ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 14, 2005

Ms. Sharon Alexander
Assistant General Counsel
Texas Department of Transportation
Dewitt C. Greer State Highway Bldg
125 E. 11th Street
Austin, Texas 78701-2483

OR2005-11233

Dear Ms. Alexander:

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# 237106.

The Texas Department of Transportation (the "department") received a request for information regarding the selection of I 69 corridors leading to and including Link 601 surrounding the Edroy community, and items pertaining to the environmental justice impact to the Edroy community. You claim that the submitted 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.[1]

Initially, we address whether the department complied with the procedural requirements of the Act. Pursuant to section 552.301(b) of the Government Code, a governmental body that wishes to withhold information must ask for an attorney general's decision and state the exceptions that apply within ten business days of receiving the request. *See* Gov't Code

[1]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.

§ 552.301(b). In this instance, the requestors sent two requests for information. The first request was sent to a private consulting firm. Since the request was not sent to the department, we conclude that this request did not trigger the department's obligations under the Act. *See* Gov't Code ch. 552 (discussing a governmental body's obligations upon receiving an open records request). The second request, however, was sent to the department. Since the department timely requested an attorney general decision upon receiving the second request, we will address the department's arguments concerning the submitted information. *See* Gov't Code § 552.301(b).

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. You state that the requested information consists of internal pre-decisional deliberations between the employees of the department, consultants working on the project, and the Federal Highway Administration ("FHWA"). You also state that section 771.123 of title 23 of the Code of Federal Regulations and the FHWA govern the availability of this information. Although section 771.123 provides the detailed procedure for preparation of the Draft Environmental Impact Statement, the provision does not, however, expressly make any information confidential. *See* 23 C.F.R. § 771.123; *see also* Open Records Decision Nos. 658 at 4 (1989) (statutory confidentiality must be express, and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to the public). Therefore, we conclude that you have not demonstrated that the requested information is confidential by statute. Accordingly, you may not withhold it under section 552.101 of the Government Code.

You also claim that the requested information is excepted under section 552.111 of the Government Code. 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." Gov't Code § 552.111. Section 552.111 encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). 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 from disclosure only those internal communications that consist of advice, recommendations, and opinions that reflect 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). Furthermore, 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. 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). Further, when determining if an interagency memorandum is excepted from disclosure under section 552.111, we must also consider whether the agencies between which the memorandum is passed share a privity of interest or common deliberative process with regard to the policy matter at issue. *See* Open Records Decision No. 561 at 9 (1990).

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.

You state that the submitted documents are "rife with advice, opinions, and recommendations" concerning a number of proposed policies regarding the selection of I 69 corridors. You explain that these deliberations and documents will make up a Draft Environmental Impact Statement that will be made available for public comment upon approval by the FHWA. *See* C.F.R. § 771.123(e), (g) (draft EIS must be made available to public upon Federal Highway Administration's determination that it complies with applicable requirements). After reviewing your arguments and the submitted information, we find that the department may withhold most of the requested information under section 552.111 of the Government Code. However, we find that portions of the information you seek to withhold, namely a meeting attendance sign-in sheet, a meeting agenda, and some of the minutes of a meeting, are purely factual. Accordingly, the department may only withhold the information we have marked under section 552.111 of the Government Code. The remaining information may not be withheld under section 552.111 of the Government Code.

We note, however, that the meeting attendance sign-in sheet contains e-mail addresses. 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). The types of e-mail addresses excluded by subsection (c) include an e-mail address that is "provided to a governmental body by a person who has a contractual relationship with the governmental body. . . ." Gov't Code § 552.137(c)(1). We also note, that government employees' work e-mail addresses are not protected by section 552.137, and thus, may not be withheld under this section. Futhermore, if the named individuals on the sign-in sheet have a contractual relationship with the department, their e-mail addresses must be released. On the other hand, if the individuals on the sign-in sheet do not have a contractual relationship with the department and did not consent to the release of their e-mail addresses, the department must withhold them in accordance with section 552.137 of the Government Code.

In summary, the department may withhold the information we have marked under section 552.111 of the Government Code. If the named individuals on the sign-in sheet have a contractual relationship with the department, their e-mail addresses must be released. However, if the individuals on the sign-in sheet do not have a contractual relationship with the department and did not consent to the release of their e-mail addresses, the department must withhold them in accordance with section 552.137 of the Government Code. 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

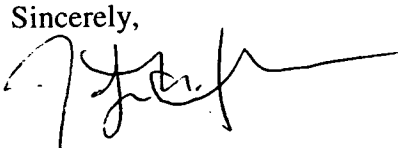
free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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,



Jaclyn N. Thompson
Assistant Attorney General
Open Records Division

JNT/krl

Ref: ID# 237106

Enc. Submitted documents

c: Julie Stalcup
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(w/o enclosures)