



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 20, 2011

Mr. C. Brian Cassidy
Locke Lord Bissell & Liddell LLP
100 Congress, Suite 300
Austin, Texas 78701

OR2011-07179

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# 418280.

The Cameron County Regional Mobility Authority (the "authority"), which you represent, received a request for five categories of information for a specified period of time, which relate to a specified toll road project, including: (1) environmental assessments, draft or otherwise; (2) any public hearing summary analysis; (3) correspondence between the Federal Highway Administration and the authority relating to specified subject matters; (4) intra-departmental correspondence between authority officials, employees, or consultants relating to specified subject matters; and (5) contracts or agreements between the authority and HNTB Corporation ("HNTB").¹ You state the authority does not possess any information responsive to the portion of the request regarding public hearing summary analysis. The Act does not require a governmental body to release information that did not exist when it received a request. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2

¹You state the authority sought and received clarification of item numbers three and four of the request for information. *See* Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if a large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *see also City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding that when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date the request is clarified or narrowed).

(1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983). You also state the authority will provide some of the requested information, including the master agreement and work authorizations between the authority and HNTB. You claim that the remaining requested information is excepted from disclosure under sections 552.111 and 552.137 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information, a portion of which you state constitutes a representative sample.³

You assert some of the submitted information 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). Section 552.111 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. 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 reexamined 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. ORD 615 at 5; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). Further, section 552.111 does not generally except from disclosure facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 157; 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). 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

²Although you raise section 552.101 of the Government Code in conjunction with section 552.111 of the Government Code, we note section 552.101 does not encompass other exceptions in the Act.

³This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. *See* Gov’t Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

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.*

This office also has concluded a preliminary draft of a document that has been or 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.

You seek to withhold the draft environmental assessment ("EA") in Attachment B and information in Attachment C under section 552.111. You state the authority hired HNTB as an outside engineering consultant in order to assist the authority with the environmental review process. You also explain HNTB has subconsultants to assist in this matter. Furthermore, you state the authority and Texas Department of Transportation (the "department") are working together as applicants for the specified roadway project. Thus, we understand HNTB, its subconsultants, and the department share a privity of interest with the authority regarding this project. You explain the draft EA was prepared by the authority and HNTB in cooperation with the department, and that the draft EA will be released to the public in its final form in accordance with the National Environmental Policy Act. Upon review, we find the draft EA constitutes a draft of a policymaking document, and the authority may withhold the draft EA in Attachment B under section 552.111 of the Government Code.

You explain the communications at issue between the authority, HNTB, HNTB's subconsultants, and the department consist of advice, recommendations, and opinions as to the draft EA, strategies for addressing public concerns regarding the project, and proposed responses to public questions and comments. You explain the e-mails contain draft documents or portions of the draft EA that were or will be released to the public in their final form. Upon review, we find some of the information at issue in Attachment C relates to draft documents that have been or will be released to the public in their final form or advice, opinions, and recommendations regarding the policymaking processes of the authority. Accordingly, the authority may withhold the information we have marked in Attachment C under section 552.111 of the Government Code. However, we find the remaining information does not constitute a draft document that will be released to the public in final form, and is not advice, opinion, or recommendation. Thus, we find you have failed to demonstrate how the deliberative process privilege applies to the remaining information. Accordingly, the authority may not withhold the remaining information at issue on this basis.

We note a portion of the remaining information in Attachment C constitutes information that is subject to section 552.117 of the Government Code.⁴ Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, a governmental body must withhold information under section 552.117 on behalf of current or former officials or employees only if these individuals made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the employee whose information is at issue timely elected to keep his personal information confidential pursuant to section 552.024, the authority must withhold the information we have marked under section 552.117(a)(1). The authority may not withhold this information under section 552.117 if the employee did not make a timely election to keep the information confidential.

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). Gov't Code § 552.137(a)-(c). We note section 552.137 is not applicable to an institutional e-mail address, an Internet website address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, or an e-mail address maintained by a governmental entity for one of its officials or employees. *See id.* § 552.137(c). We note some of the e-mail addresses you have marked in Attachment D fall under subsection 552.137(c), therefore, the authority may not withhold these addresses, which we have marked for release. Accordingly, with the exception of the e-mail addresses we have marked for release, the authority must withhold the e-mail addresses you have marked in Attachment D, as well as the additional e-mail addresses we have marked in Attachment C, under section 552.137 of the Government Code unless the owners of the addresses have affirmatively consented to their release under section 552.137(b).⁵

In summary: (1) the authority may withhold the draft EA in Attachment B and the information we have marked in Attachment C under section 552.111 of the Government

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

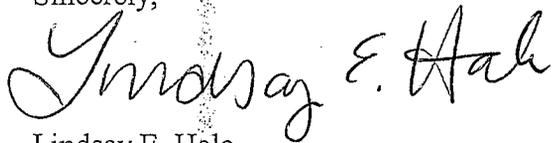
⁵We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

Code; (2) to the extent the employee whose information is at issue made a timely election, the authority must withhold the information we have marked under section 552.117(a)(1) of the Government Code; and (3) with the exception of the e-mail addresses we have marked for release, the authority must withhold the e-mail addresses you have marked in Attachment D and the e-mail addresses we have marked in Attachment C under section 552.137 of the Government Code unless the owners of the addresses have consented to their release. The authority must release the remaining information at issue.

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,



Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/em

Ref: ID# 418280

Enc. Submitted documents

c: Requestor
(w/o enclosures)