No. 03-21-00256-CV

In the Court of Appeals
Third District of Texas
At Austin

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
Appellant
v.
SIERRA CLUB
Intervenor-Appellee
and
KEN PAXTON, ATTORNEY GENERAL OF TEXAS
Appellee

On Appeal from the 53rd Judicial District Court
Travis County, Texas
Cause No. D-1-GN-19-006941

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ORAL ARGUMENT REQUESTED

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STATEMENT REGARDING ORAL ARGUMENT

Sierra Club requests oral argument. Oral argument would assist the Court given: the large volume of information at issue; the detailed facts regarding the dates and actions showing that TCEQ's submission to the Attorney General was untimely; and the importance of the public's interest in disclosure of that information.

ISSUES PRESENTED

1. Can TCEQ withhold six documents, even though it makes no argument that they are privileged or excepted from disclosure under the Act?

   a. Are these six documents responsive to Sierra Club's public-information request?

   b. Should these six documents be removed from the scope of the protective order intended to protect documents TCEQ contends are privileged or excepted from disclosure?

2. Does the deliberative process privilege apply to the remaining documents, [redacted]?

3. Even if the deliberative process privilege applies, should these documents be disclosed because:

   a. TCEQ failed to timely submit a request for a ruling from the Attorney General, and

   b. TCEQ cannot show a compelling reason to overcome the statutory presumption that the information must be disclosed?

STATEMENT OF FACTS

This appeal concerns a request under the Texas Public Information Act submitted to the Texas Commission on Environmental Quality ("TCEQ") by the Sierra Club and its Lone Star Chapter.[1]

I. The Public-Information Request.

Sierra Club requested information from TCEQ regarding or relating to a "Development Support Document," or "DSD." CR 1176. DSDs summarize how TCEQ calculated a value to measure the cancer risk from breathing in a specific pollutant—in this case, ethylene oxide.[2]

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[1] TCEQ's brief mislabels the requestor as Earthjustice. *See, e.g.*, TCEQ Br. at 2, 25. Sierra Club is the Requestor. *See* CR 1176 ("on behalf of Sierra Club"). Sierra Club is a national nonprofit organization dedicated to the protection of the quality of the natural and human environment, with local chapters throughout the country. The Texas chapter is known as the Lone Star Chapter. For years, the Lone Star Chapter has prioritized issues of public transparency and air quality, to protect the public health and well-being of Texans.

[2] TCEQ, About TCEQ Development Support Documents (DSDs) for Effects Screening Levels (ESLs) and Air Monitoring Comparison Values (AMCVs), https://www.tceq.texas.gov/toxicology/dsd. (DSDs "summarize[] how chemical-specific toxicity values were derived").

Understanding the danger from ethylene oxide emissions is a critical issue to Texans.[3] According to a national inventory, there are at least 32 existing chemical plants in Texas that emit nearly 40 tons of ethylene oxide into the air every year.[4] These emissions create at least four cancer risk hotspots in Texas.[5]

In 2016, scientists with the U.S. Environmental Protection Agency's "IRIS" Program (Integrated Risk Information System) completed a toxicological review of ethylene oxide.[6] After ten years

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[3] *See* Kiah Collier & Maya Miller, *A Laredo Plant That Sterilizes Medical Equipment Spews Cancer-Causing Pollution on Schoolchildren,* TEX. TRIBUNE (Dec. 27, 2021), https://www.texastribune.org/2021/12/27/laredo-texas-ethylene-oxide/; EPA 2014 National Air Toxics Assessment (released in 2018), https://www.epa.gov/national-air-toxics-assessment/2014-nata-results-summary.

[4] EPA, 2017 National Emissions Inventory data, https://www.epa.gov/air-emissions-inventories/2017-national-emissions-inventory-nei-data. [Under "Data Summaries," download "Facility-level by pollutant" then sort by Texas and ethylene oxide].

[5] *See* ProPublica, The Most Detailed Map of Cancer-Causing Industrial Pollution in the U.S. (Nov. 2, 2021), https://projects.propublica.org/toxmap/; Sharon Lerner, A Tale of Two Toxic Cities, The Intercept (Feb. 24, 2019) (chart showing 109 cancer risk hot spots due in part to ethylene oxide emissions), https://theintercept.com/2019/02/24/epa-response-air-pollution-crisis-toxic-racial-divide/.

[6] *See* EPA IRIS, Evaluation of The Inhalation Carcinogenicity of Ethylene Oxide, CASRN 75-21-8 (Dec. 2016), available for download at:https://cfpub.epa.gov/ncea/iris/iris_documents/documents/toxreviews/1025tr.pdf

of study, peer-review, and public comment, the IRIS scientists determined the value that represents the amount of cancer risk caused from breathing in ethylene oxide pollution.[7]

To regulate chemicals like ethylene oxide, TCEQ's usual practice is to apply the IRIS cancer-risk value. *See* 30 Tex. Admin. Code § 350.73(a)(1) (listing IRIS first), § 334.203(3)(A) (listing IRIS first).[8] TCEQ did not follow its usual practice for ethylene oxide.

Instead, TCEQ calculated its own cancer risk value that is thousands of times less-protective than IRIS scientists had shown.[9] TCEQ summarized its calculations in the proposed DSD, published

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[7] *See Id.*

[8] *See also* Publication No. RG-442, TCEQ GUIDELINES TO DEVELOP TOXICITY FACTORS at 135 (Sept. 2015), available for download at: https://www.tceq.texas.gov/assets/public/comm_exec/pubs/rg/rg-442.pdf (listing IRIS first).

[9] The IRIS cancer risk value for ethylene oxide is:

- 0.0091 per part-per-billion of ethylene oxide, or
- 0.0050 per microgram of ethylene oxide per cubic meter.

EPA, IRIS Executive Summary at 5, available for download at: https://cfpub.epa.gov/ncea/iris/iris_documents/documents/subst/1025_summary.pdf.

TCEQ proposed that the cancer risk value was:

- 0.0000025 per part-per-billion of ethylene oxide, or
- 0.0000014 per microgram of ethylene oxide per cubic meter.

CR 1253.

on June 28, 2019. CR 1242. TCEQ finalized the DSD on May 15, 2020.[10] Use of TCEQ's less-protective risk value will allow Texas facilities to emit higher levels of ethylene oxide, including levels that the IRIS scientists showed are dangerous and highly carcinogenic.[11]

In the proposed DSD, TCEQ relied on the work of Dr. Valdez-Flores. The DSD:

- explained that TCEQ "contracted with" Dr. Valdez-Flores "to perform supplemental analysis," CR 1306, 1341, 1345;
- cited as factual support "personal communication" with Valdez-Flores, CR 1264, 1277;
- selected Valdez-Flores's 2010 paper, funded by the American Chemistry Council,[12] as its key study, CR 1340; and

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[10] TCEQ's final cancer risk value is:
- 0.0000041 per part-per-billion of ethylene oxide, or
- 0.0000023 per microgram of ethylene oxide per cubic meter.

TCEQ, Ethylene Oxide (EtO) Development Support Document (dated May 15, 2020), https://www.tceq.texas.gov/toxicology/ethylene-oxide.

[11] *See* Ocampo, *TCEQ, Midwest Sterilization Dispute Report Citing Increased Cancer Rate for Laredoans*, LAREDO MORNING TIMES ONLINE (updated Dec. 8, 2021), https://www.lmtonline.com/news/article/TCEQ-Midwest-Sterilization-dispute-report-citing-16684064.php (TCEQ arguing against the need to reduce ethylene oxide emissions from a sterilization facility).

[12] *See* CR 1515–16 ("The funding for this paper was from contracts with the American Chemistry Council … on behalf of its Ethylene Oxide Panel.").

- relied on an unpublished study that had "become available" to Valdez-Flores, CR 1341.

Dr. Valdez-Flores is a known consultant for the American Chemistry Council and other ethylene oxide industry and lobbying groups.[13]

On July 1, 2019, Sierra Club submitted a public-information request seeking information "regarding or relating to" TCEQ's DSD and the information TCEQ relied on or considered in developing the DSD, such as information regarding the toxicity of ethylene oxide or the modeling approach. CR 1176 ("public-information request"). Sierra Club also requested information regarding or relating to the IRIS cancer risk value. CR 1176.

Sierra Club was particularly concerned about the potential influence of the American Chemistry Council, or "ACC," on TCEQ's assessment.[14] Therefore, the public-information request specifically

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[13] *See, e.g.*, CR 1514 ("The work of Drs. Sielken and Valdez-Flores was supported by the Ethylene Oxide Industry Panel of the Chemical Manufacturers Association."); CR 1516 ("The funding for this paper was a contract between Sielken & Associates Consulting, Inc. and the American Chemistry Council … on behalf of its Ethylene Oxide Panel."); CR 1520 ("The authors are exposure-response assessment consultants to both EO chemical and sterilant trade groups. Funding for this research and its publication was received from the Ethylene Oxide Sterilant Association (EOSA) and the American Chemistry Council (ACC).").

[14] *See, e.g., supra* n. 13; American Chemistry Council, Request for Correction (Sept. 20, 2018), available for download at: https://www.epa.gov/sites/production/files/2018-10/documents/iqa_petition_eo-_sept_2018_0.pdf.

asked for communications between TCEQ and the American Chemistry Council or Exponent, a consulting firm that works with the ACC.[15] Because the proposed DSD identified Valdez-Flores as a contractor, the public-information request also included his name "Valdez-Flores" as a search term. CR 1178.

II. TCEQ's Request for an Attorney General Ruling.

TCEQ refused to release all responsive information. TCEQ claimed that the information was protected from disclosure by the deliberative process privilege and requested a ruling from the Texas Attorney General pursuant to Section 552.301. CR 1186. TCEQ cited no other basis for withholding information. TCEQ's request, dated July 17, 2019, stated that the ten-day deadline for it to request a ruling from the Attorney General was July 17, 2019. CR 1186. The Attorney General received TCEQ's request on July 18, 2019. CR 1197.

III. The Attorney General's Ruling.

The Attorney General ruled that TCEQ had not complied with the Act's ten-day deadline to request a ruling, thus triggering the statutory presumption that the requested information was public. CR 1197. The Attorney General reviewed TCEQ's arguments regarding the deliberative process privilege and concluded that TCEQ had not shown a "compelling reason" under the Act to withhold the

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[15] *See* CR 1177; Exponent Presentation on behalf of the American Chemistry Council's Ethylene Oxide Panel at CR 1420.

information. CR 1197–98. The Attorney General therefore ruled that TCEQ "must release" the requested information to Sierra Club. CR 1198.

IV. TCEQ's Request for Reconsideration.

After the Attorney General ruling, TCEQ requested the Attorney General change its ruling. CR 1200. In a letter styled as a "Request for Correction," TCEQ argued that its submission was timely, stating for the first time that its offices were closed on July 4 and 5, and that it had deposited its request for a ruling in interagency mail on July 17. CR 1200. The Attorney General took no action on TCEQ's request for correction, because the Act does not allow a governmental body to ask the Attorney General for reconsideration or rehearing. *See* OFFICE OF THE ATTORNEY GENERAL, PIA HANDBOOK at CR 1234 (Tex. Gov't Code § 552.301(f) "precludes a governmental body from asking for reconsideration of an attorney general decision that concluded the governmental body must release information").[16]

V. The Trial Court Proceedings.

TCEQ filed suit against the Texas Attorney General, seeking a declaration that TCEQ may withhold the requested information on the basis of the deliberative process privilege, Tex. Gov't Code

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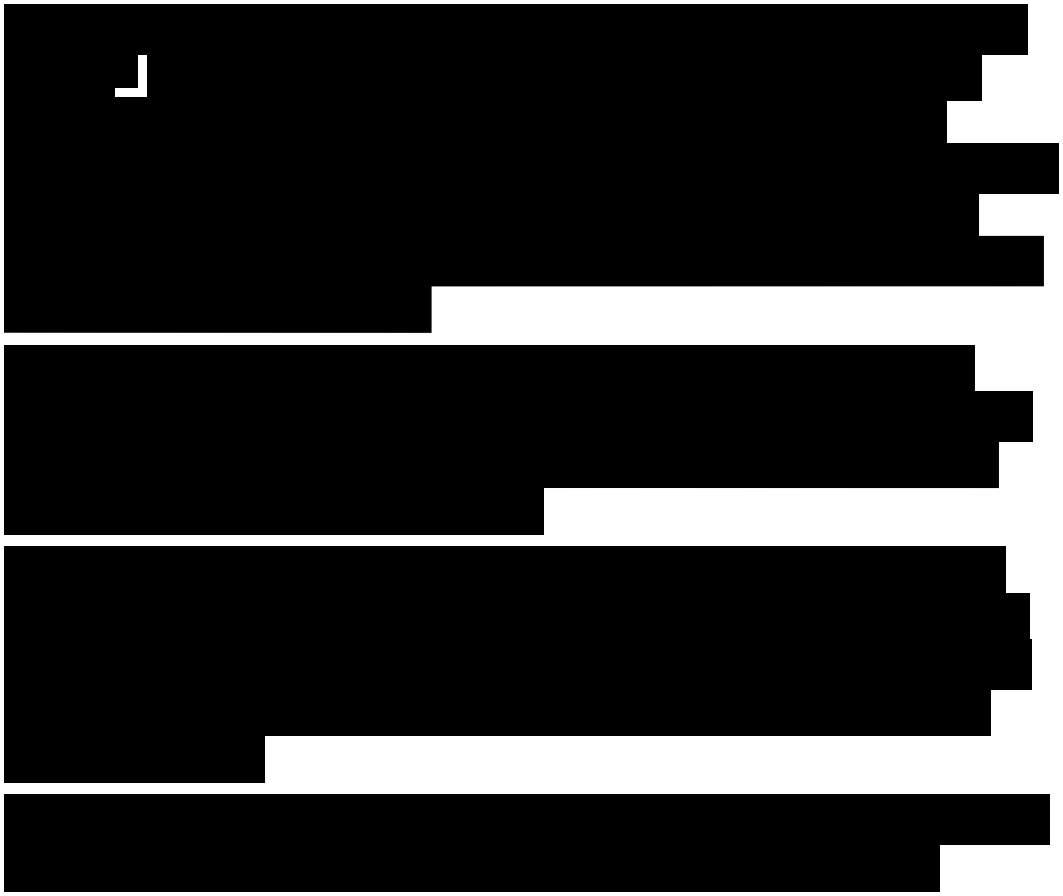
[16] Sierra Club's summary judgment evidence includes relevant excerpts of the PIA Handbook. CR 1233. The full publication can be accessed online at https://www.texasattorneygeneral.gov/open-government/office-attorney-general-and-public-information-act.

§ 552.324. CR 6. Sierra Club intervened to oppose TCEQ's request for declaratory relief, Tex. Gov't Code § 552.325(a), and to seek a writ of mandamus to compel TCEQ to release the requested information that the Attorney General had determined was public information that must be disclosed, *id.* § 552.321(a). CR 96.

The trial court entered a protective order for the production to Sierra Club's counsel of "certain information" TCEQ argues "is excepted from required disclosure under the Act." CR 175. The "Information at Issue" is further defined as "all interagency communications … regarding the creation of TCEQ's Ethylene Oxide Carcinogenic Dose-Response Assessment Development Support Document ['DSD'], proposed June 28, 2019." CR 175.

The documents TCEQ provided to counsel for Sierra Club under the protective order [redacted]

[17] The information at issue was submitted for *in camera* review as part of the summary judgment evidence. CR 1601. The documents are Bates-Numbered 1–6414. In this brief, Sierra Club cites to each document by its Bates Number. To facilitate the Court's review of these documents, Sierra Club has prepared the index attached as Appendix 5.



The parties submitted the case to the trial court for decision on cross-motions for summary judgment,[19] and the trial court ruled in favor of Sierra Club and against TCEQ on all claims. CR 1728-30. The trial court ordered TCEQ to produce the requested information to Sierra Club, entered a take-nothing judgment on TCEQ's claim

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18 TCEQ Contract No. 582-18-81465 at CR 1526; Work Order No. 582-18-81465-3 at CR 1564.

19 To comply with the Protective Order, the parties filed both (1) redacted public versions of the briefs, which are in the Clerk's Record of June 29, 2021, and (2) unredacted briefs filed under seal, which are in the Supplemental Clerk's Record of October 18, 2021.

against the Attorney General, and awarded Sierra Club its attorneys' fees. *Id.* TCEQ appeals the trial court's final judgment.

SUMMARY OF THE ARGUMENT

The trial court correctly ruled that TCEQ must release all information at issue to Sierra Club under the Texas Public Information Act.

First, TCEQ belatedly argues that some documents are not responsive to Sierra Club's public-information request. The documents are plainly responsive [redacted]. Further, because TCEQ has withdrawn all arguments that these documents are privileged or otherwise excepted from disclosure, they should no longer be subject to the protective order entered in this case.

Second, TCEQ may not withhold the remaining information at issue under the deliberative process privilege. [redacted] is neither "policy-making" nor "deliberative," as required for the privilege to apply. And, even if the deliberative process privilege did apply, TCEQ must still produce the information, because it failed to comply with the statutory ten-day deadline to request a ruling from the Attorney General and cannot show a "compelling reason" to rebut the resulting presumption of public disclosure—particularly

here, where the public has a strong interest in the full disclosure [redacted].

Because Sierra Club is the prevailing party, the trial court properly awarded Sierra Club its attorneys' fees. The final judgment should therefore be affirmed.

ARGUMENT

I. The Standard of Review.

In a public-information case, the governmental body bears "the burden of proving in a judicial proceeding that an exception to disclosure applies." *Thomas v. Cornyn*, 71 S.W.3d 473, 488 (Tex. App.—Austin 2002, no pet.). Any exceptions to disclosure must be "construed narrowly." *Arlington ISD v. Tex. Att'y Gen.*, 37 S.W.3d 152, 157 (Tex. App.—Austin 2001, no pet.). The Act must be "liberally construed in favor of granting a request for information." Tex. Gov't Code § 552.001(b).

This case was appropriately resolved on summary judgment because the issues concern the application of the Texas Public Information Act to undisputed facts. "[W]hether information is subject to the Act and whether an exception to disclosure applies to the information are questions of law." *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 357 (Tex. 2000).

This Court reviews the trial court's summary judgment ruling *de novo*. *City of San Antonio v. Abbott*, 432 S.W.3d 429, 430 (Tex. App.—Austin 2014, pet. denied). For a case decided on cross-motions for summary judgment, this Court reviews "the summary-judgment evidence presented by both sides," determines "all questions presented," and if the trial court erred, renders "the judgment that the trial court should have rendered." *Id.* at 431.

II. TCEQ has no basis to avoid public disclosure of the documents it belatedly asserts are not responsive to the public-information request.

TCEQ has cycled through argument after argument in an attempt to avoid disclosure of two sets of documents regarding [redacted]. While TCEQ may prefer the public not see these documents, it has no legal basis to avoid public disclosure. TCEQ's latest contention that these documents are not responsive to the public-information request should be rejected as untimely, unmeritorious, or both.

A. The disputed documents are responsive.

The two sets of documents in question are responsive to the public-information request, as the trial court determined. TCEQ staff that worked on the DSD provided the documents to TCEQ in response to the public-information request. TCEQ Br. at 7, n. 4. TCEQ itself "initially determined" that these documents were responsive. TCEQ Br. 27. TCEQ also produced the information under a Protective Order applicable to information "regarding the creation of TCEQ's Ethylene Oxide DSD"—*i.e.,* the very information sought by the public-information request. CR 175 (protective order), CR 1176 (PIA request).

But, after the suit had been pending for over a year, after summary judgment briefing had concluded, and only a week before the hearing, TCEQ withdrew all prior claims of privilege and argued for the first time that the documents were not responsive. *See* TCEQ Br. at 7, n.4, and 26; TCEQ's Third Am. MSJ at CR 1615. The trial court requested supplemental briefing on this issue,[20] reviewed this information *in camera*, and ruled against TCEQ and in favor of the Sierra Club, finding that the information is responsive and must be released. This Court should affirm that ruling.

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[20] The unredacted version of the supplemental briefing is in the Supplemental Clerk's Record filed on October 18, 2021.

TCEQ's distorted portrayal of the scope of the request conflicts with both the plain language of the request and the legislative directive requiring liberal interpretation in favor of granting public-information requests. *See* Tex. Gov't Code § 552.001(b) (The Texas Public Information Act "shall be liberally construed in favor of granting a request for information.").

1. The public-information request is not limited to draft documents.

TCEQ makes the sweeping argument that both sets of documents are not responsive because they are not "drafts." TCEQ Br. at 27. But the public-information request is not limited to "drafts." None of the five categories listed in the request is restricted to "drafts." The public-information request seeks all information "regarding or relating to":

> (1) The Texas Commission on Environmental Quality (TCEQ) proposed or final Development Support Document entitled "Ethylene Oxide Carcinogenic Dose-Response Assessment" (June 28, 2019), its plan for and/or draft of such document, and/or any other material discussing or including the modeling approach, the toxicity information, or any other proposed, draft, or final action to create a unit risk factor (or URF, unit risk estimate, or any cancer-risk value or metric) for Ethylene Oxide;[1]
> (2) The full and underlying record of information on which TCEQ is relying and/or that TCEQ has considered or is considering in potential support of the Ethylene Oxide Development Support Document;
> (3) The comments that TCEQ filed with EPA stating that: "the TCEQ is in the process of deriving a URF for ethylene oxide. . . ." and describing a "draft" of this document;[2]
> (4) TCEQ's draft or final "request for toxicity information on Ethylene Oxide" to EPA and/or the public (Aug. 16, 2017);
> (5) U.S. EPA's Integrated Risk Information (IRIS) draft or final Evaluation, toxicological review, and cancer risk value or Unit Risk Estimate for Ethylene Oxide (2016).[3]

CR 1176–77. The request for "communications between TCEQ and … any person employed by, contracting, or otherwise affiliated with …

the American Chemistry Council [or] Exponent" is similarly not limited to "drafts." CR 1177.

Moreover, the phrase "regarding or relating to" that precedes each category of information broadens the scope of the request beyond its specific terms to include any material connected to its subject matter. This Court has held that the term "relates to" means "'to have a connection with, to refer to, or to concern' and is very broad in its ordinary usage." *Adkisson v. Paxton*, 459 S.W.3d 761, 771 (Tex. App.—Austin 2015, no pet.).

2. [redacted]

The first set of documents, Bates Nos. 966–69, 975–82, and 985–88, a[redacted] are responsive to the first, second, and fifth categories of the request. [redacted]

- [redacted]
- [redacted]
- [redacted]

[21] TCEQ Contract No. 582-18-81465 at CR 1526; Work Order No. 582-18-81465-3 at CR 1564.

[redacted]

[redacted]

3. [redacted].

The second set of documents, Bates Nos. 415-16, 500-01, and 564-65, [redacted]:

[redacted]

[redacted] responsive to Sierra Club's first, second, and fifth requested categories of information and must be released [redacted]

[redacted]

22 [redacted]

[redacted] appears elsewhere in the rest of the information at issue that TCEQ concedes is responsive—at Bates Nos. 347-48, 351-52, 374-75, 377-78, 496-97, 523-24, and 526-27. TCEQ gives no explanation why the exact same document is not responsive in one part of the document set, yet responsive in others.

B. The Protective Order should be lifted as to these documents because, even if they were not responsive, TCEQ raises no exception to public disclosure.

There is no valid basis to continue to protect the confidentiality of documents to which TCEQ raises no exception to public disclosure. *See* TCEQ Br. at 4, n. 3. The trial court issued the Protective Order to apply to information TCEQ argues "is excepted from required disclosure under the [Act] ('Information at Issue')." CR

[23] [redacted]

175. But with respect to the two sets of documents TCEQ now contends are "nonresponsive," TCEQ no longer asserts this information is excepted from required disclosure under the Act. *See* TCEQ Br. at 4, n.3. TCEQ has already produced these documents to counsel for Sierra Club as part of the "Information at Issue," rendering the question of whether they are responsive or not little more than an academic exercise. Because TCEQ raises no privilege or exception to required disclosure, it has no justification for maintaining the confidentiality of these documents under the strict restrictions in the Protective Order.

As discussed more fully below, Section IV.B.2, there is a strong public interest in prompt disclosure of these documents, as the Environmental Protection Agency ("EPA") is currently considering requests by TCEQ and the American Chemistry Council to apply TCEQ's weaker toxicity value on a nationwide basis.[24] Due to the protective order, Sierra Club has been unable to see the documents, or to consider including the information they contain in comments to EPA. And, as a result, both state and national decision-makers have

[24] EPA Proposal, 87 Fed. Reg. 6,466 (Feb. 4, 2022); TCEQ, Petition for Reconsideration (Oct. 12, 2020), available at: https://www.regulations.gov/comment/EPA-HQ-OAR-2018-0746-0243; American Chemistry Council, Petition for Reconsideration (Aug. 12, 2020), available at: https://www.regulations.gov/comment/EPA-HQ-OAR-2018-0746-0243.

been unable to fully understand the value TCEQ calculated. Sierra Club therefore respectfully requests that this Court order the immediate lifting of the Protective Order as to these six documents so that Counsel for the requestor can provide the documents to the requestor for its review, use, and consideration in all pending public proceedings involving ethylene oxide.

III. TCEQ must release the remaining documents because the deliberative process privilege does not apply.

TCEQ has failed to carry its burden to establish that the deliberative process privilege shields any of the remaining documents from disclosure.[25] *Thomas*, 71 S.W.3d at 488. "The Legislature has clearly expressed its intent that exceptions to disclosure be construed narrowly." *Jackson v. State Office of Admin. Hearings*, 351 S.W.3d 290, 299 (Tex. 2011).

To fall within the scope of the deliberative process privilege, a governmental body must establish that a document meets each of these three requirements:

(1) **Predecisional**. "Predecisional documents are those prepared in order to assist an agency decisionmaker in arriving at his decision." *City of Garland*, 22 S.W.3d at 361 (quotation omitted).

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[25] Bates Nos. other than 415-16, 500-01, 564-65; and 966–69, 975–82, 985–88. TCEQ does not allege that Bates Nos. 415-16, 500-01, 564-65; and 966–69, 975–82, 985–88 are protected by the deliberative process privilege.

(2) **Deliberative**. "Deliberative documents reflect the give-and-take of the consultative process." *Id*. (quotation omitted). "[P]urely factual information" is not deliberative. *Id at* 364.

(3) **Involved in the formulation of policy**. The privilege protects only documents that "reflect the agency's group thinking in the process of *working out its policy and determining what its law shall be*." *Id*. at 366 (quoting Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 797 (1967) (emphasis added by Court)). The privilege does not apply when a communication "merely implemented existing policy and did not contribute to policy formulation." *Id*. at 363. The privilege also does not apply to "internal administrative or personnel matters that d[o] not involve … policymaking." *Id.*

TCEQ claims predecisional documents are "[c]onsequently … also deliberative." TCEQ Br. at 12. But, the U.S. Supreme Court case cited by TCEQ only states that "a document cannot be deliberative unless it is predecisional," not that *all* predecisional documents are deliberative. *United States Fish & Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777, 786 (2021). Here, as explained below, the documents do not meet one or more of the elements adopted by the Texas Supreme Court and therefore cannot be withheld under the deliberative process privilege.

A. The DSD is not deliberative and does not formulate policy.

TCEQ cannot show the deliberative process privilege applies to any of the documents because the DSD is not policy-making. Rather than "represent" a "policy position" by TCEQ, *see* TCEQ Br. at 11, the DSD "summarize[s]" how the ethylene oxide risk value was "derived," *i.e.*, calculated,[26] following the existing policy of the agency.[27] Deliberative process privilege does not apply to documents that "merely implement[] existing policy and d[o] not contribute to policy formulation." *City of Garland*, 22 S.W.3d at 363. Contrary to TCEQ's contention, a DSD, *i.e.*, a summary of how a value was calculated following existing agency policy, does not "represent" a "policy position." TCEQ Br. at 11.

TCEQ contends that disclosure here "would cause greater harm than good" and warns that disclosure of the requested information "could chill the open and honest scientific analysis and discourse TCEQ needs to arrive at a correct and scientifically defensible position." TCEQ Br. at 25. But "scientific analysis and discourse" is

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[26] TCEQ, About TCEQ Development Support Documents (DSDs) for Effects Screening Levels (ESLs) and Air Monitoring Comparison Values (AMCVs), https://www.tceq.texas.gov/toxicology/dsd (DSDs "summarize[] how chemical-specific toxicity values were derived").

[27] *See* Publication No. RG-442, TCEQ GUIDELINES TO DEVELOP TOXICITY FACTORS (Sept. 2015), available for download at https://www.tceq.texas.gov/toxicology/esl/guidelines/about.

not "policymaking," and [redacted] is not a policy—it is a mathematically calculated number that is based on purported factual and scientific information. The Supreme Court considered and rejected extending the privilege to information held out as science or fact, even recognizing a potential "chilling effect" on agency discussions: "We recognize that public disclosure of agency communications reflecting deliberative processes on any subject, even nonpolicy communications, could have a chilling effect on agency employees' communications in the future. But the exception's purpose is not to prevent all disclosures that would chill all frank and open discussions." 22 S.W.3d at 364; *see also Arlington ISD*, 37 S.W.3d at 158–60; Tex. Att'y Gen. Op. ORD 615 at 4-5 (1993). "Disclosure of information not related to policy matters will not inhibit free discussion among agency personnel about policy matters." *City of Garland*, 22 S.W.3d at 364.

TCEQ further argues that the documents concern policymaking simply because they are "related to" TCEQ's "mission" and "official business": "The information at issue was created as a part of TCEQ's policymaking process because the information is directly related to its agency mission and concerns the official business of the agency, which is the conservation of natural resources and the protection of the environment and public health." TCEQ Br. at 14.

Under this conception of policymaking, there is little information, if any, that would fall outside the scope of the deliberative process privilege. As the Supreme Court noted, "every decision an agency makes arguably involves a policy." *City of Garland*, 22 S.W.3d at 365. Thus, allowing an agency to withhold documents "because they somehow involve policy, is the same as holding that there is no policy requirement at all." *Id.* Accepting TCEQ's broad conception of "policymaking" here would endorse the very situation the Supreme Court warned against: giving in to the "inevitable temptation" of a government agency to interpret the privilege "as expansively as necessary to apply it to the particular records it seeks to withhold." *Id.* at 362.

None of the documents at issue can be withheld under the deliberative process privilege, because they were not involved in "policy formulation," as expressly required to qualify for the privilege by the Texas Supreme Court's test in *City of Garland*.

B. [redacted]

[28] Bates Nos. 283-88, 785-813 (and attachments to Bates Nos. 785, 794, and 795), and 6414.

[redacted]

TCEQ [redacted] argues that factual information "reveal[s] something about the deliberative process by indicating where additions and deletions were made in the preliminary draft as it was reviewed." TCEQ Br. at 13. Yet as the Attorney General has repeatedly ruled: "Underlying factual data upon which the document was based … where severable, must be released." Tex. Att'y Gen. Op. ORD-559 at 3 (1990); Tex. Att'y Gen. Op. ORD-631 at 3 (1995) ("severable factual material may not be withheld"); *see also City of Garland*, 22 S.W.3d at 364. [redacted] Thus, these documents cannot be withheld under the deliberative process privilege.

C. [redacted]

[redacted]

[redacted]

D. [redacted]

[redacted]

IV. Alternatively, TCEQ must release the documents because it failed to comply with the Act's statutory deadlines and cannot show a compelling reason to withhold them.

Even if the deliberative process privilege did apply, TCEQ cannot withhold the requested information because TCEQ failed to timely request a ruling from the Attorney General and has not raised a compelling reason to outweigh the public interest in disclosure.

A. TCEQ failed to request an Attorney General ruling within ten business days.

To further the stated public policy of ensuring that "each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government," the Act requires governmental bodies seeking to withhold information from disclosure to strictly comply with certain statutory deadlines. Tex. Gov't Code § 552.001(a).

In particular, if a governmental body seeks to withhold information pursuant to one of the exceptions in the Act, it must request a ruling from the Attorney General "not later than the 10th business day after the date of receiving" a public-information request. *Id*. § 552.301(b). If a governmental body fails to comply with this deadline, then the requested information is "presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information." *Id.* § 552.302.

Here, TCEQ failed to comply with the requirement to request a ruling from the Attorney General within ten business days. TCEQ received the public-information request on July 1, 2019. *See* CR 1186 (verifying receipt on July 1). The Attorney General received TCEQ's request for a ruling on July 18, 2019. CR 1196.

In its request for a ruling, TCEQ asserted that "[t]he 10th business day after receipt of the request is July 17, 2019"—i.e., the day before the Attorney General received it—but did not inform the Attorney General of any intervening holidays. *Id*. The Attorney General concluded that—even when considering July 4 as a national holiday—the ten-business day deadline was July 16, not July 17. CR 1197. Because the Attorney General had received TCEQ's request for decision on July 18, 2019, the Attorney General ruled that TCEQ's

request for decision was outside the statute's ten-business-day period and untimely. CR 1197.

1. TCEQ may not rely on arguments that it failed to make before the Attorney General issued its ruling.

After receiving the adverse Attorney General ruling, TCEQ asserted the following three post-hoc reasons to argue that it should not be held responsible for its failures to inform the Attorney General of all relevant facts bearing on the timeliness of its submission:

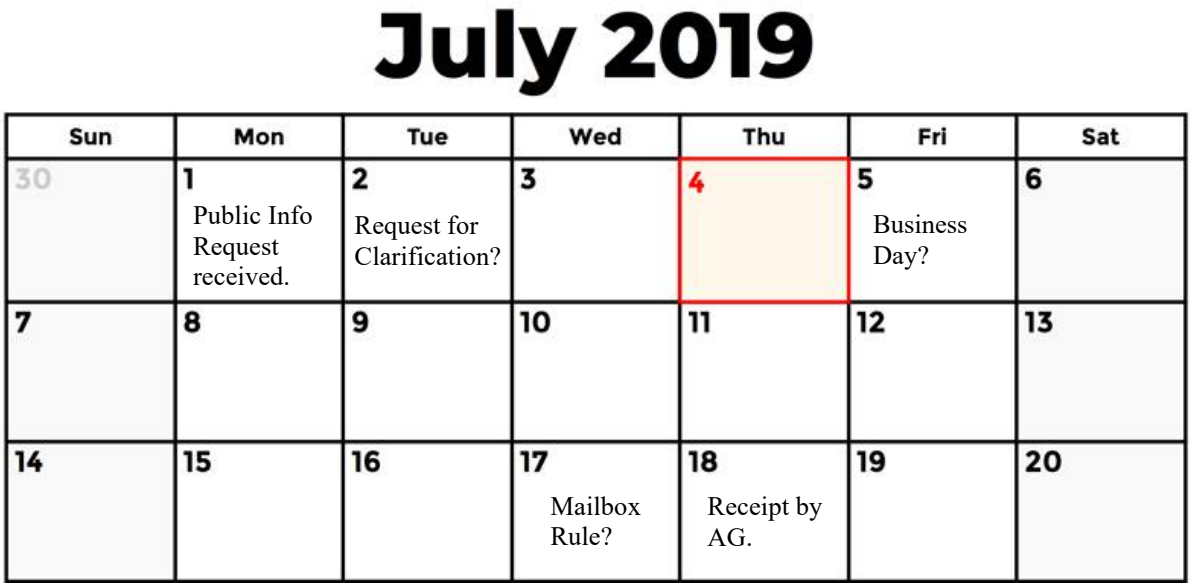
- TCEQ claims that the Attorney General should have added an extra day to the deadline, based on a less-than five-minute email exchange on the public-information request that TCEQ did not mention in its request for a ruling.
- TCEQ asserts the Attorney General miscalculated the deadline by including Friday, July 5 as a business day, even though TCEQ did not inform the Attorney General in its request for a ruling that TCEQ was closed that day.
- TCEQ contends the Attorney General should have applied the "mailbox rule," even though TCEQ never told the Attorney General before ruling that TCEQ had deposited its request in interagency mail or when it did so.

TCEQ may not cure these types of deficiencies after receiving an adverse Attorney General ruling. The Act imposes strict deadlines on an agency to seek an attorney-general opinion. Tex. Gov't Code § 552.301. The Act requires the Attorney General to issue a ruling within a set period of time. *Id*. § 552.306. And the Act prohibits the

agency from seeking reconsideration of the Attorney General's ruling. *Id*. § 552.301(f).

Together, these provisions mean that a governmental body must provide the Attorney General with enough information on the timeliness of the submission to make an informed decision *before the Attorney General rules*. The Act does not allow a governmental body, having received a decision it does not like, to introduce new evidence and arguments that it failed to introduce earlier. Judicial review of an Attorney General's decision is a fair opportunity for a governmental body to seek correction of errors made *by the Attorney General*. But judicial review is not a second chance for TCEQ to fix mistakes that TCEQ itself made. Under the Act, the "only suit a governmental body may file seeking to withhold information from a requestor is a suit that" "seeks declaratory relief from compliance with a decision by the attorney general." *Id.* § 552.324(a)(2). Here, based on the information TCEQ provided to it, the Attorney General's decision was correct. This Court should reject TCEQ's attempts to avoid compliance with that ruling by offering arguments bearing on the timeliness of its submission that TCEQ never presented to the Attorney General before ruling.

The calendar below identifies the relevant dates, beginning with the undisputed date that TCEQ received the public-information request (July 1), ending with the undisputed date that the Attorney General received TCEQ's request for a ruling (July 18), counting July 4 as a holiday (even though TCEQ did not so state this in its request for a ruling), and marking the three intervening dates that TCEQ seeks to avoid counting as business days (July 2, 5, and 17):



In order for TCEQ's request to be deemed timely, the Court would have to find that two of the three dates in dispute should not be counted towards the ten-business day deadline. As explained below, however, all three dates must be counted towards the ten-day deadline, and TCEQ's request was untimely as a matter of law.

2. TCEQ's so-called "request for clarification" did not restart the 10-business-day clock.

TCEQ seeks to gain an extra business day by arguing that a brief email exchange—lasting less than five minutes and simply confirming that Sierra Club wanted all the information it had already requested—reset the ten-business day clock. TCEQ Br. at 19-21; *see* CR 1221. This argument fails, for three independent reasons.

a. This email did not seek to clarify or narrow the scope of the public-information request.

TCEQ's inquiry was not a permissible request for clarification under the Act because TCEQ did not seek to "clarify" the public-information request. The Act allows a governmental body to make a request for clarification only "[i]f what information is requested is unclear to the governmental body." Tex. Gov't Code § 552.222(b). Put another way, if a governmental body cannot "accurately identify and locate the requested items," then it can ask the requestor to clarify. *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (quoting OFFICE OF THE ATTORNEY GENERAL, PUBLIC INFORMATION HANDBOOK (2008)). That was not the purpose of TCEQ's email here, which, while it used the term "clarify," just sought confirmation that Sierra Club wanted TCEQ to request an Attorney General opinion, with the attendant delay in resolving the request:

> Please clarify whether your request is seeking confidential information. If you request confidential information, we will need to seek an Attorney General opinion for the requested

> confidential material or information. It may take up to 60 days for the Attorney General to reach a determination on our request.

CR 1221. Five minutes later,[29] TCEQ received confirmation that the public-information request sought "all responsive information that TCEQ may believe is confidential." CR 1221. Asking whether Sierra Club wants "confidential information" here did not help TCEQ "accurately identify and locate" the information Sierra Club was requesting. *City of Dallas*, 304 S.W.3d at 387. Nor was there any confusion regarding the public-information request, which stated clearly the information sought.

For the first time on appeal, in a footnote, TCEQ throws in the additional argument that this email exchange was also a permissible request to narrow the scope of the request: "Due to the voluminous amount of information requested, TCEQ sought to discuss how the scope of the request could be narrowed pursuant to Tex. Gov't Code § 552.222(b) to reduce the burden on TCEQ personnel and provide a less costly alternative … for obtaining the requested information." TCEQ Br. at 21 n.8. TCEQ's email does not describe the information responsive to the public-information request as "voluminous" or

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[29] Sierra Club's attorney is in the Eastern time zone, which explains why her response email appears to be sent an hour before TCEQ's inquiry in the email chain. TCEQ's email was sent at 1:41 pm CDT/2:41 pm EDT, and Sierra Club responded at 1:45 CDT/2:45 EDT.

suggest that foregoing "confidential" information would be "less costly" for Sierra Club. TCEQ's email mentions only delay from requesting an Attorney General opinion. TCEQ's inquiry was neither a proper request for clarification nor a request to narrow the scope of the request, and therefore extended no deadlines.

b. TCEQ's email did not include the mandatory warning required by the Act.

TCEQ's inquiry was also not a valid request for clarification, because TCEQ did not include a statutorily required warning about the consequences of the failure to respond to the request. The Act provides that if a requestor does not respond within 60 days to a request for clarification or to narrow the scope, the public-information request is deemed withdrawn. Tex. Gov't Code § 552.222(d). The Act therefore requires that any request to clarify or narrow the scope "*must* include a statement as to the consequences of the failure by the requestor to timely respond to the request for clarification, discussion, or additional information." *Id*. § 552.222(e) (emphasis added). Here, TCEQ's email did not include this mandatory warning. CR 1221. Accordingly, TCEQ's inquiry was not a valid request to clarify or narrow the scope under the Act, and TCEQ does not receive the benefit of any extra time to request a decision from the Attorney General.

c. TCEQ waived its ability to argue for more time on the basis of this email.

Waiver is "the intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right." *Moayedi v. Interstate 35/Chisam Rd., L.P.*, 438 S.W.3d 1, 6 (Tex. 2014) (quoting *Sun Exploration & Prod. Co. v. Benton*, 728 S.W.2d 35, 37 (Tex. 1987)). Here, in asking the Attorney General to reconsider its ruling (CR 1200), TCEQ submitted the email exchange and told the Attorney General that TCEQ had made the deliberate decision not to attempt to rely on the email to extend the ten-day deadline:

> TCEQ clearly did not intend to cause any delay in submitting its request for a ruling, as evidenced by the fact that TCEQ requested and received clarification from the requestor on July 2, 2019 …. If it was seeking delay, *TCEQ could have, but did not choose to rely on the clarification*, which would have provided the agency an additional day to submit its referral.

CR 1201 (emphasis added). In other words, TCEQ believed it could try to seek additional time based on this email exchange, TCEQ intentionally chose not to do so, and TCEQ informed the Attorney General in writing of this choice. TCEQ may not now take the opposite position on judicial review, including by arguing the email was a request to narrow the scope of the request. TCEQ has instead waived any argument that the less-than five-minute email exchange that it initiated entitled TCEQ to an additional day to submit its request to the Attorney General.

3. July 5 is a "business day."

Contrary to TCEQ's argument, July 5 is included in the calculation of "business days" for purposes of the ten-business day deadline to request an Attorney General decision. This is so for two independent reasons: because July 5, 2019 was not a weekend or legal holiday, and because TCEQ, when requesting a ruling, failed to inform the Attorney General that TCEQ was closed on July 5.

a. July 5 was a "business day," because it was not a weekend or legal holiday.

The Act does not define the term "business days," and so this Court should apply the common, ordinary meaning of the term. *See Union Carbide Corp. v. Synatzske*, 438 S.W.3d 39, 52 (Tex. 2014) (holding that a court must "construe a statute's words according to their plain and common meaning unless they are statutorily defined otherwise, a different meaning is apparent from the context, or unless such a construction leads to absurd results"). The common, ordinary meaning of "business days" is a day other than a weekend or a legal holiday. CR 1240. The definitions of the term "business days" in other Texas statutes in a wide variety of contexts consistently define the

term to exclude only weekends and legal holidays.[30] *See Jaster v. Comet II Const., Inc.*, 438 S.W.3d 556, 563 (Tex. 2014) ("the use and definitions of the word in other statutes and ordinances" is relevant to construction of an undefined term's meaning). The use of the term "business day" in the Act should be no different.

As a matter of law, July 5, 2019 was not a legal holiday. For state agencies such as TCEQ, the Legislature has promulgated a specific list of national and state holidays that the agency may observe. Tex. Gov't Code § 662.021. July 5 is not one of those legal holidays. *Id*. § 662.003. For Fiscal Year 2019, the Comptroller posted on its website a schedule of the State's legal holidays, optional holidays, and skeleton crew days—July 5 is not among them. CR 1231. In 2019, TCEQ's own website represented that the agency was open for business "except holidays," linking to the holiday schedule on the Comptroller's website. *See* CR 1232 (TCEQ is open "except holidays: view the State of Texas Holiday Schedule").

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[30] *See, e.g.*, Tex. Ins. Code § 542.051(1) ("'Business day' means a day other than a Saturday, Sunday, or holiday recognized by this state."); Tex. Code Crim. Pro. art. 17.292(l)(3) ("'Business day' means a day other than a Saturday, Sunday, or state or national holiday."); Tex. Gov't Code § 2116.001(3) ("'Business day' means a day other than a Saturday, Sunday, or banking holiday for a bank chartered under the laws of this state."); Tex. Prop. Code § 222.003(4) ("'Business day' means any day other than a Saturday, Sunday, or federal holiday.").

Defining "business days" to exclude only weekends and legal holidays is also consistent with the Act's requirement of promptness:

> An officer for public information shall promptly produce public information for inspection, duplication, or both on application by any person to the officer. In this subsection, "promptly" means as soon as possible under the circumstances, that is, within a reasonable time, without delay.

Tex. Gov't Code § 552.221(a). Citing this statutory requirement of promptness, the First Court of Appeals rejected an argument that the definition of "business days" in the Act excluded days that an agency was forced to work remotely due to the COVID-19 pandemic:

> We conclude that the OAG's interpretation of the term "business day" under the [Act], insofar as it excludes days that a "governmental body has closed its physical offices for purposes of a public health or epidemic response ... , even if staff continues to work remotely," without limit or regard to duration, is inconsistent with the [Act] as a whole, which is to be "liberally construed in favor of granting a request for information" and requires a governmental body to "promptly produce public information."

Houston Cmty. Coll. v. Hall Law Group, PLLC, No. 01-20-00673-CV, 2021 WL 2369505, at *13 (Tex. App.—Houston [1st Dist.] June 10, 2021, pet. filed). The same reasoning applies here. It would frustrate the purpose of this requirement if a state agency could delay its response to a public-information request by choosing to close on days other than those holidays expressly and exclusively authorized by the Legislature.

In an opinion interpreting the term "business days" in Michigan's counterpart to the Texas Public Information Act (CR 830), the Michigan Attorney General explicitly endorsed the interpretation that only weekends and legal holidays are excluded from the term "business days"—not other days that the agency may be closed:

> [T]he five business days within which a public body must respond to a request for a public record under section 5 of the Freedom of Information Act, means five consecutive weekdays, other than Saturdays, Sundays, or legal holidays, and not five consecutive days on which the particular public body receiving the request is open for public business.

CR 833 (citation omitted).[31] That conclusion rested on the same considerations that should govern the Act here: the plain, ordinary meaning of the term "business day"; the term's definition in other statutes; and the Act's emphasis on prompt responses to public-information requests:

> Although a public body may choose to maintain a limited schedule for public access to its principal place of business, this does not serve to limit or reduce the obligation of its administrative officers to perform their legal duties and responsibilities. These duties must be discharged regardless of whether the public body's offices are open to the public on a given business day or not.

CR 833.

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[31] The opinion is available on the website of the Michigan Attorney General at: https://www.ag.state.mi.us/opinion/datafiles/2000s/op10248.htm.

For the same reasons, this Court should likewise hold that (1) the term "business days" in the Act means any day other than a weekend or a legal holiday; and (2) July 5, 2019 was not a legal holiday. TCEQ's decision to close its doors on July 5 does not redefine the term "business day" nor relieve TCEQ of its obligation to promptly process the public-information request within ten business days. Those ten business days included, as a matter of law, July 5, 2019.

b. In the alternative, July 5 must be counted as a business day, because TCEQ failed to inform the Attorney General otherwise before the ruling.

TCEQ admits it did not inform the Attorney General before the ruling that TCEQ was closed on July 5 or that July 5 should otherwise not count as a business day. *See* TCEQ Br. at 2 ("Due to a clerical oversight TCEQ failed to include in the letter that TCEQ was closed on July 4 and 5, 2019, in observance of Independence Day.").

The Act requires presentation of evidence to the Attorney General in order to exclude days from the ten-business-day deadline. Specifically, the Act requires TCEQ to "provide[] evidence sufficient to establish that the request …. was [submitted] within that [ten-day] period." Tex. Gov't Code § 552.308(b)(2). The Attorney General interprets the Act to require the governmental body to identify in its initial request any days that should not count as a business day and to demonstrate why that is the case:

> A governmental body briefing the attorney general under section 552.301 must inform the attorney general in the briefing of any holiday, including skeleton crew days, observed by the governmental body. If the briefing does not notify the attorney general of holidays the governmental body observes, the deadlines will be calculated to include those days.

CR 1236. This is only common sense. It cannot be left up to the Attorney General to guess when TCEQ is closed and for what reasons; it is instead TCEQ's responsibility to inform the Attorney General of any holidays that should not be counted as business days.

TCEQ raised the issue of whether July 5 was a holiday only after the Attorney General's ruling, in a request for reconsideration that the Act prohibits. CR 1200; *see* Tex. Gov't Code § 552.301(f) ("A governmental body … is prohibited from asking for a decision from the attorney general … if the governmental body has previously requested and received a determination from the attorney general concerning the precise information at issue in a pending request."); PIA HANDBOOK at CR 1234 ("[T]his provision precludes a governmental body from asking for reconsideration of an attorney general decision that concluded the governmental body must release information."). Accordingly, the Attorney General was correct in treating July 5 as a business day, and TCEQ's request for an Attorney General ruling was untimely as a matter of law.

4. TCEQ does not get the benefit of the "mailbox rule" because TCEQ failed to provide the Attorney General before ruling with evidence sufficient to establish deposit in interagency mail.

TCEQ contends that its request for decision was submitted on July 17, not July 18 when the Attorney General received it. Specifically, TCEQ asserts that it placed the request in interagency mail on July 17, triggering the "mailbox rule" in Section 552.308(b) of the Act. But, in order to gain the benefit of this rule, a state agency must provide the Attorney General with "evidence sufficient to establish that the request … was deposited in the interagency mail within that period"—before the Attorney General rules. Tex. Gov't Code § 552.308(b)(2); *see also* PIA HANDBOOK at CR 1239 ("If a state agency is required to submit information to the attorney general, the timeliness requirement is met if the information is sent by interagency mail *and the state agency provides sufficient evidence to establish* the information was deposited within the proper period." (emphasis added)); PIA HANDBOOK at CR 1234 (Tex. Gov't Code § 552.301(f) "precludes a governmental body from asking for reconsideration of an attorney general decision").

In its request here, CR 1186, TCEQ did not cite the mailbox rule, did not state the request had been deposited in interagency mail, and did not otherwise provide "sufficient evidence to establish" that the request had been timely sent. PIA HANDBOOK at CR 1234; *see* Tex.

Gov't Code § 552.308(b)(2). As with the alleged "holiday" status of July 5, TCEQ raised the mailbox rule only after the Attorney General had already ruled. *See* CR 1201.[32]

Again, however, the Act does not allow TCEQ to submit belated evidence or to seek correction or reconsideration of an Attorney General ruling. Tex. Gov't Code § 552.301(f); PIA HANDBOOK at CR 365. Allowing an agency to cure such a defect after the Attorney General's ruling would defeat the strict time deadlines in the Act; undermine the Legislature's stated public policy that the Act must be "liberally construed in favor of granting a request for information," Tex. Gov't Code § 552.001(b); and prejudice the requestor who, in this case, has now been forced to intervene in TCEQ's lawsuit and wait over two years to try to access the public information.

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[32] Contrary to TCEQ's claim, the Attorney General did not concede that it had "miscalculated the deadline." TCEQ Br. at 17. Instead, the Attorney General stated that the trial court "should consider additional information provided by TCEQ after issuance of the [Attorney General] Ruling in its calculation of the ten-business-day period of section 552.301(b)." CR 755. The trial court correctly ruled against TCEQ on timeliness. Even if considered, one additional day for the mailbox rule would be insufficient to cure TCEQ's timeliness defect.

B. TCEQ must produce the requested information because it cannot show a "compelling reason" to withhold it.

The consequence of TCEQ's failure to comply with the ten-business-day deadline is that the requested information is "presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information." Tex. Gov't Code § 552.302. "In the great majority of cases, the governmental body will not be able to overcome that presumption and must promptly release the requested information." PIA HANDBOOK at CR 1238. Here, the Attorney General concluded that TCEQ had not demonstrated a "compelling reason," CR 1197, and this Court should rule the same.

The Texas Supreme Court has interpreted the term "compelling reason" to require a balancing between the interest in withholding the information against the public interest in disclosing it: "a reason to withhold information will be 'compelling' only when it is of such a pressing nature (e.g., urgent, forceful, or demanding) that it outweighs the interests favoring public access to the information and overcomes section 552.302's presumption that disclosure is required." *Paxton v. City of Dallas*, 509 S.W.3d 247, 259 (Tex. 2017). TCEQ bears the burden of rebutting the presumption of public disclosure with a "compelling reason." *Id*. at 253.

1. The deliberative process privilege is not a "compelling reason" to rebut the presumption of disclosure.

In *Paxton*, the Texas Supreme Court the attorney-client could, when asserted before the Attorney General, rise to a "compelling reason" for withholding information, even if it were not timely asserted. *Id.* at 271. In reaching this conclusion, the Court emphasized the unique importance of the attorney-client privilege. The Court explained, for instance, that the "attorney-client privilege holds a special place among privileges." *Id.* at 259. The Court characterized it as "the oldest and most venerated" and "the most sacred of all recognized privileges." *Id.* (citations omitted). Because the preservation of the attorney-client privilege is "essential to the just and orderly operation of our legal system," *id.*, the privilege can be a "compelling reason" for purposes of the Act.[33]

TCEQ seeks to extend the *Paxton* holding to the deliberative process privilege in this case—and apparently to the nearly 70 exceptions "the Legislature saw fit to include … as a statutory basis for withholding public information." *See* TCEQ Br. at 22. But the deliberative process privilege does not share the same qualities that led the Court in *Paxton* to hold the attorney-client privilege is a "compelling reason," for at least three reasons.

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[33] This case does not concern the attorney-client privilege. *See* TCEQ Br. at 4, n.3 (stating that argument "was withdrawn" and "is not before the Court in this appeal").

First, while the attorney-client privilege "has been a cornerstone of our legal system for nearly 500 years," *Paxton*, 509 S.W.3d at 261, the Texas Supreme Court did not even recognize the existence of the deliberative process privilege until 2000. *See City of Garland*, 22 S.W.3d at 360 ("Whether the deliberative process privilege exists in Texas and, if it does, the privilege's scope, are issues of first impression for this Court."). And even in recognizing the privilege, the Court cautioned that its scope must be limited, in order to resist the "'inevitable temptation' on the part of governmental litigants to interpret the exception as expansively as necessary to apply it to the particular records it seeks to withhold." *Id*. at 362 (citations omitted). Such an expansive approach "would allow the exception to swallow the [Texas Public Information] Act" and undermine the "strong statement of public policy favoring public access to governmental information and [the] statutory mandate to construe the Act to implement that policy and to construe it in favor of granting a request for information." *Id.* at 364.

Second, even when it applies, courts do not protect the confidentiality of information subject to the deliberative process privilege to the same degree as the attorney-client privilege. Preserving the confidentiality of attorney-client communications is "quintessentially imperative," *Paxton*, 509 S.W.3d at 261, and the privilege is subject to only a handful of narrow, clearly defined

exceptions. Tex. R. Evid. 503(d). This Court has held, by contrast, that deliberative process privilege is "not an absolute shield" to disclosure and that whether privileged information should be disclosed or withheld is governed by a "flexible, common-sense approach." *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 412 (Tex. App.—Austin 1992, no writ) (quoting *Envt'l Protection Agency v. Mink*, 410 U.S. 73, 85–86 (1973)). Other courts have likewise described the deliberative process privilege as a "qualified privilege" that "can be overcome by a sufficient showing of need" "on a case-by-case, ad hoc basis." *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997); *see also Texaco Puerto Rico, Inc. v. Dep't of Consumer Affairs*, 60 F.3d 867, 885 (1st Cir. 1995) ("Even if a document satisfies the criteria for protection under the deliberative process privilege, nondisclosure is not automatic.").

Third, while both privileges may protect "frank" discussions, *Paxton*, 509 S.W.3d at 260; *see City of Garland*, 22 S.W.3d at 360, the attorney-client privilege alone promotes "broader public interests in the observance of law and administration of justice." *Paxton*, 509 S.W.3d at 260 (citations omitted). Contrary to TCEQ's contentions, TCEQ Br. at 23-24, the rationale for recognizing the deliberative process privilege is not the same as the reasons for safeguarding the attorney-client privilege—which the Texas Supreme Court has

described as singularly "essential to the just and orderly operation of our legal system." *Paxton*, 509 S.W.3d at 259.

The deliberative process privilege does not share the same history, protection, or unique qualities as the attorney-client privilege and thus cannot, by itself, serve as a "compelling reason" sufficient to overcome the presumption of disclosure in this case. Regardless, the Court may avoid reaching this issue by ruling against TCEQ on the facts of this case.

2. The public interest in disclosure outweighs any interest in withholding the information.

Even if the deliberative process privilege did apply and could qualify as a "compelling reason" for withholding information, the public's strong interest in prompt disclosure of information [redacted] outweighs TCEQ's arguments for nondisclosure. *Cf. Paxton*, 509 S.W.3d at 264–67 (concluding balancing of interests in that case did not require disclosure).

Texans and all members of the public have a significant interest in disclosure of information regarding or relating the DSD, including [redacted], to understand the value that TCEQ purports to represent the danger from breathing ethylene oxide and that determines how much ethylene oxide they will breathe.

The public interest is particularly strong when that information shows [redacted]

[34] *See* Bates Nos. 966–69, 975–82, and 415–16, 500–01, 564–65. TCEQ does not allege that these documents are protected by any privilege or exception, as discussed in Sections II.A and II.B above. Regardless, as discussed in this section, the public has a strong interest in the disclosure of all the information regarding [redacted].

[redacted]

The public interest in the prompt disclosure of all of the documents at issue in this case is particularly strong now because TCEQ and the American Chemistry Council have petitioned EPA to use TCEQ's value nationwide.[35] While EPA has proposed to reject TCEQ's value, it intends to make a final decision by August 2022 and is currently accepting public comment.[36] The withheld information

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35 TCEQ, Petition for Reconsideration (Oct. 12, 2020), available at: https://www.regulations.gov/comment/EPA-HQ-OAR-2018-0746-0243; American Chemistry Council, Petition for Reconsideration (Aug. 12, 2020), available at: https://www.regulations.gov/comment/EPA-HQ-OAR-2018-0746-0243.

36 EPA Proposal, 87 Fed. Reg. 6,466 (Feb. 4, 2022) (setting March 24, 2022 as deadline for comment); EPA Proposal Timeline, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=2060-AV54 (last visited Mar. 1, 2022) (final rule expected Aug. 2022). Related federal litigation is on hold pending this rulemaking. *See Huntsman v. EPA*, D.C. Cir. Nos. 20-1414 and consolidated cases (filed Oct. 9, 2020).

must be released as soon as possible so that the public, as well as state and national decision-makers, can fully understand the value TCEQ calculated and the harm posed by sources of ethylene oxide pollution in Texas and nationally. And, Sierra Club must be allowed to see the documents and consider including the information they contain in comments on those state and national limits.

Finally, the public interest in transparency greatly outweighs any alleged "chilling effect" on TCEQ. TCEQ Br. at 24. In fact, rather than "chilling" future deliberative process, TCEQ Br. at 24, disclosure would *advance* meaningful deliberative process [redacted] The "open and honest scientific analysis and discourse [] need[ed] to arrive at a correct and scientifically defensible" [redacted] that TCEQ claims to aspire to will only occur with full disclosure of the information at issue. *See* TCEQ Br. at 24-25.

Together, these reasons preclude TCEQ from establishing a "compelling reason" sufficient to rebut the presumption that the information must be disclosed.

V. Sierra Club is entitled to the award of its attorneys' fees.

The trial court awarded Sierra Club attorneys' fees under a provision of the Act allowing a prevailing plaintiff in a suit for mandamus to recover its costs and fees against a governmental body. Tex. Gov't Code § 552.323(a). On appeal, TCEQ argues only that—if TCEQ is correct that it can withhold the information—then Sierra Club would no longer be the prevailing party. TCEQ Br. at 28. But for all of the reasons argued above, the trial court's ruling was correct, TCEQ cannot withhold the information at issue, and Sierra Club is the prevailing party entitled to the award of its fees in this case. The award of attorneys' fees should therefore be affirmed along with the rest of the trial court's final judgment.

PRAYER

Appellees pray that this Court affirm the trial court's Order on Cross-Motions for Summary Judgment and Final Judgment; lift the Protective Order as to Bates Nos. 415-16, 500-01, 564-65; and 966–69, 975–82, 985–88; and grant such other and further relief to which they may be justly entitled.

/s/William Christian
William Christian
SBN 00793505
GRAVES DOUGHERTY
HEARON & MOODY
401 Congress Ave., Ste. 2700
Austin, TX 78701
T: (512) 480-5704/F: (512) 480-5804
wchristian@gdhm.com

Ilan Levin
State Bar No. 00798238
ilevin@environmentalintegrity.org
ENVIRONMENTAL INTEGRITY PROJECT
1206 San Antonio Street
Austin, Texas 78701
(512) 619-7287

Kathleen Riley
Admitted *pro hac vice*
Emma Cheuse
Admitted *pro hac vice*
EARTHJUSTICE
1001 G St., NW, Suite 1001
Washington, DC 20001
T: (202) 745-5227/F: (202) 667-2356
kriley@earthjustice.org
echeuse@earthjustice.org

CERTIFICATE OF COMPLIANCE

This computer-generated document complies with the type-volume limitations of Tex. R. App. P. 9.4(i)(2)(B) because it contains **10,567 words**, excluding the parts exempted by Tex. R. App. P. 9.4(i)(1). In making this certificate of compliance, I am relying on the word count of the computer program used to prepare the document.

/s/William Christian

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served through the texas.gov e-filing system on counsel of record for the other parties to this appeal on this the 7th day of March, 2022.

/s/William Christian

Appendix 1

Sierra Club's Public-Information Request (CR 1176)

EARTHJUSTICE

July 1, 2019

Public Information Officer, MC 197
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087
openrecs@tceq.texas.gov
https://www2.tceq.texas.gov/pircs/index.cfm

Dear Public Information Officer,

Pursuant to Texas's Public Information Act, on behalf of Sierra Club, I request the following documents and/or records from any relevant offices, staff files, or otherwise in the possession of the Texas Commission on Environmental Quality (TCEQ), including but not limited to those of Toby Baker, Executive Director; Division Director Michael Honeycutt, Angela Curry, Joseph T. Haney, Jr., TCEQ; Allison Jenkins, M.P.H.; Jessica L. Myers, PhD, and any other staff or contractors employed by the TCEQ Toxicology Division (TD); Deputy Director Tonya Baer, Mike Wilson, TCEQ Air Permits Division, and any other staff or contractors employed by the TCEQ Office of Air, as well as any other staff or contractors of the TCEQ, involving, containing information on, or otherwise relating to communications since November 9, 2016, regarding or relating to:

(1) The Texas Commission on Environmental Quality (TCEQ) proposed or final Development Support Document entitled "Ethylene Oxide Carcinogenic Dose-Response Assessment" (June 28, 2019), its plan for and/or draft of such document, and/or any other material discussing or including the modeling approach, the toxicity information, or any other proposed, draft, or final action to create a unit risk factor (or URF, unit risk estimate, or any cancer-risk value or metric) for Ethylene Oxide;[1]
(2) The full and underlying record of information on which TCEQ is relying and/or that TCEQ has considered or is considering in potential support of the Ethylene Oxide Development Support Document;
(3) The comments that TCEQ filed with EPA stating that: "the TCEQ is in the process of deriving a URF for ethylene oxide. . . ." and describing a "draft" of this document;[2]
(4) TCEQ's draft or final "request for toxicity information on Ethylene Oxide" to EPA and/or the public (Aug. 16, 2017);

[1] TCEQ, proposed Development Support Document, Ethylene Oxide Carcinogenic Dose-Response Assessment (June 28, 2019), https://www.tceq.texas.gov/assets/public/implementation/tox/dsd/proposed/jun19/eo.pdf.
[2] TCEQ comment (Apr. 26, 2019), https://www.regulations.gov/document?D=EPA-HQ-OAR-2018-0417-0142; TCEQ comment (May 30, 2019), https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0688-0089.

Sierra Club MSJ Exhibit No. 1
1176

(5) U.S. EPA's Integrated Risk Information (IRIS) draft or final Evaluation, toxicological review, and cancer risk value or Unit Risk Estimate for Ethylene Oxide (2016).[3]

Please provide copies of any and all such records, including any involving, including, or relating to communications between TCEQ and any of the following people and organizations outside of TCEQ, including but not limited to any person employed by, contracting, or otherwise affiliated with: the U.S. Environmental Protection Agency (any current or former staff or contractors), and/or with the American Chemistry Council, the American Petroleum Institute, the American Fuel & Petrochemical Manufacturers' Association, the Chamber of Commerce, UARG, the Alliance for Risk Assessment, TERA, Exponent, Ramboll, Summit Toxicology, Toxicology Excellence for Risk Assessment, BASF, Bayer MaterialScience, Chevron Phillips, Denka, Dow/DuPont, Eastman, Equistar, ExxonMobil, Formosa, Georgia-Pacific, Honeywell, Huntsman, Kururay, Lubrizol, Lyondell, Momentive, Monsanto, Occidental Chemical, Rohm & Haas, Rubicon, Sasol, Solvay, Syngenta, Total Petrochemicals, Union Carbide, Valero, Westlake Polymers, Hunton & Williams, Beveridge & Diamond, Sidley Austin, Keller Heckman, Covington Burling, Kimberly White, Michael Dourson.

Relevant search terms include, but are not limited to, "ethylene oxide cancer risk value," "2016 IRIS assessment," "2016 IRIS value," "USEPA (2016)," "USEPA unit risk factor," "URF for ethylene oxide," "EtO," "eto," "ethylene oxide," "inhalation unit risk estimate," "ethylene oxide URE," "75-21-8," "two-piece linear spline model," "supra-linear model," "sublinearity," "TCEQ's assessment," "ethylene oxide URF," "7.1E-3 per ppb," "1 in 100,000 excess cancer risk," "URF of 2.5E-6," "1.4E-6," "Valdez-Flores," "Kirman," "Kirman and Hays," "USEPA 2016," "Cox proportional hazards model.

For the purposes of this request, the terms "record" and "records" mean all materials in whatever form (handwritten, typed, electronic or otherwise produced, reproduced, or stored) in TCEQ's possession since November 9, 2016, including, but not limited to, letters, memoranda, correspondence, notes, applications, completed forms, studies, reports, reviews, guidance documents, policies, notes of telephone conversations, telefaxes, e-mails, text messages, internet chat logs, documents, databases, drawings, graphs, charts, photographs, minutes of meetings, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained. Without limitation, the records requested include records relating to the topics described above at any stage of development, whether proposed, draft, pending, interim, final, embargoed, or otherwise. All of the foregoing are included in this request if they are in the possession of or otherwise under the control of the TCEQ or any of its staff or contractors, including responsive records in or on the personal computers, cellphones, or other devices, or personal email accounts used by any federal employee or official if used for any governmental purpose.

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[3] EPA, IRIS, Evaluation of the Inhalation Carcinogenicity of Ethylene Oxide, EPA/635/R-16/350Fa (Dec. 2016), https://cfpub.epa.gov/ncea/iris/iris_documents/documents/toxreviews/1025tr.pdf.

Sierra Club respectfully requests a waiver or reduction of costs because Sierra Club is a nonprofit organization that intends to review and use these records solely for the evaluation of the records in the public interest, and not for the commercial or financial benefit of any person. We are willing to pay up to $200 for the cost of these records without further consultation. If the cost is going to be more than $200, please let us know as soon as possible before further processing this request.

In addition, if at all possible, we would strongly prefer to receive these records in electronic format either by CD-ROM, or by email to: Robyn Winz, rwinz@earthjustice.org and Emma Cheuse, echeuse@earthjustice.org. To the extent any of the requested documents are located on a publicly accessible website, please provide the relevant internet hyperlinks in lieu of producing those specific records.

Finally, we request all documents to be released as soon as possible on a rolling basis. If any documents cannot be released within ten business days of this request, please provide a list of responsive documents that TCEQ is evaluating for release and provide a date-certain when TCEQ will provide the documents.

Thank you for your assistance, and please contact us if you have any questions about the scope of this request or the particular documents requested.

Sincerely,

Emma Cheuse
Robyn Winz
Earthjustice
echeuse@earthjustice.org
rwinz@earthjustice.org
(202) 667-4500 ext. 5220 or ext. 5256

On behalf of Requester Sierra Club and the Lone Star Chapter
Neil Carman

Appendix 2

TCEQ's Request for an Attorney General Ruling (CR 1186)

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

July 17, 2019

The Honorable Ken Paxton
Office of the Attorney General
Price Daniel Sr. Building, 6th Floor
209 W. 14th Street
Austin, Texas 78701

Attention: Justin Gordon, Division Chief, Open Records Division

Re: Public Information Act Request for TCEQ Documents Regarding US Cement LLC
Request for Attorney General Opinion
PIR No.: 19-48291

Dear Attorney General Paxton:

The Texas Commission on Environmental Quality ("TCEQ") received a Public Information Act ("PIA") request for access to TCEQ information. By letter dated July 1, 2019, which was received by the TCEQ on the same day, Emma Cheuse and Robyn Winz of Earthjustice ("Earthjustice") requested access to information relating to TCEQ Development Support Document entitled "Ethylene Oxide Carcinogenic Dose-Response Assessment" (June 28, 2019) (Attachment A).

The 10th business day after receipt of the request is July 17, 2019. The TCEQ has made available to Earthjustice documents that the TCEQ believes to be public information. Other information that the TCEQ believes to be protected from disclosure under the PIA has not been released. On July 17, 2019, TCEQ notified Earthjustice of our intention to not release any documents which TCEQ believes to fall within an exception to disclosure under the PIA pending a decision from the Attorney General under TEX. GOV'T CODE §§ 552.301 and 552.305 (Attachment B).

It is our interpretation that certain documents are not subject to disclosure under §§ 552.111, 552.021, and 552.002 of the PIA. In accordance with § 552.301(e) of the PIA, the TCEQ submits the following information: 1) written comments explaining why the exceptions raised are applicable; 2) a copy of the request for information (Attachment A); 3) this signed statement evidencing the date the request was received; 4) representative samples of the information at issue; and 5) labeled information indicating which exceptions apply to which parts of the requested information (Attachments C and D).

Background Information

The information at issue under this public information request pertains to the TCEQ's Ethylene Oxide Carcinogenic Dose-Response Assessment Development Support Document (the "Ethylene Oxide DSD"), proposed June 28, 2019. A Development Support Document summarizes how chemical-specific toxicity values were derived. Once final, these toxicity values are incorporated into TCEQ's health and welfare-based inhalation toxicity values and health-based oral toxicity values, which are used in various permitting processes. A proposed DSD is published on the TCEQ's website for public review and comment. After the close of the public comment period, the TCEQ's Toxicology Division addresses and resolves any relevant issues and makes scientifically defensible changes to the DSD, if needed. The final DSD and a written Response to Comments, if applicable, are then published on the TCEQ website. The Ethylene Oxide DSD was proposed and released for public comment on June 28, 2019; the comment period will end on August 12, 2019.[1]

Section 552.111, Agency Memoranda (Deliberative Process)

Attachment C includes a representative sample of documents TCEQ believes contain information protected by the deliberative process privilege.

Texas Government Code § 552.111 excepts from disclosure "[a]n interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency[.]" This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 (1993). The purpose of § 552.111 is to protect advice, opinion, and recommendation in the decision-making 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, writ ref'd n.r.e.); Open Records Decision No. 538 (1990).

Section 552.111 excepts from disclosure those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* Open Records Decision No. 615 (1993). A governmental body's policymaking functions include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 (1995). When 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 § 552.111. *See* Open Records Decision No. 313 (1982).

A preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendations with regard to the form and content of the final document, so as to be excepted from disclosure under § 552.111. *See* Open Records Decision No. 559 (1990) (applying statutory predecessor). Section 551.111 protects factual information in the draft that also will be

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1 The proposed Ethylene Oxide DSD is publicly available on the TCEQ's website at https://www.tceq.texas.gov/toxicology/dsd.

included in the final version of the document. *See id.* at 2-3. 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 documents in Attachment C include a representative sample of documents consisting of email records between TCEQ staff and between TCEQ staff and a Texas A&M University researcher hired as a contractor by the TCEQ deliberating the draft Ethylene Oxide DSD. The documents also consist of various drafts of the Ethylene Oxide DSD prior to its public release and drafts of studies, draft calculations, and draft figures that were incorporated into the final Ethylene Oxide DSD.

Both the emails and other documents generally discuss and provide comments concerning the draft Ethylene Oxide DSD or contain preliminary material subsequently included in the final draft. As described in the Background Section above, the final draft of the Ethylene Oxide DSD is publicly available on the TCEQ's website. Therefore, the documents in Attachment C necessarily represent the TCEQ's staff advice, opinion, and recommendations with regard to the form and content of the final document intended for eventual public release.

The email communications between TCEQ staff and TCEQ staff and the TCEQ contractor opining, deliberating, and making recommendations on the final Ethylene Oxide DSD could also have policy implications that may impact future open discussions and evaluations of other DSDs and how that data are incorporated into the TCEQ's permitting process. There are definitive policy implications as the drafts are part of the deliberative process in developing a final Ethylene Oxide DSD.

Accordingly, the internal communications and draft documents represented in Attachment C should be excepted from release pursuant to section 552.111 under its Deliberative Process Privilege.

Sections 552.021 and 552.002, Public Information

Attachment D includes an email communication containing the TCEQ's username and password for the American Conference of Governmental Industrial Hygienists ("ACGIH") which is not public information subject to the PIA. The TCEQ has made available to Earthjustice the email communication with the user name and password redacted.

The PIA is applicable to public information. *See* TEX. GOV'T. CODE § 552.021. Section 552.002 of the PIA defines public information as information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) By a governmental body; or
(2) For a governmental body and the governmental body owns the information or has a right of access to it.

Id. § 552.002. The PIA also encompasses information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body, and the governmental body owns the information or has a right of access to it. *Id.* § 552.002(a)(2).

The Attorney General has determined that certain computer information, such as source codes, documentation information, and other computer programming that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under TEX. GOV'T. CODE § 552.021. *See* Open Records Decision No. 581 (1990) (construing predecessor statute).

The user name and password are codes used to access portions of the ACGIH website and to purchase publications from the ACGIH and do not have significance other than this use. Accordingly, the user name and password are not public information subject to release under the PIA.

Conclusion

We ask that the TCEQ be able to withhold from disclosure any information excepted under TEX. GOV'T CODE § 552.111 and the information that is not public under TEX. GOV'T CODE § 552.021. In accordance with § 552.301 of the PIA, I request a formal opinion on this matter.

I appreciate your response to this request. If you have any questions about this matter, please call Betsy Peticolas, Staff Attorney, with the TCEQ's Environmental Law Division, at (512) 239-6033.

Sincerely,

Robert Martinez, Director
Environmental Law Division
Texas Commission on Environmental Quality

Enclosure

cc: Jessica Ruiz, TCEQ General Law Division
Lena Roberts, TCEQ General Law Division
Betsy Peticolas, TCEQ Environmental Law Division
Emma Cheuse and Robyn Winz, Earthjustice (*without attachments*)

Appendix 3

Attorney General Ruling (CR 1196)

KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 23, 2019

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

OR2019-26474

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# 787094 (ORR# 19-48291).

The Texas Commission on Environmental Quality (the "commission") received a request for information related to a specified topic. You state you released some information. You claim some of the information is not subject to the Act. You further claim the submitted information is excepted from disclosure under section 552.111 of the Government Code. We have considered the submitted arguments and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

You argue some of the submitted information is not "public information" subject to disclosure under the Act. Section 552.002(a) of the Government Code defines "public information" as information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body;

(2) for a governmental body and the governmental body:

(A) owns the information;

> (B) has a right of access to the information; or
>
> (C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or
>
> (3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.

Gov't Code § 552.002(a). In Open Records Decision No. 581 (1990), this office determined certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. You argue some of the submitted information consists of information used solely for the purpose of maintenance, manipulation, or protection of public property and has no other significance. Upon review, we conclude the username and password information you marked is not "public information" for purposes of the Act, and the commission is not required to release it in response to this request.

Next, we must address the commission's procedural obligations under the Act. Section 552.301 of the Government Code prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. *See id.* § 552.301. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See id.* § 552.301(b). The commission received the request for information on July 1, 2019. We understand the commission was closed on July 4, 2019. This office does not count the date the request was received or holidays for purposes of calculating a governmental body's deadlines under the Act. Thus, the commission's ten-business-day deadline was July 16, 2019. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail). However, the commission did not request a ruling from this office until July 18, 2019. Accordingly, we find the commission failed to comply with section 552.301 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ). The commission claims section 552.111 of the Government Code. However, we find you have failed to establish a compelling reason to address your claim under section 552.111 for this information. Accordingly, no portion of the submitted information may be withheld under

section 552.111. However, section 552.117 of the Government Code can provide a compelling reason to overcome the presumption of openness. [1] Therefore, we will address the applicability of section 552.117 to the submitted information.

Section 552.117(a)(1) of the Government Code excepts from disclosure the current and former home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Section 552.117(a)(1) also applies to the personal cellular telephone number of a current or former official or employee of a governmental body, provided the cellular telephone service is not paid by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, a governmental body must withhold information under section 552.117(a)(1) on behalf of a current or former employee only if the individual made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, to the extent the individual whose information is at issue timely requested confidentiality under section 552.024, the commission must withhold the cellular telephone number we marked under section 552.117(a)(1) of the Government Code if the cellular telephone service is not paid for by a governmental body. The commission may not withhold the marked cellular telephone number under section 552.117(a)(1) if the individual did not make a timely election to keep the information confidential or a governmental body pays for the cellular telephone service.

In summary, the username and password information you marked is not "public information" for purposes of the Act, and the commission is not required to release it in response to this request. To the extent the individual whose information is at issue timely requested confidentiality under section 552.024, the commission must withhold the cellular telephone number we marked under section 552.117(a)(1) of the Government Code if the cellular telephone service is not paid for by a governmental body. The commission must release the remaining information.

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 https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable

[1] The 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).

charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Emily Buchanan
Assistant Attorney General
Open Records Division

EBO/be

Ref: ID# 787094

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Appendix 4

Protective Order (CR 175)

CAUSE NO. D-1-GN-19-006941

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY *Plaintiff,*	§	IN THE DISTRICT COURT OF
v.	§	TRAVIS COUNTY, TEXAS
KEN PAXTON, ATTORNEY GENERAL OF TEXAS, *Defendant,*	§	
and	§	
SIERRA CLUB *Defendant-Intervenor.*	§	53RD JUDICIAL DISTRICT

FIRST AMENDED PROTECTIVE ORDER

This is an open records lawsuit. Plaintiff Texas Commission on Environmental Quality (TCEQ) seeks a declaratory judgment pursuant to the Public Information Act (the PIA), Tex. Gov't Code § 552.324, that certain information collected, assembled, or maintained by TCEQ is excepted from required disclosure under the PIA ("Information at Issue"). The Information at Issue includes all interagency communications dated November 9, 2016 through July 1, 2019, regarding the creation of TCEQ's Ethylene Oxide Carcinogenic Dose-Response Assessment Development Support Document, proposed June 28, 2019 that have not already been made public.

The requestor, Sierra Club, has intervened. This order is issued pursuant to Tex. Gov't Code § 552.322 which permits the discovery of the information at issue under a protective order.

IT IS ORDERED that, within 10 days of receipt of this signed order, Plaintiff shall provide to the Attorney General and to the attorneys of record for Sierra Club listed in paragraph 1 a copy of the Information at Issue in this suit, subject to the following conditions:

1. The copies produced are to remain in the sole custody of the attorneys for the Attorney General and the following attorneys of record for the Sierra Club: William Christian, Ilan Levin, Emma Cheuse, and Kathleen Riley.

2. The copies produced may be disclosed only to the following persons:

(a) the attorneys working on this action on behalf of the Attorney General; and

(b) secretarial and paralegal assistants working under the supervision of individuals listed in Paragraph 2(a), only to the extent necessary to perform work directly related to this action; and

(c) the following attorneys of record for the Sierra Club: William Christian, Ilan Levin, Emma Cheuse, and Kathleen Riley.; and

(d) secretarial and paralegal assistants working under the supervision of individuals listed in Paragraph 2(c), only to the extent necessary to perform work directly related to this action;

3. Disclosure of the Information at Issue may be made to the individuals listed in Paragraph 2(b) only after each individual has been made aware of the provisions of this Protective Order and has indicated his or her written assent to be bound by it.

4. The individuals listed in Paragraph 2 shall not disclose, discuss, release, or characterize the contents, substance, or copies of the Information at Issue under this protective order to or with persons or entities not listed in Paragraph 2. Any such disclosure,

discussion, release, or characterization to or with persons or entities not listed in Paragraph 2 is unauthorized and a violation of this protective order.

5. The Information at Issue is only to be used in preparation for trial or in settlement discussions with TCEQ.

6. If any of the Information at Issue is transmitted via email or fax, to or between the individuals listed in Paragraph 2(c) and 2(d), such transmissions must be encrypted. All electronic copies of such transmissions and the Information at Issue shall be stored in a separate secure folder, password protected, and access restricted to the individuals listed in Paragraph 2(c) and 2(d). All physical copies must be kept in a secure, locked cabinet that shall be accessible only to the individuals listed in Paragraph 2(c) and 2(d).

7. Documents produced will be labeled in bold print with the following: "Confidential—Attorneys' Eyes Only." Documents unintentionally produced without designation as "Confidential—Attorneys' Eyes Only" may later be so designated and shall be treated as "Confidential—Attorneys' Eyes Only" from the date written notice of the designation is provided to the receiving party. If a receiving party learns of any unauthorized disclosure of the Information at Issue, the party shall immediately upon learning of such disclosure inform the producing party of all pertinent facts relating to such disclosure and shall make all reasonable efforts to prevent disclosure by each unauthorized person who received such information. It is the responsibility of the receiving party to ensure the recovery or destruction of any copies or records of the Information at Issue connected with the unauthorized disclosure.

8. At trial, in support of a motion for summary judgment, or at any other stage in this suit where a party deems it necessary to submit the Information at Issue to the Court,

any document, exhibit, or motion containing the Information at Issue or references to the Information at Issue shall be submitted to the Court *in camera*, pursuant to the sealing provisions of Tex. Gov't Code § 552.3221. The parties hereby agree and waive any objection to a motion for summary judgment on the basis that such protected documents were not attached to or filed with the motion for summary judgment.

9. Upon termination of this litigation by an order that has become final due to the expiration of the time to appeal, or when all appeals have been exhausted, or by settlement, the Attorney General and Sierra Club shall securely destroy all paper copies of the information produced under this Protective Order and securely erase all electronic copies of the information produced under this Protective Order.

10. No privilege is waived by disclosure under this Protective Order.

11. Insofar as the provisions of this Protective Order, or any other protective orders entered in this litigation, restrict the communication and use of the information protected by it, such provisions shall continue to be binding after the conclusion of this litigation, except that (a) there shall be no restriction on documents that are used as exhibits in open court unless such exhibits were filed under seal, and (b) upon termination of litigation due to the expiration of the time to appeal, or when all appeals have been exhausted, or by settlement, this Protective Order shall cease to apply to any information ordered released by the Court.

12. Violations of this Protective Order shall be enforceable by and subject to sanctions under the Court's contempt power.

13. All documents produced in this open records lawsuit marked with the label "Confidential—Attorneys' Eyes Only" are deemed produced under this Protective Order, pursuant to Tex. Gov't Code § 552.322.

14. The parties may by written agreement ask the Court to modify the terms of this Protective Order consistent with the Texas PIA and Texas Rules of Civil Procedure.

Signed this 6th day of MARCH, 2020

Judge Presiding

Appendix 5

Index to Information (Filed Under Seal)

Appendix 6

Cited Attorney General Opinions

THE ATTORNEY GENERAL OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

June 4, 1990

Honorable Jim Hightower
Commissioner
Department of Agriculture
P.O. Box 12847
Austin, Texas 78711

Open Records Decision No. 559

Re: Whether documents relating to the Texas-Federal Inspection Service are excepted from disclosure under the Open Records Act, article 6252-17a, V.T.C.S. (RQ-1935)

Dear Mr. Hightower:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S.

The information in question concerns an audit by the State Auditor of Texas of the Department of Agriculture and the Texas-Federal Inspection Service. The Texas-Federal Inspection Service is an entity created under a cooperative agreement between the United States Department of Agriculture and the Texas Department of Agriculture to carry out the Fresh Fruit and Vegetable Grading Program pursuant to the Agricultural Marketing Act of 1946 (7 U.S.C. 1621, et seq).

You claim that some of the requested information is excepted from required public disclosure by sections 3(a)(1), 3(a)(7), 3(a)(11), or 3(a)(16), or by a combination of these sections. Pursuant to the Open Records Act, you have submitted the material you believe is excepted from public disclosure to this office for our inspection. You have organized this material into folders labeled A, B-1, B-2, B-3, and C through J.

As your most inclusive claim for exception from public disclosure is that with respect to section 3(a)(11), we will consider the applicability of section 3(a)(11) first.

> 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.' It is well established that the purpose of section 3(a)(11) is to protect from public disclosure advice, opinion, and recommendation used in the decisional process within an agency or between agencies. This protection is intended to encourage open and frank discussion in the deliberative process. See, e.g., Austin v. City of San Antonio, 630 S.W.2d 391, 394 (Tex. App. - San Antonio 1982, writ ref'd n.r.e.); Attorney General Opinion H-436 (1974); Open Records Decision No. 470 (1987).

Open Records Decision No. 538 (1990).

You describe the material in folders A through E as draft documents. With respect to the information in folders A through B-3, you advise that the final version of these documents have already been released in the State Auditor's report.

It is clearly inimical to the purposes of the Open Records Act to suppose that an agency may close up documents merely by stamping the word "draft" upon them. However, where a document is genuinely a preliminary draft of a document that has been released or is intended for release in a final form, the draft necessarily represents the advice, opinion, and recommendation of the drafter as to the form and content of the final document. To the extent the content of the preliminary draft has appeared in the final version, it is already on the public record. The release of an edited version of the preliminary draft that includes only material incorporated into the final draft would not make more of the subject matter available to the public. It would, however, reveal something about the deliberative process by indicating where additions and deletions were made in the preliminary draft as it was reviewed. See National Wildlife Federation v. U.S. Forest Service, 861 F.2d 1114, 1122 (9th Cir. 1988); Dudman Communications v. Department of the Air Force, 815 F.2d 1565 (D.C. Cir. 1987); Lead Indus. Ass'n v. Occupational Safety & Health Admin., 610 F.2d 70, 85-86 (2d Cir. 1979). Thus, the draft itself, as well as comments made on the draft, underlining, deletions, and proofreading marks would qualify for exception under section 3(a)(11).

Underlying factual data upon which the document was based on purely factual matter, where severable, must be released. When such factual matter is contained in the

final version of the document, the release of the final version would satisfy this requirement. Open Records Decision No. 196 (1978) reached a contrary result, in addressing a preliminary draft of a report which had been made public in its final form. In that case, this office said that portions of a preliminary draft which were identical or nearly identical to information in the final report must be made available. But see Open Records Decision No. 120 (1975). Open Records Decision No. 196 did not consider whether the governmental body could comply with the request for information by providing one comprehensive document. As drafts of documents intended for eventual release form an integral part of the deliberative process which section 3(a)(11) is intended to protect, we believe this consideration is relevant to questions concerning preliminary drafts. As Open Records Decision No. 196 recognized, the content of information already released cannot be excepted by 3(a)(11). However, the drafter's recommendation of the form in which that information ought to be presented in the final report is within the scope of 3(a)(11). To the extent Open Records Decision No. 196 suggests the contrary, it is disapproved. We concluded that information in an earlier draft which has been released in the final document may be protected from disclosure by section 3(a)(11). We expressly do not conclude that severable factual information that appears in a preliminary draft but not in the final version may be excepted by section 3(a)(11).

A comparison of the draft documents to the report which has been released indicates the factual information in the documents in folders A through B-3 appears in the final draft. These documents may be withheld.

You do not explain the documents in folder C. However, they appear to be a schedule of charges made on a credit card and a list of the Department of Agriculture and Inspection Service meetings. As this information is entirely factual, it is not excepted from disclosure by section 3(a)(11). Since you claim no other exception for folder C, the information must be released.

You advise that the documents in folder D are drafts of letters that were not sent or not yet sent. As discussed above with respect to draft documents in general, drafts of proposed or actual correspondence are by definition the advice, opinion, or recommendation as to the form and content of the correspondence. Consideration of such drafts is clearly part of the internal give and take that must occur prior to the adoption of a public posture by an agency

as expressed in its correspondence. This internal deliberative process is what section 3(a)(11) is intended to protect. Nothing in this correspondence appears to be the sort of purely factual information or data that is appropriately severable for release. Therefore the information in container D may be withheld.

You advise that the documents in folder E are drafts of documents that have been released in another form. As indicated above, consideration of a claim of exception from public disclosure with respect to such drafts depends largely upon a comparison of the draft to the information actually released so that a determination can be made as to exactly what is being proposed to be withheld. In this case, with the exception of item 7 of the draft document titled "Facts about the Texas-Federal Inspection Service", the released versions of the documents include all the factual information contained in the drafts. With the exception of the indicated item, which is entirely factual and is not included in the final version, the information in folder E may be withheld.

Folders G and H contain various correspondence between or among the Texas Department of Agriculture, the U.S.D.A., and the State Auditor with various attachments. The correspondence consists of inquiries or responses to inquiries. The attachments consist of copies of other correspondence or of purely factual information. None of this information is the sort of advice, opinion, or recommendation protected by section 3(a)(11).

Folder I contains a letter from the deputy commissioner of the Department of Agriculture to the director of the Inspection Service. This letter contains no advice, opinion, or recommendation. In addition, folder I contains several affidavits with respect to various practices or operations concerning the Inspection Service. These affidavits contain no advice, opinion, or recommendation. Hence, the information in folder I is not excepted from public disclosure by section 3(a)(11).

Folder J contains two memoranda, dated October 11, 1989, and November 10, 1989, respectively. Folder J also contains an unsigned document that recites facts concerning lunch and dinner meetings involving Department of Agriculture and Inspection Service staff. The November 10, 1989, memorandum recites the content of a telephone conversation between a staff member of the State Auditor and a staff member of the Department of Agriculture. Of the three documents in folder J, only the October 11, 1989,

memorandum which expresses the opinion of the drafter as to the answer of a question within the scope of the exemption found in section 3(a)(11).

With respect to the contents of folders C and G through J, you have also claimed exemption from required public disclosure under section 3(a)(16), the exemption for working papers of the State Auditor.

Documents that reveal (1) the timing, scope, or strategy of an audit, (2) discussion and opinion expressed by participants in an audit, or (3) law enforcement techniques may be withheld under section 3(a)(16). Open Records Decision No. 164 (1977). None of the material in folders C or G through J contain any discussion or opinion other than that already exempted from public disclosure by section 3(a)(11) as discussed above. No law enforcement techniques are revealed in the information in folders G through J. Our analysis of the applicability of section 3(a)(16) is therefore limited to whether any of the information in folders C or G through J is excepted from public disclosure as information which would reveal the timing, scope, or strategy of an audit.

Exempting information which reveals the timing, scope, or strategy of an audit serves public policy by preserving the secrecy of audit techniques and preventing client agencies from circumventing the State Auditor's work. Id. In the instant case, the audit is completed and the information in question is in the possession of the audited agency. Withholding information that might reveal audit timing, scope, or strategy with specific respect to the audit of the Department of Agriculture and the Inspection Service would not serve the purpose of the exemption. It is not apparent how any of the information in folders C or G through J reveal audit techniques of such a general or confidential nature that their release would provide agencies with the means to circumvent the State Auditor's work. We conclude that none of the requested information is exempted from public disclosure by section 3(a)(16).

Finally, you claim the information in folders B-1, B-2, D, and F, is excepted from public disclosure under sections 3(a)(1) and 3 (a)(7) by the attorney-client privilege, and the Rules and Cannons of Ethics of the State Bar of Texas. As we have concluded that the information in folder B-1, B-2, and D are excepted by section 3(a)(11), we will limit our analysis to folder F. The information in folder F consists of a chronology of events with respect to interactions of the Texas Department of Agriculture, the

Texas-Federal Inspection Service, the U.S.D.A., and the State Auditor. You advise that this information was prepared by the general counsel of the Department of Agriculture for the purpose of advising the commissioner. The information is presented factually, without comment or elaboration.

This office has consistently held that the attorney-client privilege aspects of sections 3(a)(1) and 3(a)(7) protect legal advice and opinion from public disclosure, but do not extend to factual information solely because it is reported by an attorney. Open Records Decision Nos. 462 (1987), 230 (1979), 80 (1975). We conclude that the information in folder F may not be withheld under the asserted exceptions.

S U M M A R Y

It is clearly inimical to the purposes of the Open Records Act to suppose that an agency may close up documents merely by stamping the word "draft" upon them. However, where a document is genuinely a preliminary draft of a document that has been released or is intended for release in a final form, the draft necessarily represents the advice, opinion, and recommendation of the drafter as to the form and content of the final document. In such an instance, the draft itself, as well as comments made on the draft, underlining, deletions, and proof-reading marks would qualify for exemption under section 3(a)(11). Purely factual matter, where severable, must be released. When such factual matter is contained in the final version of the document, the release of the final version would satisfy this requirement. Open Records Decision No. 196 (1978) is overruled to the extent inconsistent with this decision.

Where an audit is completed and the information in question is in the possession of the audited agency, withholding information that might reveal audit timing, scope, or strategy with specific respect to that audit would not serve the purpose of the exemption from public disclosure found in section 3(a)(16).

Very truly yours,

Jim Mattox

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Office of the Attorney General
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DAN MORALES
ATTORNEY GENERAL

June 29, 1993

Mr. Ray Farabee
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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,

Dan Morales

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DAN MORALES
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January 11, 1995

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Open Records Decision No. 631

Re: Whether a consultant's report concerning a university's overall faculty hiring and retention policies is excepted from required public disclosure by section 552.111 of the Government Code (formerly V.T.C.S. article 6252-17a, section 3(a)(11)) (RQ-589)

Dear Mr. Giddings:

On behalf of The University of Texas at Arlington (the "university"), you have asked this office to determine whether a particular report is excepted from required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code (formerly V.T.C.S. article 6252-17a).[1] The report was produced by an outside consultant hired by the university, rather than an officer or employee of the university, and addresses allegations of systematic discrimination against Black and Hispanic faculty members in the retention, tenure, and promotion process at the university and allegations of discrimination against one particular faculty member. You assert that the report contains "confidential interviews, 'findings' that are really the opinions of the consultant, as well as advice, opinions and recommendations to the university for future action." You ask whether this information is excepted from disclosure by section 552.111 in light of the court's decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ).

Your request requires us to consider whether, in light of the court's decision in *Gilbreath* and our decision in Open Records Decision No. 615 (1993), section 552.111 may be applicable to information created for a governmental body by an outside consultant.[2] This office first concluded that the language now in section 552.111 may encompass information prepared by an outside consultant in Open Records Decision No. 192 (1978) at 2. In *Gilbreath*, however, the court criticized our interpretation of section

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[1]The Seventy-third Legislature codified the Open Records Act as chapter 552 of the Government Code and repealed article 6252-17a, V.T.C.S. *See* Acts 1993, 73d Leg., ch. 268, §§ 1, 46. The codification of the Open Records Act in the Government Code is a nonsubstantive codification. *Id.* § 47.

[2]By "outside consultant," we mean a person other than an officer or employee of the governmental body.

552.111 as narrowing the scope of the Open Records Act. *Gilbreath*, 842 S.W.2d at 413. Following *Gilbreath*, this office re-examined our interpretation of the language in section 552.111 and concluded that it must be construed in the same manner as exemption 5 of the federal Freedom of Information Act ("FOIA") was construed by Congress and the federal courts at the time the Texas Open Records Act was passed by the Texas Legislature. Open Records Decision No. 615 (1993) at 3.

We conclude that section 552.111 may apply to information created for a governmental body by an outside consultant when the outside consultant is acting at the request of the governmental body and performing a task within the authority of the governmental body. We base this conclusion on two early federal cases interpreting exemption 5 of FOIA that deal specifically with material prepared by a consultant to the governmental body. *See Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971); *Wu v. National Endowment for Humanities*, 460 F.2d 1030 (5th Cir. 1972), *cert. denied*, 410 U.S. 926 (1973).

In both *Soucie* and *Wu*, the courts concluded that exemption 5 may apply to information created by persons other than agency officers or employees. In *Soucie*, 448 F.2d at 1078, the court held that portions of the Garwin report could be withheld under exemption 5. The Garwin Report was written by a panel of experts convened by the Director of the Office of Science and Technology to evaluate the program for developing a supersonic transport ("SST"). The director convened the panel after being asked by the president to provide an independent assessment of the SST program. In *Wu*, 460 F.2d at 1032, the court held that the evaluations of certain specialists hired by the National Endowment for the Humanities to evaluate the plaintiff's proposal were intra-agency memoranda under exemption 5 even though the specialists were not agency employees. The court quoted the following footnote from *Soucie*:

> The rationale for the exemption for internal communications [exemption (5)] indicates that the exemption should be available in connection with the Garwin report even if it was prepared for an agency by outside experts. The Government may have a special need for the opinions and recommendations of temporary consultants, and those individuals should be able to give their judgments freely without fear of publicity. A document like the Garwin Report should therefore be treated as *an intra-agency memorandum of the agency which solicited it.* [Emphasis added.]

Id. (quoting *Soucie*, 448 F.2d at 1078 n.44). The court also noted that extending exemption 5 to outside consultants is especially appropriate when Congress specifically authorizes an agency to use consultants. *Wu*, 460 F.2d at 1032.

We believe that the facts and the courts' statements in these cases restrict the application of exemption 5 to information created by persons acting at the request of the

governmental body and performing a task within the authority of the governmental body. Both cases involved situations in which outside experts were hired by the agency to assist the agency in performing some function entrusted to the agency. Neither case involved unsolicited information or advice, and neither case involved a governmental body asking outside persons to perform a task outside of the governmental body's authority. Furthermore, the court in both cases specifically noted that a document created by an outside consultant should "be treated as an intra-agency memorandum of the agency which solicited it." *Soucie*, 448 F.2d at 1078 n.44; *Wu*, 460 F.2d at 1032.

Accordingly, we conclude that section 552.111 may apply to the report you provided for review. The report itself indicates that the university solicited it. Furthermore, investigating allegations of discrimination and the faculty retention, tenure, and promotion process is clearly within the authority of the university. Therefore, the report may be excepted from disclosure under section 552.111.

Section 552.111 excepts from required public disclosure "[a]n 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 at 5, this office concluded that information excepted from disclosure under section 552.111 "must be related to the *policymaking* functions of the governmental body." This information includes advice, recommendations, and opinions on matters involving the agency's policy mission. We indicated, on the other hand, that an agency's policymaking functions do not encompass information that pertains solely to internal administrative or personnel matters. Furthermore, section 552.111 does not except from disclosure purely factual information that is severable from the advice and opinion portions of internal memoranda. *Id.* Therefore, severable factual information may not be withheld under section 552.111.

We conclude that the report you submitted for review is related to the policymaking functions of the university. We believe that the policymaking functions of a governmental body include advice, recommendations, and opinions regarding administrative and personnel matters of broad scope that affect the governmental body's policy mission. The report you submitted for review does not pertain solely to the internal administration of the university. Instead, the scope of the report is much broader and involves the university's educational mission: it relates to the university's policies concerning affirmative action and how it will meet the needs of a diverse student body. Accordingly, you may withhold the portions of the report that constitute advice, recommendations, or opinions. We have examined the portions of the report you marked as excepted from disclosure by section 552.111 and identified those portions that may be withheld. The portions of the report that we have not marked are the portions containing severable factual information, which you must release.

SUMMARY

Section 552.111 of the Government Code may apply to information created for a governmental body by an outside consultant when the outside consultant is acting at the request of the governmental body and performing a task within the authority of the governmental body. Information created by an outside consultant for a governmental body may constitute an intra-agency memorandum that may be withheld under section 552.111. Under section 552.111, a governmental body may withhold information that relates to the *policymaking* functions of the governmental body. This information includes advice, recommendations, and opinions regarding administrative and personnel matters of broad scope that affect the governmental body's policy mission.

Yours very truly,

Dan Morales

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ATTORNEY GENERAL OF TEXAS

November 5, 2015

Ms. Sarah Parker
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Texas Department of Transportation
125 East 11th Street
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OR2015-23236

Dear Ms. Parker:

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# 586106.

The Texas Department of Transportation (the "department") received a request for specified communications from or to named department offices or divisions from June 1, 2015.[1] You state you have released some information. You claim the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.[2]

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[1]We note the department sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

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

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

> (a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:
>
> > (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The submitted information includes completed reports which are subject to section 552.022(a)(1). The department must release the completed reports pursuant to section 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or are made confidential under the Act or other law. *See id.* You seek to withhold the information subject to section 552.022 under sections 552.107 and 552.111 of the Government Code. However, these sections are discretionary in nature and do not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver). Therefore, the information subject to section 552.022 may not be withheld under section 552.107 or section 552.111 of the Government Code. However, you claim the information subject to section 552.022 is privileged under rule 503 of the Texas Rules of Evidence. The Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will address your claim of the attorney-client privilege under rule 503 of the Texas Rules of Evidence for the information at issue. We will also consider your arguments against disclosure of the information not subject to section 552.022 of the Government Code.

Texas Rule of Evidence 503(b)(1) provides:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:
>
> > (A) between the client or the client's representative and the client's lawyer or the lawyer's representative;
> >
> > (B) between the client's lawyer and the lawyer's representative;

> (C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;
>
> (D) between the client's representatives or between the client and the client's representative; or
>
> (E) among lawyers and their representatives representing the same client.

Tex. R. Evid. 503(b)(1). A communication is "confidential" if it is not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must 1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; 2) identify the parties involved in the communication; and 3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. *See* ORD 676. Upon a demonstration of all three factors, the entire communication is confidential under Rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

You assert the information subject to section 552.022 consists of attachments to privileged attorney-client communications between department attorneys, outside counsel, employees and consultants. You state the communications at issue were made for the purpose of the rendition of legal services to the department. You indicate these communications were intended to be confidential and have remained confidential. Based on the department's representations and our review of the information at issue, we find the department has established the information at issue constitutes attorney-client communications under Rule 503. Thus, the department may withhold the information subject to section 552.022 of the Government Code pursuant to Rule 503 of the Texas Rules of Evidence.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. The elements of the privilege under section 552.107 are the same

as those discussed for rule 503. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* ORD 676 at 6-7. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie*, 922 S.W.2d at 923.

You state the remaining information consists of communications between and among department attorneys, outside counsel, employees, and consultants. You state the information at issue was communicated for the purpose of facilitating the rendition of professional legal services to the department. You further state these communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the department may generally withhold the remaining information under section 552.107(1) of the Government Code. We note, however, some of these e-mail strings include e-mails received from and sent to parties with whom you have not demonstrated the department shares a privileged relationship. Furthermore, if the e-mails received from and sent to non-privileged parties are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, if the non-privileged e-mails, which we have marked, are maintained by the department separate and apart from the otherwise privileged e-mail strings in which they appear, then the department may not withhold this information under section 552.107(1) of the Government Code. In that event, we will consider the department's remaining argument against disclosure of such information.

Section 552.111 of the Government Code excepts from disclosure "[a]n 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 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, writ ref'd n.r.e.); 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).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *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).

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.

You claim the non-privileged e-mails contain advice, opinions, and recommendations regarding the department's policy. However, we find the non-privileged e-mails consist of communications with individuals you have failed to demonstrate share a common deliberative process with the department. Therefore, we find you have failed to demonstrate the applicability of section 552.111 of the Government Code and the deliberative process privilege to the remaining information, and the department may not withhold it on that basis.

In summary, the department may withhold the information subject to section 552.022(a)(1) under Texas Rule of Evidence 503. The department may generally withhold the remaining information under section 552.107(1) of the Government Code. However, to the extent the non-privileged e-mails we have marked exist separate and apart from the otherwise privileged e-mail strings in which they appear, the department must release those non-privileged e-mails.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

Thana Hussaini
Assistant Attorney General
Open Records Division

TSH/som

Ref: ID# 586106

Enc. Submitted documents

c: Requestor
(w/o enclosures)