ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 24, 2009

Ms. Maria Smith
North Texas Tollway Authority
5900 West Plano Parkway, Suite 100
Plano, Texas 75026

OR2009-16693

Dear Ms. Smith:

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# 360896.

The North Texas Tollway Authority (the "authority") received a request for sixteen categories of information pertaining to a proposed eastern extension to the President George Bush Turnpike. You have informed this office the authority has released the submitted final appraisal report and final environmental impact statement to the requestor. You claim the remaining submitted information is excepted from disclosure under sections 552.103, 552.105, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you acknowledge some of the information at issue in Exhibit D was the subject of a previous request received by the authority, in response to which this office issued Open Records Letter No. 2009-16633 (2009). In that ruling, we concluded the authority must release the submitted minutes, as well as the attachments to those minutes, pursuant to section 551.022 of the Government Code. The authority must rely on Open Records Letter No. 2009-16633 and continue to release the information we marked in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, because the remaining

information is not subject to the previous determination, we will consider your arguments against its disclosure.

The remaining information in Exhibit D includes resolutions that were passed by the authority's board of directors. Because laws and ordinances are binding on members of the public, they are matters of public record and may not be withheld from disclosure under the Act. *See* Open Records Decision No. 221 at 1 (1979) ("official records of the public proceedings of a governmental body are among the most open of records"); *see also* Open Records Decision No. 551 at 2-3 (1990) (laws or ordinances are open records). The submitted resolutions are analogous to an ordinance. Accordingly, the authority must release the marked resolutions in their entirety.

Some of the remaining information is subject to section 552.022 of the Government Code, which provides:

> the following categories of information are public information and not excepted from required disclosure under [the Act] unless they are expressly confidential under other law:
>
> > (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). Exhibit D contains reports that have been completed by or for the authority, which must be released under section 552.022(a)(1) unless they are excepted from disclosure under section 552.108 or expressly confidential under "other law." Although you assert these reports are excepted under section 552.103, this section is a discretionary exception to public disclosure that protects a governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 665 at n.5 (2000) (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived). As such, section 552.103 is not "other law" that makes information confidential for purposes of section 552.022, and the reports we marked in Exhibit D may not be withheld under that exception. As you raise no other exceptions to disclosure of these marked reports, they must be released.

Additionally, some of the remaining information in Exhibit D consists of bid clarifications that appear to have been released to the public. Section 552.007 provides:

> (a) This chapter does not prohibit a governmental body or its officer for public information from voluntarily making part or all of its information available to the public, unless the disclosure is expressly prohibited by law or the information is confidential under law.

> (b) Public information made available under Subsection (a) must be made available to any person.

Gov't Code § 552.007. Once information has been voluntarily released to any member of the public, that same information may not subsequently be withheld from the public, unless its public disclosure is expressly prohibited by law. *See id.*; Open Records Decision Nos. 518 at 3 (1989), 490 at 1 (1988). However, as discussed above, section 552.103 does not prohibit public disclosure of information or make information confidential. *See Dallas Area Rapid Transit*, 4 S.W.3d at 475-76. Accordingly, to the extent the submitted bid clarifications have been previously released to the public, they must be released at this time. However, to the extent these documents have not been released, we consider them with the remaining information.

You assert the remaining submitted information is subject to section 552.103 of the Government Code, which provides in relevant part as follows:

> (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.
>
> . . .
>
> (c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, *writ ref'd n.r.e.*); ORD 551 at 4. A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You inform this office, and provide documentation showing, that prior to receiving this request the authority instituted condemnation proceedings against a company that owns land along the proposed turnpike extension. The submitted documentation reflects that this lawsuit pertains to the authority's attempts to acquire this land for the turnpike extension. You inform us a 2010 trial date has been set. Based on your representations and our review, we agree litigation was pending on the date the request was received. We also find the remaining information relates to this pending litigation.

However, once information is obtained from or provided to all the opposing parties in the litigation, there is no interest in withholding that information under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Exhibit D contains letters that were mailed to or received from (1) the authority's opposing party in the pending litigation or (2) an individual you identify as a representative of this opposing party. Exhibit C additionally contains a document that consists of a typed letter sent from the authority's opposing party, as well as the authority's handwritten notes on this underlying letter. Although we agree the handwritten notes are excepted from disclosure by section 552.103, we find the underlying letter may not be withheld on this basis. Accordingly, the marked documents in Exhibit D and an unmarked copy of the letter we marked in Exhibit C may not be withheld under section 552.103. Because you do not raise any other exceptions to disclosure of the letters in Exhibit D, they must be released. We will address your remaining argument for the marked letter in Exhibit C. However, the authority may withhold the remaining information under section 552.103 of the Government Code. We note that the applicability of section 552.103 ends once the litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You claim the letter in Exhibit C is excepted from disclosure under the deliberative process privilege encompassed by section 552.111 of the Government Code. *See* Open Records Decision No. 615 at 2 (1993). The purpose of the deliberative process privilege under 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, 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 (1993). Section 552.111 can also encompass communications between a governmental body and a third-party, including a consultant or other party with a privity of interest. *See* Open Records Decision No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the

governmental body establishes it has a privity of interest or common deliberative process with the third party. *See id.* In this instance, as noted above, an unmarked copy of the letter in Exhibit C was sent from the authority's opposing party in a pending litigation. Because the authority does not share a privity of interest or common deliberative process with its opposing party, we conclude section 552.111 of the Government Code is inapplicable to the underlying letter. As you raise no other exceptions to disclosure of this information, an unmarked copy of this letter must be released.

In summary, the authority must rely on Open Records Letter No. 2009-16633 as a previous determination and release the marked information in accordance with that ruling. The resolutions, completed reports, and correspondence we marked must be released, along with any submitted bid clarifications that have been previously released to the public. The authority may withhold the remaining information under section 552.103 of the Government Code. As our ruling is dispositive, we need not address your remaining arguments against disclosure.

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

Bob Davis
Assistant Attorney General
Open Records Division

RSD/cc

Ref: ID# 360896

Enc. Submitted documents

cc: Requestor
(w/o enclosures)