



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 15, 2011

Ms. Lori Fixley Winland  
Locke Lord, L.L.P.  
100 Congress, Suite 300  
Austin, Texas 78701

OR2011-18506

Dear Ms. Winland:

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# 439219.

The Cameron County Regional Mobility Authority (the "authority"), which you represent, received a request for eight categories of information pertaining to a specified toll road project.<sup>1</sup> You state the authority will release some of the responsive information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.105 and 552.111 of the Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>3</sup>

Initially, we note some of the information in Exhibit B constitutes a completed appraisal report that is subject to section 552.022(a)(1) of the Government Code. Section 552.022(a) provides in relevant part the following:

---

<sup>1</sup>You inform us the authority asked for and received clarification of the request. *See* Gov't Code § 552.222(b) (providing that if request for information is unclear, governmental body may ask requestor to clarify request).

<sup>2</sup>Although you also raised sections 552.101, 552.103, 552.104, 552.107, and 552.137 of the Government Code as exceptions to disclosure in your initial brief to this office, you did not submit to this office written comments stating the reasons why these sections would except the submitted information; we therefore assume you no longer assert these exceptions. *See* Gov't Code §§ 552.301, .302.

<sup>3</sup>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.

Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

- (1) a completed report, audit, evaluation, or investigation made or for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). You seek to withhold the completed appraisal report at issue under section 552.105 of the Government Code. However, section 552.105 is discretionary in nature and does not make information confidential under the Act. *See* Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, §§ 3-21, 23-26, 28-37 (providing for “confidentiality” of information under specified exceptions); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 564 (1990) (statutory predecessor to section 552.105 subject to waiver). Thus, the authority may not withhold the completed appraisal report in Exhibit B under section 552.105. As you raise no additional exceptions to disclosure of this information, it must be released. However, we will address your claim under section 552.105 for the remaining information in Exhibit B, and your claim under section 552.111 of the Government Code for the information in Exhibit C.

We first address your section 552.105 of the Government Code claim for the remaining information in Exhibit B. Section 552.105 excepts from disclosure information relating to:

- (1) the location of real or personal property for a public purpose prior to the public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contract for the property.

Gov't Code § 552.105. Section 552.105 is designed to protect a governmental body's planning and negotiating position with respect to particular transactions. Open Records Decision Nos. 564 at 2, 357 (1982), 310 (1982). Information pertaining to such negotiations that is excepted from disclosure under section 552.105 may be withheld so long as the transaction relating to the negotiations is not complete. *See* ORD 310. Under section 552.105, a governmental body may withhold information “which, if released, would impair or tend to impair [its] ‘planning and negotiating position in regard to particular transactions.’” ORD 357 at 3 (quoting Open Records Decision No. 222 (1979)). The question of whether specific information, if publicly released, would impair a governmental body's planning and negotiating position in regard to particular transactions is a question of fact. Thus, this office will accept a governmental body's good-faith determination in this regard, unless the contrary is clearly shown as a matter of law. *See* ORD 564.

You inform us the authority is currently negotiating the acquisition of real property owned by the Union Pacific Railroad (the “railroad”). You state the authority and the railroad have

not yet entered into a contract for the property in question. You also state the authority has made a good faith determination that release of the information at issue would harm the authority's negotiating position with regard to the acquisition of this property. Based on your representations and our review, we conclude the authority may withhold the remaining information in Exhibit B, which we have marked, under section 552.105 of the Government Code.

We now address your claim under section 552.111 of the Government Code for the information in Exhibit C. 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. Section 552.111 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. The 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). 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, opinions, or recommendations 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 also has concluded 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.

Further, section 552.111 can encompass communications between a governmental body and a third-party consultant. *See* Open Records Decision Nos. 631 at 2 (1995) (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. We note a governmental body does not have a privity of interest or common deliberative process with a private party with which the governmental body is engaged in contract negotiations. *See id.* (section 552.111 not applicable to communication with entity with which governmental body has no privity of interest or common deliberative process).

You seek to withhold from disclosure the draft Historic-Age Resource Reconnaissance Survey Report in Exhibit C. You inform us the HNTB Corporation ("HNTB"), working as a third-party engineering consultant to the authority, prepared this report as part of the environmental review process for the toll road project specified in the request. You state the environmental review process is an important policymaking function of the authority. You also state the report at issue has been reviewed by the Texas Department of Transportation (the "department"). Further, you state the authority and the department share a privity of interest and common deliberative process with respect to the environmental review process for the toll road project at issue, as the authority and the department share responsibility for the development of the environmental assessment for this project. Thus, we understand the department and HNTB share a privity of interest with the authority regarding the project. You explain the report at issue will be released to the public in its final form. Based on your representations and our review, we find the draft Historic-Age Resource Reconnaissance Survey Report constitutes a draft of a policymaking document, and the authority may withhold this report, which we have marked, under section 552.111 of the Government Code.

You also seek to withhold the draft Reconnaissance-Level Survey Report in Exhibit C under section 552.111. You inform us that Hardy, Heck & Moore, Inc., working as a consultant to the department, prepared this report. You state the Texas Historic Commission (the "commission") has not yet concurred in the recommendations contained in the report as required by law. However, you have not demonstrated how the authority shares a privity of interest or common deliberative process with the commission, which appears to be acting in a regulatory capacity. Therefore, we find you have failed to establish the applicability of section 552.111 to the draft Reconnaissance-Level Survey Report. Accordingly, this information may not be withheld under section 552.111 of the Government Code.

Finally, we note the remaining information contains information that may be protected by copyright. A custodian of public records must comply with the copyright law and is not

required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the authority may withhold the information we marked in Exhibit B under section 552.105 of the Government Code. The authority may withhold the draft Historic-Age Resource Reconnaissance Survey Report in Exhibit C under section 552.111 of the Government Code. The remaining information must be released; however, any copyrighted information may only be released in accordance with copyright law.

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,



Kenneth Leland Conyer  
Assistant Attorney General  
Open Records Division

KLC/agn

Ref: ID# 439219

Enc. Submitted documents

c: Requestor  
(w/o enclosures)