



May 1, 2001

Ms. Janice Mullenix  
Associate General Counsel  
Texas Department of Transportation  
125 East 11<sup>th</sup> Street  
Austin, Texas 78701-2483

OR2001-1773

Dear Ms. Mullenix:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 146714.

The Texas Department of Transportation (the “department”) and The Grand Parkway Association (the “association”) each received a request for information pertaining to segment C of the proposed Grand Parkway, a highway construction project in the Houston area. Excluding a previously released Draft Environmental Impact Statement, the request specifically seeks “all records relating or making reference in any way” to the following:

1. Hurricane evacuation in the area of the proposed segment, including all analyses of hurricane evacuation needs and possible solutions to those needs;
2. Traffic projections, travel demand, or traffic congestion in the area of the proposed segment;
3. Flooding and flood prevention in the area of the proposed segment;
4. Projected impacts of the proposed segment on facilities or resources subject to section 4(f) of the Federal Department of Transportation Act;
5. Alternate routes to the proposed segment;

6. Growth-inducing impacts of the proposed segment;
7. Air quality impacts of the proposed segment; and
8. The current or future possible relationship between the proposed segment and the proposed route for I-69, another highway in the region.

You state the information in tabs 1 through 6 of the submitted Exhibit B comprises a representative sample of the information responsive to the request.<sup>1</sup> You claim that the requested information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You contend that the release of the information responsive to the request is governed by federal regulations promulgated by the Federal Highway Administration that pertain to the procedure for the preparation of a Final Environmental Impact Statement. *See* 23 C.F.R. § 771.125. You state that "it would be inappropriate to circumvent the federal procedure." You thus appear to argue that the information should be deemed confidential under section 552.101 in conjunction with the federal regulation you cite. As a general rule, statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to the public. Open Records Decision No. 478 at 2 (1987). We find no such language in the above-cited federal regulation, and we accordingly conclude the information is not excepted from disclosure by section 552.101.

Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, No. 03-00-00219-CV, 2001 WL 23169, at \* 5 (Tex. App.--Jan. 11, 2001, no pet. h.). An agency's policymaking functions do not encompass

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<sup>1</sup>We assume that 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.

internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. This exception applies not only to internal memoranda, but also to memoranda prepared by consultants of a governmental body. Open Records Decision Nos. 462 at 14 (1987), 298 at 2 (1981).

Section 552.111 generally does not, however, except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. Open Records Decision No. 615 at 4-5 (1993). Yet, where a policymaking document is a genuine preliminary draft that has been released or is intended for release in final form, factual information in the draft which also appears in a released or releaseable final version is excepted from disclosure by section 552.111. Open Records Decision No. 559 (1990). Severable factual information appearing in the draft but not in the final version is not excepted by section 552.111. *Id.* In the case of interagency communications, section 552.111 is not demonstrated to apply unless the agencies between which the information is passed are shown to share a privity of interest or common deliberative process with regard to the policy matter at issue. Open Records Decision No. 561 at 9 (1990).

You represent that the information in tabs 4 and 5 constitutes preliminary drafts of particular sections of the Final Environmental Impact Statement. Based on our understanding that the Final Environmental Impact Statement will be released upon completion, we find that these preliminary drafts may be withheld at this time pursuant to section 552.111. You represent that the information in tabs 3 and 6 was prepared by a consultant and contains questions posed by the consultant as well as the consultant's draft responses to comments made by various interested parties. Assuming that the final version of the responses to the comments will be publicly released, we find that the draft responses prepared by the consultant and the questions posed by the consultant may be withheld at this time pursuant to section 552.111. However, the remaining information in these documents, *i.e.* the comments submitted by the various interested parties, is not excepted from disclosure under section 552.111 and must be released to the requestor.

You describe the information in tab 1 as "inter-agency advice and comments" submitted to the association by the Houston-Galveston Area Council (the "council"), and you state the advice and comments pertain to the potential effects of the highway construction project on the "Metropolitan Transportation Plan." You do not explain, however, nor can we discern from our review of the information at issue, whether there exists any privity of interest or common deliberative process for any particular policy matter between the council, the association, and the department. As to tab 2, you state that this information comprises meeting summaries "of the travel forecasting peer review panel," but you do not explain, nor can we discern from our review of the information at issue, the relationship between the peer review panel, the department, and the association. Because neither a privity of interest nor a common deliberative process for any particular policy matter has been demonstrated to exist with regard to the information in tabs 1 and 2, we are unable to conclude that

section 552.111 applies to any of this information. Accordingly, the information in tabs 1 and 2 is not excepted from disclosure and must be released to the requestor.

In summary, the preliminary drafts of the Final Environmental Impact Statement, as well as the questions and recommended responses to public comment prepared by the consultant, are excepted from disclosure under section 552.111. The remaining information must be released to the requestor.

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

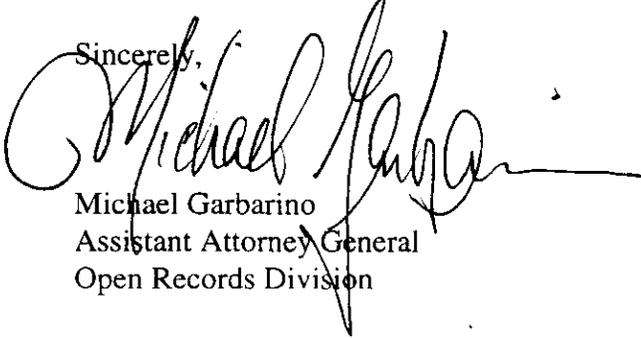
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Garbarino". The signature is written in a cursive style and is positioned above the typed name and title.

Michael Garbarino  
Assistant Attorney General  
Open Records Division

MG/seg

Ref: ID# 146714

Encl. Submitted documents

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