



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 8, 2010

Mr. John B. Dahill
General Counsel
North Texas Tollway Authority
5900 West Plano Parkway Suite 100
Plano, Texas 75093

OR2010-04989

Dear Mr. Dahill:

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# 375438.

The North Texas Tollway Authority (the "authority") received a request for information relating to the Southwest Parkway/Chisholm Trail project, including (1) information pertaining to the financing of the project and (2) e-mail communications between members of the authority's board of directors and senior staff members.¹ You state that some of the submitted information was the subject of a previous open records letter ruling. You also claim that the submitted information is excepted from disclosure under sections 552.101, 552.104, and 552.111 of the Government Code.² We have considered the

¹You inform us, and have provided documentation demonstrating, that the requestor narrowed and clarified his original request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

²As you also initially claimed sections 552.107 and 552.110 of the Government Code, but have submitted no arguments in support of the applicability of those exceptions, this decision does not address sections 552.107 and 552.110. *See* Gov't Code §§ 552.301(e)(1)(A) (governmental body must submit written comments demonstrating applicability of claimed exceptions to information at issue), .302.

exceptions you claim and reviewed the information you submitted.³ We also have considered the comments we received from the requestor.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). We assume that the authority has released any other types of information that are responsive to this request, to the extent that such information existed when the authority received the request. If not, then any such information must be released immediately.⁵ See *id.* §§ 552.006, .221, .301, .302; Open Records Decision No. 664 (2000).

You state that the information submitted as Attachments B and C was encompassed by a previous request for information, as a result of which this office issued Open Records Letter No. 2010-01748 (2010). In the previous ruling, we concluded that information concerning the Southwest Parkway/Chisholm Trail project and consisting of draft documents relating to a traffic and revenue study and draft financial reports may be withheld under section 552.111 of the Government Code. You do not indicate that there has been any change in the law, facts, and circumstances on which the previous ruling is based. We therefore conclude that the authority may continue to rely on Open Records Letter No. 2010-01748 with respect to Attachments B and C.⁶ See Gov't Code § 552.301(a); Open Records Decision No. 673 at 6-7 (2001) (listing elements of first type of previous determination under Gov't Code § 552.301(a)).

Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 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

³This letter ruling assumes that the representative sample of information submitted as Attachment B is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the authority 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).

⁴The requestor notes, among other things, that the authority responded to his request and sought this decision 14 *calendar* days after the date of the request for information. We note that the authority complied with its ten- and fifteen-*business*-day deadlines under section 552.301 of the Government Code in requesting this decision. See Gov't Code § 552.301(a)-(b), (e).

⁵We 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 *dism'd*); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

⁶As we are able to make this determination, we need not address your claim for Attachments B and C under section 552.111 of the Government Code.

“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 state that the information submitted as Attachment E consists of financial forecasts and traffic and revenue projections relating to the Southwest Parkway/Chisholm Trail project. You explain that this information will be used in formulating funding options for the project, which may include the public or private sale of bonds. You note that potential purchasers of such bonds “will evaluate a number of factors, not the least of which is the perceived risk associated with the bonds, which will be repaid with toll revenue.” You indicate that the financial forecasts and traffic and revenue projections in Attachment E are subject to change. You contend that disclosure of information that is subject to adjustment “injects uncertainty into the [financial] market [which] manifests itself in higher risk premiums. Put another way, the [authority’s] bonds may be less attractive than other options available in the marketplace to investors.” Consequently, you believe that the release of traffic and revenue projections and financial analyses that have not been finalized could result in higher costs to the authority. Having considered your representations, we find that you have demonstrated that the authority has specific marketplace interests. We also find that you have demonstrated the existence of a specific threat of actual or potential harm to the authority’s interests in a particular competitive situation. We therefore conclude that the authority may withhold Attachment E under section 552.104 of the Government Code.

Section 552.111 of the Government Code 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, 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, opinions, and other material reflecting 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. 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.

We note that section 552.111 can encompass communications between a governmental body and a third party. See Open Records Decision Nos. 631 at 2 (Gov't Code § 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 561 at 9 (1990) (Gov't Code § 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (Gov't Code § 552.111 applies to memoranda prepared by governmental body's consultants). To withhold communications with a third party, a 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 ORD 561 at 9.

You state that the information submitted as Attachment D consists of draft documents. You state that factual information within these documents, subject to modification on further review, will be included in final reports that will be released to the public. We understand that the information in Attachment D implicates the policymaking processes of the authority. We note that some of this information was prepared by a third party, which you have identified as a consultant retained by the authority to provide feasibility and financial analysis of the Southwest Parkway/Chisholm Trail project. Based on your representations

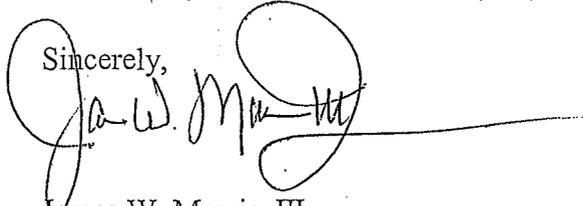
and our review of the information at issue, we conclude that the authority may withhold Attachment D under section 552.111 of the Government Code.⁷

In summary: (1) the authority may continue to rely on Open Records Letter No. 2010-01748 with respect to Attachments B and C; (2) the authority may withhold Attachment E under section 552.104 of the Government Code; and (3) the authority may withhold Attachment D under section 552.111 of the Government Code.

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,

A handwritten signature in black ink, appearing to read "James W. Morris, III", with a long horizontal line extending to the right.

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

JWM/cc

Ref: ID# 375438

Enc: Submitted documents

c: Requestor
(w/o enclosures)

⁷As we are able to make this determination, we need not address the authority's claim for Attachment D under section 552.101 of the Government Code.