



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 26, 2010

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

OR2010-16185

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# 399021.

The Cameron County Regional Mobility Authority (the "authority"), which you represent, received a request for environmental studies related to the construction of a second bridge to South Padre Island. You claim the requested information is excepted from disclosure under section 552.111 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

You inform us the responsive information consists of two documents: a draft environmental impact statement (the "EIS") and the "Essential Fish Habitat Assessment" (the "assessment"). The draft EIS was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2010-14569 (2010). In Open Records Letter No. 2010-14569, we determined the authority may withhold the draft EIS under the deliberative process privilege and section 552.111 of the Government Code. As we have no indication that the law, facts, and circumstances on which the prior ruling was based have changed, the authority may continue to rely on that ruling as a previous determination and withhold the draft environmental impact statement in accordance with Open Records Letter No. 2010-14569. *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).

You assert the assessment is also excepted under section 552.111 of the Government Code, which excepts from disclosure "an interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency." 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) (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* 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).

This office has also 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 can also encompass communications between a governmental body and a third-party consultant. *See* Open Records Decision Nos. 631 at 2 (section 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) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body's consultants). 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

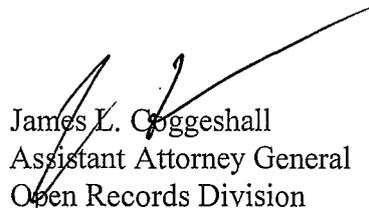
a third-party unless the governmental body establishes it has a privity of interest or common deliberative process with the third-party. *See* ORD 561 at 9.

You state the authority is charged with implementing innovating transportation solutions and accelerating the development of needed transportation projects in Cameron County. You also state the requested information relates to one of the authority's initial projects, which is the construction of a causeway connecting South Padre Island to mainland Cameron County. You inform us the assessment was created by a consultant working on behalf of the authority, in cooperation with the Texas Department of Transportation ("TxDOT"). You state the assessment is currently in draft form and is subject to review by TxDOT and the Federal Highway Administration (the "administration"). You state the authority, TxDOT, and the administration share a privity of interest and common deliberative process with respect to the assessment. Finally, you state the authority will release the assessment in its final version. Based on your representations and our review, we find the authority may withhold the assessment 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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/tp

Ref: ID# 399021

Enc. Submitted documents

c: Requestor
(w/o enclosures)