ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

August 20, 2010

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General Counsel
Texas Commission on Environmental Quality
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Austin, Texas 78711-3087

Mr. Robert Martinez
Director - Environmental Law Division
Texas Commission on Environmental Quality
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OR2010-12717

Dear Mr. Martinez and Mr. Trobman:

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# 391141 (PIR Nos. 10.06.04.06 and 10.06.07.01).

The Texas Commission on Environmental Quality (the "TCEQ") received two requests for information pertaining to certain air quality tests and communications between specified entities' employees, lobbyists, or representatives during a specified time period. The TCEQ's Office of the General Counsel (the "OGC") and its Environmental Law Division (the "division") have submitted separate briefs, as well as separate documents, that each seeks to withhold. The OGC and the division state that they have provided some of the requested information to the requestor. The OGC claims that the information it has submitted is excepted from disclosure under sections 552.101 and 552.116 of the Government Code. The division claims that the information it has submitted is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. We have considered the claimed exceptions and reviewed the submitted information.

Initially, we note that the division has marked portions of its submitted information as not responsive to the present request for information. This decision does not address the public availability of the marked nonresponsive information, and the TCEQ need not release that information to the requestors.

We first address the OGC's arguments against disclosure. The OGC claims the information it has submitted is excepted from disclosure under section 552.116 of the Government Code. Section 552.116 provides as follows:

> (a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from [required public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public disclosure] by this section.
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> (b) In this section:
>
> > (1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.
> >
> > (2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:
> >
> > > (A) intra-agency and interagency communications; and
> > >
> > > (B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. The OGC states that its submitted information consists of an audit working paper that is part of an audit conducted by the TCEQ's Chief Auditor's Office. The OGC explains this audit is authorized by the Internal Auditing Act, chapter 2102 of the Texas Government Code. *See id.* § 2102.005 (requiring state agencies to conduct internal audit programs); *see also id.* § 2102.003 (defining types of audits). Based on the OGC's representations and our review of the information at issue, we agree that section 552.116 is applicable in this instance. We therefore conclude the TCEQ may withhold the information submitted by the OGC pursuant to section 552.116 of the Government Code.[1]

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[1]As our ruling is dispositive of this information, we need not address the OGC's remaining argument.

We now address the division's arguments against disclosure of the information it has submitted. Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. Section 552.101 encompasses the common-law informer's privilege, which has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). It protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority. Open Records Decision No. 515 at 3 (1988). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988). However, the informer's privilege does not apply where the informant's identity is known to the individual who is the subject of the complaint. *See* Open Records Decision No. 208 at 1-2 (1978).

In this instance, the division claims that portions of its information are excepted from disclosure by the common-law informer's privilege. However, the division fails to inform this office of any specific criminal or civil statute that was allegedly violated. As the division has not demonstrated that the complainants at issue reported alleged violations of any specific criminal or civil law, none of the information at issue may be withheld on the basis of the informer's privilege.

The division also claims portions of its information are excepted from disclosure under the deliberative process privilege encompassed by section 552.111 of the Government Code. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional 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 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). 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. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5.

This office has also concluded a preliminary draft of a document 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.

The division contends that the information at issue consists of "intra-agency draft versions of memoranda and internal e-mail documents that discuss policy decisions[.]" Upon review, we find that some of the information at issue constitutes drafts of policymaking documents that are internal to the TCEQ. However, the division does not inform us whether the TCEQ intends to release these documents in their final form. Therefore, to the extent the draft documents we marked will be released to the public in their final form, the TCEQ may withhold them in their entirety under section 552.111. To the extent these draft documents will not be released in their final form, they may not be withheld in their entirety under section 552.111 of the Government Code. In that instance, we have marked the portions of these draft documents that consist of advice, opinion, or recommendation regarding policy matters of the TCEQ. Based on the division's representations and our review, the TCEQ may withhold this information under section 552.111 of the Government Code. However, we find the remaining information consists of either general administrative information that does not relate to policymaking or information that is purely factual in nature. You do not explain how the remaining administrative and factual information consists of the advice, opinion, or recommendation of the TCEQ related to its policy. Thus, you have failed to demonstrate that this remaining information is protected by the deliberative process privilege, and it may not be withheld under section 552.111.

We note that some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1978). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the

governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the TCEQ may withhold the information submitted by the OGC pursuant to section 552.116 of the Government Code. To the extent the draft documents we marked will be released to the public in their final form, the TCEQ may withhold them in their entirety under section 552.111 of the Government Code. To the extent these draft documents will not be released in their final form, the TCEQ may withhold the information we have marked under section 552.111 of the Government Code. The remaining information submitted by the division must be released to the requestors, but any information that is protected by copyright may only be released in accordance with copyright law.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

Christopher D. Sterner
Assistant Attorney General
Open Records Division

CDSA/eeg

Ref: ID# 391141

Enc. Submitted documents

c: Requestor
(w/o enclosures)