



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 25, 2011

Ms. Sharon Alexander
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2011-05659

Dear Ms. Alexander:

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# 415413.

The Texas Department of Transportation (the "department") received a request for four categories of information from January 1, 2008 through the date of the request related to a specified toll road project. You claim the requested information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. We have considered the claimed exceptions and reviewed the submitted representative sample of information.¹

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.*

¹ We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

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). 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 submitted information consists of communications and draft documents regarding the toll road project at issue that contain advice, recommendations, and opinions relating to policy matters. You have identified most of the parties to the communications as employees of the department, employees of the regional mobility authority with whom the department has an agreement to assist in overseeing and funding the project, and a contractor hired by the regional mobility authority. You indicate the draft documents will be released in their final form. Upon review, we conclude the information we have marked may be withheld under section 552.111. However, you have not demonstrated how the remaining information constitutes advice, opinion, or recommendations regarding policy issues. Therefore the department may not withhold any of the remaining information under section 552.111.

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. This section encompasses information protected by other statutes. You state the submitted information consists of pre-decisional internal planning documents, the release of which is governed by the rules of the Federal Highway Administration (“FHWA”). In support, you quote a June 9, 2005 policy memorandum issued by the Texas Division of the FHWA:

The release of pre-decision documents can confuse and mislead the public about the development of a project and the staff must be confident that those deliberations are done in an environment that encourages full consideration of all options without the fear of bias or political influence.

We note this memorandum is neither constitutional or statutory law nor a judicial decision. In addition, based on the quoted portion provided by the department, this memorandum does not make information confidential. Thus, section 552.101 does not encompass the policy memorandum at issue and none of the remaining information may be withheld on that basis.

We note the remaining documents contain information subject to section 552.130 of the Government Code.² Section 552.130 excepts from disclosure “information [that] relates to (1) a motor vehicle operator’s or driver’s license or permit issued by an agency of this state; [or] (2) a motor vehicle title or registration issued by an agency of this state[.]” Gov’t Code § 552.130(a). We have marked the information subject to this section. The department must withhold the information we have marked under section 552.130.

We next note the remaining documents contain information subject to section 552.136 of the Government Code. Section 552.136 provides “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b). An access device number is one that may be used to “(1) obtain money, goods, services, or another thing of value; or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument,” and includes an account number. *Id.* § 552.136(a). The department must withhold the information we have marked under this section.

Finally, we note the remaining documents contain information subject to section 552.137. Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). The e-mail addresses we have marked are not of a type specifically excluded by

² The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

section 552.137(c). As such, these e-mail addresses must be withheld under section 552.137, unless their owners have affirmatively consented to their release.

In summary the department may withhold the information we have marked under section 552.111. The department must withhold the information we have marked under sections 552.130 and 552.136, and the e-mail addresses we have marked under section 552.137, unless their owners have affirmatively consented to release.³ The remaining information must be released to the requestor.

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,



Misty Haberer Barham
Assistant Attorney General
Open Records Division

MHB/eeg

Ref: ID # 415413

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³ We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing the withholding of ten categories of information, including a Texas license plate number under section 552.130 of the Government Code, a credit card number under section 552.136, and e-mail addresses of members of the public under section 552.137, without the necessity of requesting an attorney general decision.