



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 8, 2011

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

OR2011-01928

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# 408475 (TCEQ PIR# 10.11.15.02).

The Texas Commission on Environmental Quality (the "commission") received two requests from the same individual for information related to the Texas water system and radionuclide testing. The first request seeks (1) all communications from August 1, 2010, until the date of the request relating to the non-compliance or near non-compliance of any Texas water system with radionuclide regulations; questions posed to the commission by KHOU-TV regarding radionuclides in drinking water; any discussion between commission employees regarding radionuclides in drinking water; and (2) communications and documents from "any time frame" relating to subtractions for margin of error or standard deviation performed by the commission, including internal discussions related to regulations promulgated by the Environmental Protection Agency. The second request seeks (1) any annual reports for the drinking water quality division from 2004 until the date of the request; and (2) any annual or quarterly report during the same period related to the commission's regulation or enforcement of radionuclides in Texas drinking water. You state that some of the information has been provided to the requestor. You claim the submitted information is excepted from disclosure under section 552.111 of the Government Code.¹ We have

¹We note the commission has informed this office that it no longer asserts sections 552.101, 552.102, 552.103, 552.104, 552.106, 552.107, and 552.108 of the Government Code.

considered the exception you claim and reviewed the submitted representative sample of information.² We have also considered arguments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments to this office stating why the information at issue should or should not be released).

Section 552.111 of the Government Code 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. Section 552.111 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 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 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. The 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 information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

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

²We assume 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 those records contain substantially different types of information than those submitted to this office.

(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.

Section 552.111 can also encompass communications between a governmental body and a third-party, including a consultant or other party with a privity of interest. *See* Open Records Decision No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See* ORD 561 at 9.

You state the commission is responsible for the regulation of radionuclides in Texas drinking water. You state the information you seek to withhold consists of communications between the commission's staff, the Texas Radiation Advisory Board (the "board"), and the Texas Department of State Health Services (the "department") relating to the staff's opinions on how the commission carries out its regulations. We note the board is responsible for reviewing state radiation policies and reviews the proposed rules and guidelines issued by the commission and the department that relate to the regulation of radiation sources. Accordingly, we find the commission, board, and department share a privity of interest. Upon review, we find the information we have marked constitutes advice, recommendations, opinions, or other material reflecting the policymaking processes related to the commission's regulation of radionuclide testing. Accordingly, the commission may withhold the information we have marked under section 552.111 of the Government Code. As to the remaining information, we find you have not demonstrated how these communications constitute advice, opinion, or recommendations related to the commission's policymaking functions. Accordingly, none of the remaining information may be withheld under section 552.111 of the Government Code.

We note the remaining information contains e-mail addresses of members of the public.³ Section 552.137 provides, "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). Upon review, we find the e-mail addresses we

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

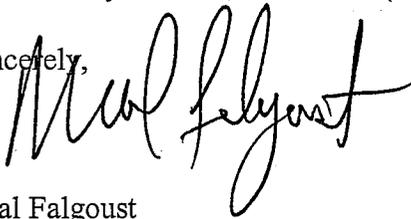
have marked are not the kind excluded by section 552.137(c) and must be withheld under section 552.137 of the Government Code, unless the owners have consented to their release.⁴

In summary, the commission may withhold the information we have marked under section 552.111 of the Government Code. The commission must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners have consented to their release. The remaining information must be released.

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,



Neal Falgoust
Assistant Attorney General
Open Records Division

NF/dls

Ref: ID# 408475

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴We note this office has issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.