



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 9, 2010

Ms. Allison Bastian  
Assistant City Attorney  
City of Brownsville  
P.O. 911  
Brownsville, Texas 78520

OR2010-18448

Dear Ms. Bastian:

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# 402438.

The City of Brownsville (the "city") received a request for the mitigation plan regarding the federal Housing and Urban Development ("HUD") review of the city's Housing Opportunities Made Equal ("HOME") program. You indicate you have released a portion of the submitted information. You claim the submitted 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.

Initially, you argue the portions of the submitted information that do not consist of the "mitigation plan" are not responsive to the instant request for information because the requestor specifically requested the "mitigation plan."<sup>1</sup> This ruling does not address the public availability of nonresponsive information, and the city need not release nonresponsive information in response to this request. Accordingly, we address your arguments only in regard to the responsive "mitigation plans."

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<sup>1</sup>We note section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. However, you do not cite to any specific law, and we are not aware of any, that makes any portion of the information at issue confidential for purposes of section 552.101. See Open Records Decision No. 478 at 2 (1987) (statutory confidentiality requires express language making information confidential or stating that information shall not be released to public). Therefore, we do not address section 552.101.

Section 552.111 of the Government Code 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.” 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 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. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *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).

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). When determining if an interagency memorandum is excepted from disclosure under section 552.111, we must 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 id.* 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.*

You explain the responsive information consists of mitigation plans developed by the city's Planning Department in response to a "finding by [HUD] that the city has failed or neglected to properly oversee the expenditure of funds granted by HUD to the [c]ity through its HOME program." You further explain in response to the claims raised by HUD, the director of the city's planning department, with input from the Community Development Corporation of Brownsville (the "CDBC"), created the responsive mitigation plans. You state, and the submitted documents show, the city contracts with and oversees the CDBC. Based on your representations and our review of the information at issue, we find the responsive information we have marked consists of advice, opinions, and recommendations regarding the city's policymaking. Therefore, the city may withhold the responsive information, which we have marked, 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](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,



Melanie Villars  
Assistant Attorney General  
Open Records Division

MJV/tf

Ref: ID# 402438

Enc. Submitted documents

c: Requestor  
(w/o enclosures)