



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 31, 2005

Mr. C. Brian Cassidy
Locke, Liddell & Sapp, L.L.P.
100 Congress Ave., Suite 300
Austin, Texas 78701-4042

OR2005-09848

Dear Mr. Cassidy:

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# 235370.

The Central Texas Regional Mobility Authority (the "authority"), which you represent, received a request for all correspondence discussing any authority surveys, questionnaires, or polls over a specified period. You state that you will release some of the requested information but claim that the submitted information is excepted from disclosure under section 552.111 and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the applicability of the Open Meetings Act, chapter 551 of the Government Code to Notices of Open Meetings. Section 551.041 requires a governmental body to give written notice of the date, hour, place, and subject of each meeting held by the governmental body. Gov't Code § 551.041. Additionally, section 551.043 states a governmental body must post such notice in a place readily accessible to the general public at all times for at least 72 hours before the scheduled time of the meeting. Gov't Code § 551.043. When a statute expressly makes information public and mandates its release, the information generally cannot be withheld from disclosure under one of the exceptions in Subchapter C of chapter 552 of the Government Code. *See* Open Records Decision No. 451 (1986) (specific statute that affirmatively requires release of information at issue prevails over litigation exception of the Act). Therefore, the submitted Notices of Open Meetings must be released to the requestor.

Next, we note that Exhibit 1A also contains Resolutions adopted by the authority's Board of Directors (the "board"). These resolutions were adopted in public meetings of the authority. The authority may not now withhold such information under section 552.111 or section 552.137 of the Government Code. Open Records Decision Nos. 551 at 203 (1990) (laws or ordinances are open records), 221 at 1 (1979) ("official records of the public proceedings of a governmental body are among the most open of records").

We also note that the authority has previously released some of the submitted information to the public. Information that a governmental body has previously released to the public may not be withheld by the governmental body unless it is able to demonstrate that the information is confidential by law. Gov't Code § 552.007. Although you assert that this information is protected under section 552.111 of the Government Code, this exception is discretionary and may be waived. As such, it does not make information confidential for purposes of section 552.007. *See id.* (prohibiting selective disclosure of information that governmental body has voluntarily made available to any member of the public); Open Records Decision Nos. 677 at 10-11 (2002) (attorney work-product privilege under section 552.111 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). Therefore, the authority has not demonstrated that any of the previously released information is confidential by law, and it must release that information to the requestor pursuant to section 552.007.

We now turn to your arguments regarding the remaining submitted information. Section 552.111 excepts from public disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." The purpose of this exception is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615 (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts only 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 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995). Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and

recommendations. *See* Open Records Decision No. 615 at 5. If, however, the 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 may also be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

This office also has concluded that a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

Section 552.111 applies not only to a governmental body's internal memoranda, but also to memoranda prepared for a governmental body by an outside consultant with which the governmental body has a privity of interest or common deliberative process. *See* Open Records Decision Nos. 561 at 9 (1990), 462 at 14 (1987), 298 at 2 (1981). You state that the information at issue "relate[s] to activities undertaken by [authority] staff, consultants and subconsultants, at the [authority's] request[.]" You further state that the information at issue consists of "draft documents of the survey instruments, and all associated correspondence, discussion, and editing of such documents." Based upon your representations and our review of the submitted documents, we agree that most of the information you seek to withhold under section 552.111 consists of advice, opinions, and recommendations regarding a policymaking matter of the authority. The remaining submitted information the authority seeks to withhold under section 552.111 is either severable factual information or information from a party with whom privity of interest or common deliberative process has not been demonstrated. Therefore, the authority may withhold the information we have marked under section 552.111 of the Government Code.

You also note the information at issue includes e-mail addresses of members of the public. Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public" but is instead the address of the individual as a government employee. Some of the e-mail addresses at issue in the remaining submitted information do not appear to be of a type specifically excluded by section 552.137(c). Therefore, in accordance with section 552.137,

the authority must withhold the e-mail addresses as marked unless the authority receives consent to release them.

In summary, the authority may withhold the portions of the submitted information that we have marked under section 552.111 of the Government Code. The authority must withhold the e-mail addresses you have marked and the additional e-mail addresses we have marked under section 552.137 of the Government Code prior to releasing the remaining information. The remaining information must be released.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Dep't of Pub. 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 Office of the Attorney General 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 cursive script that reads "L. Joseph James". The signature is written in black ink and is positioned above the typed name.

L. Joseph James
Assistant Attorney General
Open Records Division

LJJ/krl

Ref: ID# 235370

Enc. Submitted documents

c: Mr. Sal Costello
10300 Dalea Vista Court
Austin, Texas 78738
(w/o enclosures)