



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 20, 2007

Mr. Vic Ramirez
Associate General Counsel
Lower Colorado River Authority
P.O. Box 220
Austin, Texas 78767-0220

OR2007-12255

Dear Mr. Ramirez:

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# 289584.

The Lower Colorado River Authority (the "LCRA") received a request for information relating to the selection of a site for off-channel storage facilities ("OCSF"), including maps of wetlands, a study by the facility siting team of wetlands and waters in prospective sites, and a comparison of the sites. You state that the LCRA has no responsive maps.¹ You have submitted information that the LCRA seeks to withhold under sections 552.104, 552.105, and 552.111 of the Government Code.² We have considered the exceptions you claim and

¹We note that the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App. – San Antonio 1978, writ dismissed); *Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983)*.

²Although you also initially raised section 552.107 of the Government Code, you have since withdrawn the LCRA's assertion of that exception.

have reviewed the submitted information.³ We also have considered the comments that we received from the requestor.⁴

We first note, based on documents that the requestor has provided to this office, that the LCRA appears to have made some of the information that it seeks to withhold available to the public. The Act does not permit the selective disclosure of information. *See* Gov't Code §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). If information has been voluntarily released to any member of the public, then that same information may not subsequently be withheld from another member of the public, unless public disclosure of the information is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007(a); Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988); *but see* Open Records Decision Nos. 579 (1990) (exchange of information among litigants in "informal" discovery is not "voluntary" release of information for purposes of statutory predecessor to Gov't Code § 552.007), 454 at 2 (1986) (governmental body that disclosed information because it reasonably concluded that it had constitutional obligation to do so could still invoke statutory predecessor to Gov't Code § 552.108). The LCRA's claimed exceptions to disclosure, sections 552.104, 552.105, and 552.111 of the Government Code, are discretionary exceptions that protect a governmental body's interests and may be waived. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 592 at 8 (1991) (statutory predecessor to Gov't Code § 552.104 subject to waiver), 564 (1990) (statutory predecessor to Gov't Code § 552.105 subject to waiver), 470 at 7 (1987) (statutory predecessor to Gov't Code § 552.111 subject to waiver). Sections 552.104, 552.105, and 552.111 neither prohibit public disclosure of information nor make information confidential under law. Therefore, to the extent that the LCRA has voluntarily made any of the submitted information available to a member of the public, any such information must be released to this requestor.

We next note that some of the submitted information falls within the scope of section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless the information is excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law. Gov't Code § 552.022(a)(1). In this instance, the submitted information includes completed reports

³You inform us that portions of the submitted documents are not responsive to this request for information. This decision does not address the public availability of any information that is not responsive to the request, and the LCRA need not release any such information. You also indicate that the responsive information that you have submitted includes representative samples. This letter ruling assumes that any such information is truly representative of the requested information as a whole. *This ruling neither reaches nor authorizes the LCRA to withhold any information that is substantially different from the submitted information. See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

⁴*See* Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

made of, for, or by the LCRA. Sections 552.105 and 552.111 are not other law that makes information confidential for the purposes of section 552.022. *See* ORD 665 at 2 n.5, 564, 470 at 7. Therefore, the LCRA may not withhold any of the information that is subject to section 552.022 under section 552.105 or section 552.111. However, because information that is subject to section 552.022 may be withheld under section 552.104, we will address your claim under that exception with respect to all of the submitted information. *See* Gov't Code § 552.104(b) (information protected by Gov't Code § 552.104 not subject to required public disclosure under Gov't Code § 552.022(a)). We also will address your claims under sections 552.105 and 552.111 with respect to the information that is not subject to section 552.022.

Section 552.104 excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” *Id.* § 552.104(a). This exception protects a governmental body's interests in connection with competitive bidding and in certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). This office has held that a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the “competitive advantage” aspect of this exception if it can satisfy two criteria. *See id.* First, the governmental body must demonstrate that it has specific marketplace interests. *See id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *See id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body's legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body's demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *See id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

You seek to withhold all of the submitted information under section 552.104. You state that the release of information that discloses the locations of potential OCSF sites will impair the LCRA's ability to negotiate the purchase or lease of the final site or sites. Thus, you contend that the LCRA has specific marketplace interests. You have not demonstrated, however, that there is any specific threat of actual or potential harm to the LCRA's competitive interests in this particular situation. We therefore conclude that the LCRA may not withhold any of the submitted information under section 552.104 of the Government Code. Because section 552.104 is not applicable in this instance, the LCRA must release the submitted information that is subject to section 552.022 of the Government Code.⁵

⁵The information that must be released pursuant to section 552.022 consists of (1) the Reconnaissance-Level Geological and Geotechnical Considerations Report dated August 8, 2005 in Exhibits C-7A and C-7B; (2) the Preliminary Geotechnical Engineering Study for Site Selection dated December 26, 2006 in Exhibits C-7A, C-7B, and C-7C; (3) Supplement #1 to the Preliminary Geotechnical Engineering Study for Site Selection dated January 25, 2007 in Exhibits C-7A and C-7C; (4) Supplement #2 to the Preliminary Geotechnical Engineering Study for Site Selection dated March 15, 2007 in Exhibits C-7A and C-7C; and (5)

With respect to the remaining information, we address your claim under section 552.111 of the Government Code. 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.” 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, 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* 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. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (Gov’t Code § 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). Moreover, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *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).

We also have 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 inform us that the potential OCSF sites are still the subject of scrutiny and analysis. You state that the remaining information discusses the sites. You contend that the

information in question involves policymaking and that the ultimate choice of the site or sites will be a policy decision. Based on your arguments and our review of the remaining information, we conclude that the LCRA may withhold some of the information under section 552.111.⁶ We also conclude, however, that the rest of the information at issue is factual and as such may not be withheld under section 552.111.

Lastly, we address your claim under section 552.105 of the Government Code. This section excepts from disclosure information that relates to:

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Gov't Code § 552.105. Section 552.105 is designed to protect a governmental body's planning and negotiating position with regard to particular transactions. *See Open Records Decision Nos. 564 (1990), 357 (1982), 310 (1982)*. Information pertaining to such negotiations that is excepted from disclosure under section 552.105 may be withheld so long as the transaction relating to the negotiations is not complete. *See Open Records Decision No. 310 (1982)*. Under section 552.105, a governmental body may withhold information "which, if released, would impair or tend to impair [its] 'planning and negotiating position in regard to particular transactions.'" ORD 357 at 3 (quoting Open Records Decision No. 222 (1979)). The question of whether specific information, if publicly released, would impair a governmental body's planning and negotiation position in regard to particular transactions is a question of fact. Thus, this office will accept a governmental body's good faith determination in this regard, unless the contrary is clearly shown as a matter of law. *See ORD 564*.

You state that the remaining information reveals the locations of potential OCSF sites. You contend that the release of such information would adversely affect the LCRA's ability to negotiate the purchase or lease of the final sites chosen for the facilities. Based on your

⁶The information that the LCRA may withhold under section 552.111 consists of (1) the OCSF Site Reduction Workshop Draft Record dated March 28, 2006 in Exhibit C-2; (2) the Final Draft Technical Memorandum dated March 19, 2007 in Exhibit C-3; (3) the Technical Memorandum dated May 1, 2007 and Appendix A thereto in Exhibit C-4; (4) the Draft Technical Memorandum dated June 27, 2007 and Appendix A thereto in Exhibit C-5; (5) the marked information in the Final Technical Memorandum dated April 18, 2006 in Exhibit C-6; (6) the Draft Technical Memorandum dated May 23, 2007 in Exhibit C-7A; (7) the Draft Technical Memorandum dated May 23, 2007 in Exhibit C-7B; (8) the Interim Conceptual Probable Construction Cost Estimates and Technical Memorandum in Exhibit C-8; and (9) the Draft Alternative Analysis Technical Memoranda dated June 2007 in Exhibit C-9.

representations and our review of the remaining information, we have marked information that the LCRA may withhold under section 552.105.⁷

In summary: (1) to the extent that the LCRA has voluntarily made any of the submitted information available to a member of the public, any such information must be released to the requestor; (2) the LCRA must release the information that is subject to required disclosure under section 552.022 of the Government Code; (3) the LCRA may withhold the information that is excepted from disclosure under sections 552.105 and 552.111 of the Government Code; and (4) the rest of the submitted information must be released.⁸

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,

⁷The information that the LCRA may withhold under section 552.105 consists of (1) the marked information in Appendix C to the Technical Memorandum dated May 1, 2007 in Exhibit C-4; (2) the marked information in the Final Technical Memorandum dated April 18, 2006 in Exhibit C-6; and (3) the Attachments to the Interim Conceptual Probable Construction Cost Estimates in Exhibit C-8.

⁸The remaining information that must be released consists of (1) the evaluation matrix in Exhibit C-1; (2) the FSE Internal Site Reduction Workshop Record dated March 14, 2006 in Exhibit C-2; (3) the remaining information in Appendices B and C to the Technical Memorandum dated May 1, 2007 in Exhibit C-4; (4) the remaining information in the Final Technical Memorandum dated April 18, 2006 and Appendix A thereto in Exhibit C-6; and (5) the Facility Siting, Design and Affected Environment Matrix in Exhibit C-7.

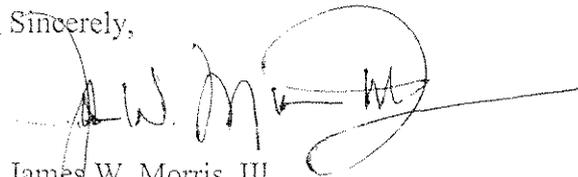
toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/ma

Ref: ID# 289584

Enc: Submitted information

c: Mr. Brian J. Knipling
Attorney at Law
2116 Thompson Road, Suite 103
Richmond, Texas 77469
(w/o enclosures)