Office of the Attorney General
State of Texas

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Mr. Ray Farabee
Vice Chancellor & General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2981

Open Records Decision No. 615

Re: Whether section 3(a)(11) of the Texas Open Records Act, article 6252-17a, V.T.C.S., exempts from public disclosure correspondence from university professors to the chancellor and the department chair regarding the evaluation of a certain professor and the method and criteria used for such evaluation (RQ-496)

Dear Mr. Farabee:

The Chancellor of The University of Texas System (the "system") has received an open records request for two letters written by professors at The University of Texas at Arlington, one letter to the former chancellor of the system and the other to the chairman of the Department of Accounting at the Arlington campus. These letters concern the method and criteria used in the evaluation of a particular professor holding a funded professorship. You contend that these documents are exempt from disclosure under section 3(a)(11) of the Open Records Act (the "act"), article 6252-17a, V.T.C.S.

Section 3(a)(11) excepts from public disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency." In the past, this office ruled in a wide variety of contexts that section 3(a)(11) excepts those interagency and intra-agency memoranda and letters that "contain advice, opinion, or recommendation intended for use in the entity's policymaking/deliberative process." Open Records Decision No. 574 (1990) at 1-2; *see also* Attorney General Opinion H-436 (1974); Open Records Decision Nos. 600 (1992); 582 (1990); 492 (1988); 439 (1986); 308 (1982); 213 (1978); 137 (1976). In *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), however, the Third Court of Appeals recently addressed the proper scope and interpretation of the section 3(a)(11) exception. In light of this decision, we now find it necessary to reexamine our past rulings construing this section.

The documents at issue in *Gilbreath* pertained to the Texas Department of Public Safety's evaluation of the plaintiff as part of the selection process for Texas Ranger positions. In analyzing the question of whether this information was excepted from public disclosure under section 3(a)(11), the court first examined the purpose and history of the exception. 842 S.W.2d at 412. In agreement with the court in *Austin v. City of San*

Antonio, 630 S.W.2d 391, 394 (Tex. App.–San Antonio, 1982, writ ref'd n.r.e.), the *Gilbreath* court recognized that section 3(a)(11) "is intended to protect advice and opinions on *policy matters* and to encourage frank and open discussion within the agency in connection with its decision-making processes." 842 S.W.2d at 412 (emphasis added).

The court next pointed out that section 3(a)(11) of the Open Records Act is patterned after a similar provision, exemption 5, in the federal Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(5), and acknowledged that "[w]hen the legislature adopts a statute from another jurisdiction it is presumed that the legislature intended to adopt the settled construction given to the statute by the courts of that jurisdiction," and "[t]hat presumption also applies when the state adopts a federal statute." 842 S.W.2d at 412 (citations omitted).[1]

FOIA exemption 5 incorporated the "deliberative process privilege," a privilege that had been recognized by the federal courts in the civil discovery context. *Id.* Congress intended this provision to "be governed by 'the same flexible, common-sense approach' that governs discovery of [internal agency memoranda] by private parties involved in litigation with governmental bodies." *Id.* at 412-13 (quoting *Environmental Protection Agency v. Mink*, 410 U.S. 73, 85-86 (1973)). The *Gilbreath* court, however, found that subsequent federal court decisions and, impliedly, decisions of this office, had strayed from the interpretation intended for exemption 5 by Congress and had "engrafted new exceptions upon" this provision and had thereby "limited the scope" of documents available for public inspection under FOIA; the court declined to reach a similar result in interpreting section 3(a)(11) of the Open Records Act. *Id.* at 413. Consequently, the court held that section 3(a)(11) "exempts those documents, and only those documents, normally privileged in the civil discovery context." *Id.*

The Texas Department of Public Safety (the "DPS") had stipulated that "if it was in litigation with Gilbreath the information would be discoverable." *Id.* at 412. Because it was therefore unnecessary for the court to address the question of whether the information at issue would be privileged from discovery in the absence of such a stipulation, the court held:

> By so stipulating, the DPS has admitted that there is no privilege, including a deliberative process privilege, which protects

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[1]Exemption 5 of FOIA provides that "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency" are exempt from public inspection. As the *Gilbreath* court notes, section 3(a)(11) of the Open Records Act as originally enacted excepted "inter-agency or intra-agency memorandums or letters which would not be available by law to a party *other than one* in litigation with the agency." 842 S.W.2d at 412 n.3 (emphasis added). The Texas Legislature amended section 3(a)(11) to its present form in 1989. *Id.* We view this change as a nonsubstantive, corrective one, although we have found no evidence of legislative intent concerning this issue.

> the information from discovery. In other words, these inter-agency or intra-agency memorandums or letters would be available by law to a party in litigation with the agency. Thus, Exemption 11 does not apply, and the information is "public information" as a matter of law.

Id. at 413.

In your case, however, we must actually determine whether the documents at issue would be "normally privileged in the civil discovery context," as the *Gilbreath* court intended that phrase to be interpreted. Based on the limited guidance set out in the *Gilbreath* decision, we conclude that section 3(a)(11) must be construed in accordance with the established interpretation of FOIA exemption 5 by Congress and the federal courts as of the time the Open Records Act was passed by the Texas Legislature. Therefore, in order to determine whether particular information is excepted from disclosure under section 3(a)(11), we will apply the same discovery-based approach applied by the federal courts in pre-Open Records Act cases to determine whether particular internal agency memoranda are exempt from disclosure under FOIA exemption 5.[2]

As will become apparent later in this opinion, these early federal cases interpreting exemption 5 of FOIA applied a standard quite similar to the section 3(a)(11) standard applied by this office prior to the *Gilbreath* decision. *See* attorney general decisions cited *supra* p.1. We recognize that the *Gilbreath* court viewed our prior opinions as interpreting the section 3(a)(11) exception too broadly. Consequently, we believe that the *Gilbreath* decision requires us to interpret section 3(a)(11) in conformance with the pre-Open Records Act federal cases, but in a way that is more limited than our prior opinions.

The Texas Legislature enacted the Open Records Act in 1973, with an effective date of June 14, 1973. *See* Acts 1973, 63d Leg., ch. 424, § 16, at 1118. In January of that year, the United States Supreme Court handed down its decision in *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973). As discussed in *Gilbreath*, the Supreme Court in *Mink* applied a discovery-based analysis in order to determine the scope of exemption 5 of FOIA. As a general rule, "the public is entitled to all such memoranda or letters that a private party could discover in litigation with the agency." *Id.* at 86. In particular, the court found that when Congress enacted exemption 5, it intended to incorporate the privilege from discovery long recognized by the federal courts for "intra-agency advisory opinions." *Id.* The court noted that the legislative history of FOIA indicates that the main purpose underlying exemption 5, like the discovery privilege for advisory opinions, was to promote a "frank discussion of legal or policy matters" within government agencies; such a discussion would be hindered if government officials were forced to

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[2]We caution that the application of this analysis to the section 3(a)(11) exception has no bearing on discovery in the civil litigation context. Section 14(f), which was added to the Open Records Act in 1989, specifically provides that "[t]he exceptions from disclosure under this Act do not create new privileges from discovery."

"'operate in a fishbowl.'" *Id.* at 87 (quoting S. REP. NO. 813, 89th Cong., 1st Sess. 9 (1965)). As the court further noted, however, neither the deliberative process privilege for advisory opinions nor exemption 5 shields from disclosure information that is "purely factual"; rather, only "materials reflecting deliberative or policymaking processes" are protected. *Id.* at 87-89. Both in the discovery context and under exemption 5, any factual material that is "severable" from the advisory portions of internal agency opinions must be disclosed. *Id.* at 88.

In *Mink*, the Supreme Court applied a well-established interpretation of the deliberative process privilege. Prior to the enactment of FOIA in 1966, the federal courts had recognized this privilege in the context of discovery in civil litigation matters. For example, in *Boeing Airplane Co. v. Coggeshall*, 280 F.2d 654 (D.C. Cir. 1960), the court held that the privilege protected certain internal agency opinions from discovery only to the extent that they contained "recommendations as to *policies* which should be pursued by the Board, or recommendations as to decisions which should be reached by it." 280 F.2d at 660 (emphasis added). The privilege did not apply, however, to "investigatory or other factual" information. *Id.* at 660. Likewise, the court in *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.D.C. 1966), also examined the scope of the deliberative process privilege in the context of a discovery dispute. In that case, the court held that the privilege protects "intra-governmental documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Id.* at 324. The purpose of the privilege is to foster "frank expression and discussion among those upon whom rests the responsibility for making the determinations that enable government to operate." *Id.*[3]

Early federal cases interpreting exemption 5 of FOIA applied a similar analysis based on the rules of civil discovery.[4] The courts in these cases recognized that the main

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[3]*See also Davis v. Braswell Motor Freight Lines, Inc.*, 363 F.2d 600 (5th Cir. 1966); *Machin v. Zuckert*, 316 F.2d 336, 339 (D.C. Cir.) *cert. denied*, 375 U.S. 896 (1963) (finding that "privilege attaches to any portions of the report reflecting Air Force deliberations or recommendations as to policies that should be pursued"); *Rosee v. Board of Trade of Chicago*, 36 F.R.D. 684 (N.D. Ill. 1965); *Walled Lake Door Co. v. United States*, 31 F.R.D. 258 (E.D. Mich. 1962).

[4]The application of the deliberative process privilege in the FOIA context differed in one respect from its application in the discovery context. Under the Federal Rules of Civil Procedure, a party seeking discovery of information within the deliberative process privilege could overcome the privilege upon a showing of sufficient need. *See, e.g., Frankenhauser v. Rizzo*, 59 F.R.D. 339 (E.D. Pa. 1973); *Union Oil Co. v. Morton*, 56 F.R.D. 643, 644 (C.D. Cal. 1972); *Olsen v. Camp*, 328 F. Supp. 728, 731 (E.D. Mich. 1969). Under FOIA, however, a court may not inquire into the "particularized needs of the individual seeking the information." *Mink*, 410 U.S. at 86. Rather, the correct test is whether the information would "*routinely* be disclosed to a private party through the discovery process." *Sterling Drug, Inc. v. Federal Trade Comm'n*, 450 F.2d 698, 705 (D.C. Cir. 1971) (quoting H.R. REP. No. 1497, 89th Cong., 2d Sess. 10 (1966)) (emphasis added). In other words, the court must determine whether the information sought "would not be available to *any* party in *any* litigation in which the agency having the records might be involved." *General Services Admin. v. Benson*, 415 F.2d 878, 880 (9th Cir. 1969) (emphasis added).

purpose of exemption 5 was to "encourage the free exchange of ideas during the process of deliberation and policymaking." *Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971); *see also International Paper Co. v. Federal Power Comm'n*, 438 F.2d 1349, 1358-59 (2d Cir. 1971), *cert. denied*, 404 U.S. 827 (1971); *Bristol-Myers Co. v. Federal Trade Comm'n*, 424 F.2d 935, 939 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970). As a result, exemption 5 was held to protect from disclosure "those internal working papers in which opinions are expressed and policies formulated and recommended." *Ackerly v. Ley*, 420 F.2d 1336, 1341 (D.C. Cir. 1969). Similarly, the court in *Soucie* found that this exemption protects "internal communications consisting of advice, recommendations, opinions, and other material reflecting deliberative or policymaking processes." 448 F.2d at 1077. In contrast, the courts addressing the issue uniformly held that the exemption did *not* protect from disclosure purely factual information. *See, e.g., Ethyl Corp. v. Environmental Protection Agency*, 478 F.2d 47, 49-50 (4th Cir. 1973); *General Services Admin. v. Benson*, 415 F.2d 878, 881 (9th Cir. 1969); *Ackerly*, 420 F.2d at 1341 n.7; *Simons-Eastern Co. v. United States*, 55 F.R.D. 88, 88-89 (N.D. Ga. 1972) (holding exemption applies to "opinions, conclusions and reasoning reached by Government officials in connection with their official duties" but not to computations and facts).

Congress incorporated this body of law interpreting the deliberative process privilege into exemption 5 of FOIA. In turn, the Texas Legislature patterned section 3(a)(11) of the Open Records Act on exemption 5. We conclude that section 3(a)(11) excepts from disclosure only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the deliberative or policymaking processes of the governmental body at issue. Section 3(a)(11) does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. As of the enactment of the Open Records Act, no federal court had applied FOIA exemption 5 to memoranda pertaining only to the internal administration of a governmental body; rather, information exempted from disclosure under this provision involved the policy mission of the agency in some way. Therefore, we stress that in order to come within the 3(a)(11) exception, information must be related to the *policymaking* functions of the governmental body. An agency's policymaking functions do not encompass routine internal administrative and personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues.[5]

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[5]The federal court decisions interpreting FOIA exemption 5 also distinguished between "predecisional" and "postdecisional" internal agency memoranda. Exemption 5 does not exempt from disclosure documents that serve to explain an agency decision already reached, rather than to aid in the policymaking process itself. *See, e.g., Sterling Drug, Inc. v. Federal Trade Comm'n*, 450 F.2d 698, 705-06 (D.C. Cir. 1971); *Benson*, 415 F.2d at 881. As discussed below, we conclude that the information at issue in the present case is not related to the policymaking functions of the system. Therefore, the predecisional/postdecisional distinction is not implicated here.

In your case, you argue that the relevant documents are excepted from disclosure by section 3(a)(11) because each is "an intra-agency memorandum which contains advice, opinion, or recommendation that is used in the deliberative or decision making process." We note that some of the information contained in these documents is factual, such as objective statements concerning various events. As discussed above, purely factual information is not excepted from disclosure by the deliberative process privilege as incorporated into section 3(a)(11). Furthermore, the information at issue here does not appear to pertain to the policymaking functions of the system. Rather, it relates solely to an internal personnel matter involving a particular individual. We conclude that this information is not of the type the Texas Legislature meant to except from disclosure when it enacted section 3(a)(11) based on FOIA exemption 5. Therefore, the requested information must be released in its entirety.

SUMMARY

Under the court's decision in *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408 (Tex App.--Austin 1992, no writ), section 3(a)(11) of the Texas Open Records Act must be interpreted in accordance with the settled construction of exemption 5 of the federal Freedom of Information Act, 5 U.S.C. § 552(b)(5), as of the time the Open Records Act was enacted. Consequently, section 3(a)(11) excepts from required public disclosure only those internal agency memoranda consisting of advice, recommendations, and opinions that pertain to the policymaking functions of the governmental body at issue. Because the correspondence between university officials at issue here relates solely to an internal personnel matter involving a particular individual, and does not implicate the policymaking functions of the university system, it must be disclosed.

Very truly yours,

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