

# IN THE SUPREME COURT OF TEXAS

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No. 98-0617

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CITY OF GARLAND, TEXAS AND RON HOLIFIELD, PETITIONERS

v.

THE DALLAS MORNING NEWS, RESPONDENT

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ON PETITION FOR REVIEW FROM THE  
COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

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**Argued on March 3, 1999**

JUSTICE OWEN, joined by JUSTICE HECHT, dissenting.

The memo at issue in this case was prepared to facilitate a personnel decision by a city's management. The memo was used for no other purpose, and the City decided not to follow the course of action that the memo reflected. A majority of the Court holds that this memo does not fall within the deliberative process exemption. Because that conclusion is not supported by the Open Records Act or its companion, the Texas Open Meetings Act, and because the overwhelming weight of authority is contrary to the judgment handed down today, I respectfully dissent.

## I

Ron Holifield, the City of Garland's City Manager, drafted a memorandum addressed to James Hager, the City's director of finance, that stated that Holifield was removing Hager from his position. The memo then set forth "[e]xamples of the reasons for my [Holifield's] having such a loss

of confidence to necessitate your removal.” Holifield’s affidavit in this case, which was uncontroverted, states that the memo was prepared with the intention of providing it to the Garland City Council in a closed executive session for the purpose of discussing it in order to determine whether to pursue a course of action consistent with the memo. The memo was never given to Hager because the City decided to pursue another course of action in dealing with its employee. The plurality opinion concludes that the memo does not fall within the deliberative process exemption, which is found in section 552.111 of the Government Code as part of the Texas Open Records Act, “because the memorandum does not bear upon policymaking.” \_\_\_ S.W.3d at \_\_\_. Justice Enoch concludes, and I agree, that the Act contemplates that only completed reports are public information. I disagree with Justice Enoch, however, that because the memo at issue was used in discussions by the City Council, it was completed.

The Court’s task is to discern what the Legislature intended when it included an exception in the Open Records Act for agency memoranda and letters. *See* TEX. GOV’T CODE § 552.111. In this case, the specific inquiry is whether the Legislature intended that exception to include a draft of a memo that was never sent but was prepared solely for discussion in a closed executive session in order to decide what, if anything, should be done about a certain employee. The law is clear that if the matters contained in the draft memo had been presented orally, the City would not be required to disclose the content of that presentation. The Texas Open Meetings Act specifically allows employment matters to be considered in a closed meeting:

§ 551.074. Personnel Matters; Closed Meeting

- (a) This chapter does not require a governmental body to conduct an open meeting:
  - (1) to deliberate the appointment, employment, evaluation, reassignment, duties, discipline, or dismissal of a public officer or employee; or
  - (2) to hear a complaint or charge against an officer or employee.
- (b) Subsection (a) does not apply if the officer or employee who is the subject of the deliberation or hearing requests a public hearing.

TEX. GOV'T CODE § 551.074.

This is clear legislative intent that matters of the kind included in the memo at issue do not have to be aired in public. The Open Records Act should be construed congruently with the Open Meetings Act. It would be odd indeed for the Legislature to have intended for an oral presentation to be exempted from the public domain but not an identical presentation in writing. I agree with the plurality that a document that would otherwise be public information cannot be brought within the deliberative process exemption by discussing it at a closed session. But where, as here, the document was prepared solely for use in a closed meeting and the document does not reflect the decision reached or the reason for that decision, it is exempt. I would also note that the attorney general opinion cited by the plurality does not address the issue in this case. In any event, with all due respect to the Attorney General, his or her opinions, though persuasive, “are not controlling on the courts.” See *Commissioners Court of Titus County v. Agan*, 940 S.W.2d 77, 82 (Tex. 1997) (other citations omitted).

The plurality’s reliance on the general proposition that we should construe the Open Records Act to favor disclosure rings hollow in light of the express intent of the Legislature that personnel matters are not required to be discussed in a fish bowl. The only hook on which the plurality can

hang its conclusion is that the personnel decision in this case did not “formulate policy.” But not a single authority cited by the plurality supports that proposition. A number of decisions, to which I now turn, undercut the plurality’s conclusions.

## II

A number of courts have held that documents used in making personnel decisions are indeed included within the deliberative process privilege. Yet the plurality brushes those decisions aside and makes no attempt to distinguish them. On the one hand, the plurality accurately tells us that we should look to federal decisions that construe the federal Freedom of Information Act because it was the model for the Texas Open Records Act. *See* \_\_ S.W.3d at \_\_. But the plurality then refuses to examine, much less be guided by, those federal decisions.

Neither the plurality nor Justice Enoch tells us why the Fifth Circuit’s decision in *May v. Department of Air Force*, 777 F.2d 1012 (5<sup>th</sup> Cir. 1985) is unpersuasive. It held that the deliberative process exemption applied to evaluations and recommendations that the Air Force kept on file and used in deciding whether to promote officers. Similarly, my colleagues do not explain why the decision in *American Federation of Government Employees, Local 2782 v. U.S. Department of Commerce*, 907 F.2d 203 (D.C. Cir. 1990) was misguided. In that case, a union representing federal government employees suspected that the Census Bureau, which is a unit of the Department of Commerce, had violated its merit system by pre-selecting employees to receive promotions rather than allowing other employees to compete. The District of Columbia Circuit held that forms on which recommendations of particular employees for specific promotions were recorded were exempt under the deliberative process privilege. *See id.* at 208; *see also Kalmin v. Department of Navy*, 605

F. Supp. 1492 (D.D.C. 1985) (holding that memoranda recording encounters with or observations about a Navy employee and used by the Navy in making personnel decisions were part of the deliberative process and were exempt under the FOIA).

There are other decisions that do not share the plurality's truncated view of the deliberative process exemption as it relates to personnel and similar matters, but the plurality does not attempt to explain or distinguish them either. We are not told why documents reviewed by the National Endowment for Humanities in determining whether to bestow an endowment upon a Chinese professor for his work on Chinese history fall within the deliberative process exemption, but the document before this Court does not. *See Wu v. National Endowment for Humanities*, 460 F.2d 1030 (5<sup>th</sup> Cir. 1972) (holding that an expression of an opinion considered by the agency in reaching a decision on a grant was included within exemption 5 of the FOIA). How is it that a memorandum found by a federal district court to "deal[] exclusively with personnel matters and interpersonal relations among employees of the federal Office of Hearings and Appeals," *Schell v. United States Dep't of Health & Human Servs.*, 843 F.2d 933 (6<sup>th</sup> Cir. 1988), is exempt but a memorandum dealing with a city's decision on how to handle a personnel matter is not? Similarly, why is it that a memorandum setting forth the opinions of a post office employee about whether disciplinary action should be taken against other employees as demanded by a citizen is included within the deliberative process exemption, *see Skelton v. United States Postal Serv.*, 678 F.2d 35 (5<sup>th</sup> Cir. 1982), but not opinions of a City of Garland employee about whether a subordinate should be terminated? Is there any principled distinction between personnel decisions made by the Postal Service and those made by a city? Are the former "policy" decisions but not the latter? The distinction eludes me.

The plurality summarily dismisses these decisions. It says none of the cases “consider the issue here -- whether the privilege protects only policymaking agency communications.” \_\_\_ S.W.3d at \_\_\_. That statement, with all due respect, is erroneous. Courts that have directly confronted the question of whether personnel decisions involve “policy” decisions have said, yes, they do.

In *Skelton*, the party making the FOIA request argued that documents reflecting a Postal Service employee’s opinion about why certain of its employees should not be disciplined were based on facts and could not be “an opinion concerning ‘legal or policy matters’ within the meaning of *Sears*.” *Skelton*, 678 F.2d at 38. The Fifth Circuit rejected that argument, holding that disclosure of the material would serve only to reveal the evaluative process by which a member of the decision-making chain arrived at his conclusions and what those predecisional conclusions were. *See id.* at 39.” Such disclosure is precisely what Exemption 5 [of the FOIA] was intended to prevent.” *Id.* (citing *Sears*, 421 U.S. at 150).

A requestor’s efforts to distinguish personnel decisions from “policy” decisions was also rejected by the District of Columbia Circuit in *AFGE v. Department of Commerce*. *AFGE*, 907 F.2d 203. In seeking documents that were used in making decisions about promotions within the Department, the party requesting the documents contended that they did not “‘evinced [anything of an] internal debate on policy options,’” and did not reflect “‘the give-and-take of the consultative process.’” *Id.* at 207 (quoting *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)). The court held otherwise, taking a reasoned and real-world view of the decisions an agency must make:

The exemption . . . covers recommendations, drafts, documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency. Documents which are protected by the privilege are those which would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is as yet only a person position.

*Id.* at 208 (quoting *Coastal*, 617 F.2d at 866). The court then described the documents before it as a “dialogue within the agency,” and therefore exempt, as distinguished from other documents that reflected the final agency position and accordingly “settled agency policy” about who would be promoted to what position. *Id.* That decision is directly on point. The City Manager’s memorandum in this case “recommended personnel actions to which the Bureau [in our case City] was not yet committed.” *Id.* A dialogue occurred among the City’s management about whether and how to deal with the director of finance.

### III

The plurality’s opinion as to the scope of section 552.111 of the Texas Open Records Act is driven by two misguided assumptions. First, the plurality erroneously concludes that a document actually used by a governmental entity in reaching its decision is not “predecisional.” Second, the plurality has not asked the right question in determining what is included within or excluded by the deliberative process exemption. The plurality recites the words “policy” and “policy-making” like a mantra and pursues a relentless search to determine whether those words appear in decisions that have defined the exemption’s boundaries. But it makes no attempt to explore what “policy” means when used by the courts in the context of the deliberative process exemption. Not a single decision cited by the plurality supports its cribbed view of what constitutes a “policy” decision. Yet, the

plurality summarily concludes with no analysis whatsoever that “policy” decisions do not include personnel decisions about whether to terminate an employee. \_\_\_ S.W.3d at \_\_\_.

A good place for the plurality to begin in trying to understand the substance of the deliberative process exemption would be a more thoughtful analysis of the United States Supreme Court’s decisions in *Renegotiation Board v. Grumman Aircraft Engineering, Corp.*, 421 U.S. 168 (1975), and *EPA v. Mink*, 410 U.S. 73 (1973). Those decisions explain some of the history of the deliberative process exemption that is set forth in section 5 of the federal Freedom of Information Act. That section of the federal statute, which the Texas exemption tracks, essentially embodies and expands decades of federal common law. *See Mink*, 410 U.S. at 86; *Ackerly v. Ley*, 420 F.2d 1336, 1340 (D.C. Cir. 1969) (citing numerous decisions to that effect). The federal common law had long recognized the need for frank exchanges among government officials in many of their deliberations. Accordingly, as *Grumman* instructs, the deliberative process privilege in exemption 5 of the federal Freedom of Information Act carves out documents considered in making a decision but that do not reflect the actual decision. The Supreme Court explained that when an internal memorandum is used by the decision-maker in arriving at its decision, the memorandum is exempt, but “postdecisional” memoranda setting forth the reasons for an agency decision are not:

[B]oth Exemption 5 [of the FOIA] and the case law which it incorporates distinguish between predecisional memoranda prepared in order to assist an agency decisionmaker in arriving at his decision, which are exempt from disclosure, and postdecisional memoranda setting forth the reasons for an agency decision already made, which are not.

*Grumman*, 421 U.S. at 184. The Court thus drew a clear distinction between final agency decisions, which are subject to disclosure under the FOIA, and documents that are created to assist in making the final decision, which are exempt.

The documents under consideration in *Grumman* were generated in determining whether government contractors had received excessive profits within the meaning of the Renegotiation Act of 1951. In that process, Regional Boards made decisions and prepared Regional Board Reports that were then considered by the national agency, which was the Renegotiation Board. At times, a division of the national Board also made recommendations to the entire Board in the form of Division Reports. Although the national Board sometimes followed the recommendations of the Regional Board Reports or the Division Reports without expressing whether it agreed with the reasoning of those decisions, the Supreme Court held that both the Regional and the Division Reports were within exemption 5 under the FOIA because they were part of the deliberative process. Even though the Regional and Division Reports were often the final written word on the matter, the Court held that the reports were nevertheless predecisional and exempt because only the Board had the authority to make the final decision and the reports were not adopted by the Board:

[B]ecause both types of reports involved in this case are prepared prior to that decision and are used by the Board in its deliberations; and because the evidence utterly fails to support the conclusion that the reasoning in the reports is adopted by the Board as *its* reasoning, even when it agrees with the conclusion of a report, we conclude that the reports are not final opinions and do fall within Exemption 5.

*Id.* at 184-85.

The Court also explained *why* documents considered in making a decision should be and are exempt but documents reflecting the decision itself are not. First, deliberations must remain

uninhibited. “The Regional Board Reports are thus precisely the kind of predecisional deliberative advice and recommendations contemplated by Exemption 5 which must remain uninhibited and thus undisclosed, in order to supply maximum assistance to the Board in reaching its decision.” *Id.* at 186. Second, the public’s interest in reasons that were not the basis of a decision are minimal. ““The public is only marginally concerned with reasons supporting a [decision] which an agency has rejected, or with reasons which might have supplied, but did not supply, the basis for a [decision] which was actually adopted on a different ground.”” *Id.* (quoting *Sears* , 421 U.S. at 152 (alteration in original)). Third, public dissemination of reasons considered by subordinates but not relied upon by the decision-maker might be misleading. “Indeed, release of the Regional Board’s reports on the theory that they express the reasons for the Board’s decision would, in those cases in which the Board had other reasons for its decision, be affirmatively misleading.” *Id.*

The Supreme Court summed up its decision in *Grumman* by saying that even when a document may contain the views of one or more members of the agency, the agency as a whole is the decision-maker. It should not be deprived of documents created to facilitate open and candid discussion by the fear of public ridicule or criticism:

The point is that the report is created for the purpose of discussion, and we are unwilling to deprive the Board of a thoroughly uninhibited version of this valuable deliberative tool by making Division Reports public on the unsupported assumption that they always disclose the final views of at least some members of the Board.

*Id.* at 190.

Another decision handed down by the Supreme Court on the same day as *Grumman* emphasized that the distinction between documents used in making a decision and those generated

after the decision has been made was “uniform,” “long-recognized,” and necessary to protect to quality of agency decisions:

Manifestly, the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions. The quality of a particular agency decision will clearly be affected by the communications received by the decisionmaker on the subject of the decision prior to the time the decision is made. However, it is difficult to see how the quality of a decision will be affected by communications with respect to the decision occurring after the decision is finally reached; and therefore, equally difficult to see how the quality of the decision will be affected by forced disclosure of such communications, as long as prior communications and the ingredients of the decisionmaking process are not disclosed. Accordingly, the lower courts have uniformly drawn a distinction between predecisional communications, which are privileged . . . and communications made after the decision and designed to explain it, which are not.

*Sears*, 421 U.S. at 151-52. Further, a predecisional document does not lose its exemption after the decision is made public unless it is “‘adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public.’” *Arthur Andersen v. IRS*, 679 F.2d 254, 258 (D.C. Cir. 1982) (quoting *Coastal*, 617 F.2d at 866). Because I find the United States Supreme Court’s decisions in *Sears* and *Grumman* persuasive, I cannot agree with Justice Enoch that the memo at issue in this case became public information simply because it was discussed in the process of making a decision.

Nor does the plurality’s view of the deliberative process exemption square with the opinion in *Sears*. The Supreme Court was careful to point out in *Sears* that there will be recommendations considered by the decision-maker that relate to overall policies rather than specific policy decisions:

Our emphasis on the need to protect pre-*decisional* documents does not mean that the existence of the privilege turns on the ability of an agency to identify a specific decision in connection with which a memorandum is prepared. Agencies are, and properly should be, engaged in a continuing process of examining their policies; this

process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process.

*Sears*, 421 U.S. at 151 n.18. The plurality disregards this admonition.

The Supreme Court's decision in *EPA v. Mink*, 410 U.S. 73 (1973), which preceded *Grumman* and *Sears* and the adoption in Texas of the Open Records Act, also indicates that this Court's view about what types of "decisions" fall within the deliberative process exemption is unduly circumscribed. In *Mink* the Supreme Court looked to the legislative history of exemption 5 under the FOIA. The *Mink* decision recounts that an "early formulation" of the deliberative process exemption in drafts of the FOIA "came under attack for not sufficiently protecting material dealing with general policy matters not directly related to adjudication or rulemaking." *Id.* at 90 n.17. Accordingly, the early version of the exemption was rewritten. The one that came to be included in the FOIA was in "substantially its present form." *Id.* at 91; *see also National Wildlife Fed'n v. United States Forest Serv.*, 861 F.2d 1114, 1118 (9<sup>th</sup> Cir. 1988) (discussing this legislative history and holding that opinions or recommendations regarding facts or consequences of fact are not automatically ineligible from exemption under exemption 5 and that material is exempt when the disclosure of the manner of selecting or presenting facts would expose the deliberative process).

The plurality asserts that I have misconstrued *Mink*. But it is the plurality that has misconstrued *Mink* by once again viewing the law about the scope of the deliberative process privilege myopically. *Mink* says, as I have accurately quoted above: "That early formulation [of exemption 5] came under attack for not sufficiently protecting material dealing with *general policy*

*matters not directly related to adjudication or rulemaking.*” *Mink*, 410 U.S. at 90 n.17 (emphasis added).

The implications of the Supreme Court’s decisions in *Grumman*, *Sears*, and *Mink* for the case before us today should be obvious. The memorandum in dispute was prepared for and used in making a decision about how to deal with the City’s director of finance. The handling of a city’s financial resources is one of its core functions. Even assuming it was not a core function, personnel decisions about who will carry out the responsibilities of a governmental entity, and in what capacity, are intertwined with the entity’s view of how best to do its job. To say, as the plurality has done, that a city’s deliberations about who is to be its director of finance is not a policy matter is illogical and provincial.

#### IV

The plurality relies heavily on Justice Ginsburg’s decision in *Petroleum Information Corp. v. United States Department of Interior*, 976 F.2d 1429 (D.C. Cir. 1992), when she served on the Court of Appeals for the District of Columbia Circuit, for the proposition that “the deliberative process is centrally concerned with protecting the process by which *policy* is formulated.” \_\_\_ S.W.3d at \_\_\_. But the plurality’s fixation on the use of the word “policy” does nothing to shed light on what other courts have meant when they discuss “policy” decisions in the context of the deliberative process exemption. The plurality ignores the teaching in Justice Ginsburg’s decision that the “key question” is “whether disclosure would tend to diminish candor within an agency.” *Petroleum Info.*, 976 F.2d at 1435. “Inquiring whether the requested materials can reasonably be

said to embody an agency’s policy-informed or -informing judgmental process . . . helps us answer the ‘key question.’” *Id.*

Justice Ginsburg’s decision cites with approval *Dudman Communications v. Department of Air Force*, 815 F.2d 1565 (D.C. Cir.1987), and *Russell v. Department of Air Force*, 682 F.2d 1045 (D.C. Cir. 1982), which held that drafts of official military histories fell within exemption 5 of the FOIA because “revelation of editorial changes threatened to ‘stifle the creative thinking and candid exchange of ideas necessary to produce good historical work.’” *Petroleum Info.*, 976 F.2d at 1434 (quoting *Dudman*, 815 F.2d at 1569). As discussed above, it is difficult to square these decisions with the plurality’s reasoning. Why is it that drafts of military histories involve “policy” decisions, but a draft of a memorandum prepared to consider options in an employment matter does not?

The plurality picks and chooses among the federal decisions construing exemption 5 that were issued after the Texas Legislature enacted the Open Records Act, but apparently approves of Justice Ginsburg’s decision in *Petroleum Information Corp.* The plurality seems to think that many federal courts, including the United States Supreme Court, have too broadly construed the deliberative process privilege. Although the plurality relies on a number of decisions decided after the Texas Act was passed, it states at one point that the Legislature could only have looked to the extant federal decisions when it passed the Open Records Act. I will not lengthen this opinion by discussing whether this latter conclusion is a valid or advisable rule of statutory interpretation. But the rationale of federal circuit court opinions that have specifically considered whether personnel deliberations are policy matters should not be rejected out of hand based on the date of the decision. No court or commentator has suggested that the cases that exempt documents used in making

personnel decisions have improperly expanded the deliberative process exemption or that they were incorrectly decided.

In resolving what is within the deliberative process exemption, it is also helpful to consider the types of documents that courts have said are *not* exempt. Non-exempt documents include a database that the Department of Interior was in the process of compiling that included the location, acreage, survey number, and other information about federally-owned land, *see Petroleum Info.*, 976 F.2d 1429; training manuals, *see Stokes v. Brennan*, 476 F.2d 699 (5<sup>th</sup> Cir. 1973); decisions by the General Counsel of the NLRB not to pursue a complaint with the Board, which had the effect of a final decision on the complaint, *see Sears*, 421 U.S. 132; and memoranda sent by Department of Energy lawyers to auditors in the field when the memos were routinely used as precedent, *see Coastal*, 617 F.2d 854. Personnel decisions bear no resemblance to these types of documents.

## V

The only decision that the plurality has cited that remotely supports its reasoning is *Cazalas v. Department of Justice*, 709 F.2d 1051 (5<sup>th</sup> Cir. 1983). The sole issue in that case was whether the Justice Department should be required to pay attorney's fees to a pro se litigant (a former assistant U.S. attorney) who had substantially prevailed in making a FOIA request to her former employer. When Cazalas made her FOIA request, she also had pending an EEOC claim against the Justice Department for alleged discrimination. She had demanded many of the same documents pursuant to 29 C.F.R. § 1613.217, which entitled her to see her EEOC investigative file. The government had repeatedly delayed in responding to these requests and had also denied any obligation to produce certain documents. Ultimately, the Justice Department voluntarily produced all documents sought

by Cazalas. It did not, however, agree to pay attorney's fees. In an attempt to escape that obligation, the Justice Department argued, among other things, that some of the requested documents fell within exemption 5 to the FOIA, and although it had produced those documents, it had not been required to do so. With very little discussion, the Fifth Circuit discarded that contention. It reasoned that "the material sought was discoverable in private litigation as well as under the FOIA." *Id.* at 1055.

While the court in *Cazalas* appears to have been correct in concluding that the plaintiff could obtain the documents she sought in a Title VII proceeding, its conclusion that the same analysis should apply under the FOIA is suspect. Most courts considering the question have recognized that the deliberative process exemption is based on what is generally discoverable in litigation, not on the most compelling hypothetical. *See, e.g., Sears*, 421 U.S. at 149 n.16 (observing "it is not sensible to construe the Act to require disclosure of any document which would be disclosed in the hypothetical litigation in which the private party's claim is the most compelling"); *see also Mink*, 410 U.S. at 84 (noting that the FOIA "does not permit inquiry into particularized needs of the individual seeking the information" but that "Congress intended to incorporate generally the recognized rule that 'confidential intra-agency advisory opinions are privileged from inspection'"). Specifically with regard to Title VII claims, at least one court has concluded that the fact documents "might be discoverable upon an adequate showing under Title VII [did not] imply" that they were available under the FOIA. *AFGE*, 907 F.2d at 207 .

The plurality offers no authoritative decisions to support its conclusions. To the extent that it purports to rely on *Lett v. Klein Independent School District*, 917 S.W.2d 455 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1996, writ denied), for the proposition that evaluations of a student do

not involve “policy,” any precedential value *Lett* may have is in doubt. This Court denied the school district’s motion for rehearing in that case in a per curiam opinion, noting that we neither approve nor disapprove of the court of appeals’ opinion. *See Klein Indep. School Dist. v. Lett*, 978 S.W.2d 120, 120 (Tex. 1998).

In sum, the case law weighs decidedly against the plurality’s reasoning. There is also tension between the plurality’s conclusions and express provisions of the Open Records Act, to which I now turn.

## VI

The Open Records Act exception at issue in this case says: “An interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency is excepted from the requirements of Section 552.021.” TEX. GOV’T CODE § 555.111. Section 552.021, referenced in that exemption, is the section of the Act that defines what is public information. *See* TEX. GOV’T CODE § 555.021.

The exemption in section 552.111 by its express terms only applies when an agency memorandum would not be “available by law to a party in litigation.” TEX. GOV’T CODE § 552.111. This clearly refers to the attorney-client privilege and work product, which have long been recognized by decisions of this Court and in procedural and evidentiary rules. But this Court has never decided whether there is a deliberative process privilege in the context of litigation. Nor do the rules of procedure or evidence mention such a privilege. Nevertheless, the Court unanimously and correctly holds today that the Legislature had in mind the deliberative process privilege recognized in federal case law and embodied in the FOIA. It is only the scope of the deliberative

process exemption that is at issue. The plurality would unduly constrict its intended scope, which is evidenced by an examination of the Act as a whole.

The Texas Open Records Act provides that all information is public if it is collected, assembled, or maintained by a governmental body under a law or ordinance or in connection with the transaction of official business. *See* TEX. GOV'T CODE § 552.021. The succeeding section of the Act sheds light on what the Legislature meant by the words “in connection with the transaction of official business.” Section 552.022 contains a detailed listing of the types of documents that are considered public information. *See* TEX. GOV'T CODE § 552.022. These categories indicate that the “transaction” of official business means a completed transaction, procedures that are actually in place, or static information. For example, the Act speaks of “a completed report, audit, evaluation, or investigation”; the “final record of voting on all proceedings”; information about an estimate for expending funds “on completion of the estimate”; and a “policy statement or interpretation that has been adopted by an agency.” TEX. GOV'T CODE §§ 552.022(1), (4), (5), (13). The Act's references to existing procedures and data are also numerous. *See* TEX. GOV'T CODE §§ 552.022(2), (3), (6), (7), (8), (9), (10), (14).

The concept that a governmental entity's final or at least present decisions and policies are the focus of the Act is given expression in the provisions of the Act itself. The distinction that the federal courts had made before the Texas Open Records Act was passed between documents used by an agency to reach a decision and documents that reflect or explain that decision seems to have been carried forward not only in the exemption embodied in section 552.111, but in the reach of the Act itself.

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For the foregoing reasons, I cannot join the Court's judgment.

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Priscilla R. Owen  
Justice

OPINION DELIVERED: January 13, 2000