted e-mail, memorandum, and notes that the commission seeks to withhold under section 552.111. You contend that the marked information consists of advice, opinion, or recommendations between commission staff pertaining to the review of LNVA's application. Based on your representations and our review, we find that you have established that the deliberative process privilege is applicable to the information we have marked. Accordingly, you may withhold the information we have marked under section 552.111 of the Government Code.

In summary, the commission must continue to rely on our rulings in Open Records Letter Nos. 2007-04723 and 2007-12023 for information in the current request that is identical to information previously requested and ruled upon by this office. The information we have marked may be withheld under section 552.111 of the Government Code. The remaining information must be released to the requestor.

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~~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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,



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M. Alan Akin  
Assistant Attorney General  
Open Records Division

MAA/mcf

Ref: ID# 293495

Enc. Submitted documents

c: Ms. Christine S. Diamond  
The Lufkin Daily News  
300 Ellis Avenue  
Lufkin, Texas 75904  
(w/o enclosures)