



May 10, 2002

Mr. Joe B. Allen  
Vinson & Elkins  
2300 First City Tower  
1001 Fannin Street  
Houston, Texas 77002-6760

OR2002-2496

Dear Mr. Allen:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 162705.

The Fort Bend County Toll Road Authority (the “authority”), which you represent, received a request for right-of-way maps “from Beltway 8 to Highway 6 and along Hillcroft” that show specific properties and how they will be affected. You contend that the requested information is not “public information” for the purpose of the Public Information Act (the “Act”). In the alternative, you claim that the requested information is excepted from disclosure under sections 552.103, 552.105, and 552.111 of the Government Code. We have considered your arguments and reviewed the submitted information.

We begin by addressing your argument that the requested information is not “public information” for the purpose of the Act. The Act applies only to “public information” in existence at the time a governmental body receives a request for information. *See* Gov’t Code § 552.021; *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism’d); Open Records Decision No. 452 at 3 (1986). “Public information” is defined under section 552.002 of the Act as:

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body; or

(2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov't Code § 552.002(a). You indicate that the requested information consists of preliminary right-of-way maps drafted by consultants for the authority. While you state that the maps have been provided to the authority's general manager, attorneys, design engineers, and appraisers, you state that the authority's board of directors has yet to inspect the maps. Citing *City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000), you argue that because the board of directors has not seen or used the maps in question, the maps "have not been used in the transaction of official business and do not constitute public information."<sup>1</sup>

In *City of Garland*, the city received a request from the Dallas Morning News for a memorandum prepared by the city manager purporting to terminate the city's finance director. 22 S.W.3d at 354. The city argued that the requested memorandum was not public information for the purpose of the Act because the memorandum was merely a draft, and thus, was not used in the transaction of official business. *Id.* at 355, 358. The Texas Supreme Court determined that "a document, even if labeled 'draft,' is public information if, under a law or ordinance or in connection with the transaction of official business, it is collected, assembled, or maintained by or for a governmental body." *Id.* at 359. The court further held that while "the mere creation of a draft is not transacting official business," the draft can become public information if it is used in connection with the transaction of official business. *Id.* Despite the fact that the city manager's memorandum had been labeled a draft, the court determined that the memorandum was public information for the purpose of the Act because the memorandum had been used by the city manager and the city council in deciding how to handle the personnel problem with the finance director and, therefore, the memorandum was used in connection with the transaction of official business. *Id.* You rely on the court's holding for the proposition that the maps at issue here are not public information since the maps have not been provided to the authority's governing body, the board of directors.

You indicate that the maps were produced by consultants for the authority, presumably at the request of the authority, to recommend the appropriate configuration and the associated right-of-way needs for the Fort Bend County Toll Road Project (the "project"). You further state that these maps have been provided to the authority's general manager, attorneys, designengineers, and appraisers and that the maps "are being used as part of the appraisal process." Based on your statements, we find that the maps were created for the authority in

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<sup>1</sup> We note that *City of Garland* is a plurality opinion of the Texas Supreme Court and therefore is not considered binding authority. See *Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 626 (Tex. 1996); *Univ. of Tex. Med. Branch at Galveston v. York*, 871 S.W.2d 175, 176 (Tex. 1994).

connection with the transaction of its official business and are being used by the authority in connection with the transaction of its official business. *See id.*; Gov't Code § 552.002(a); *see, e.g.*, Open Records Decision Nos. 499 (1988) (attorneys' notes and memoranda held solely by attorneys but created in connection with investigation conducted on behalf of university were prepared in connection with university's official business and were public information), 462 (1987) (information held solely by city's attorney concerning annexations, traffic court, and zoning related to city's official business and was public information). Therefore, the submitted maps are public information subject to release unless otherwise excepted from disclosure. *See* Gov't Code §§ 552.002, .021, .221, .301.

You contend that the submitted maps are excepted from disclosure under section 552.111 of the Government Code. Section 552.111 provides that "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency is excepted from [required public disclosure]." This section encompasses the deliberative process privilege. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152, 158 (Tex. App.--Austin 2001, no pet.). The deliberative process privilege, as incorporated into the Act by section 552.111, protects from disclosure interagency and intra-agency communications consisting of advice, opinion, or recommendations on policymaking matters of a governmental body. *See id.* at 158-160; Open Records Decision No. 615 at 5 (1993). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, the deliberative process privilege does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 158-161; ORD 615 at 4-5. The preliminary draft of a policymaking document that has been released or is intended for release in final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document. Open Records Decision No. 559 at 2 (1990).

You state that the submitted maps consist of a consultant's preliminary drafts of right-of-way maps and that the maps are subject to change as the authority finalizes the configuration of the project. Furthermore, you state that "[t]he maps were created in furtherance of the deliberations on the appropriate configuration of the Project and the associated right-of-way needs." Based on your representations, we find that the submitted maps consist of draft documents relating to the policymaking process of the authority. Consequently, we find that the authority may withhold the submitted maps under section 552.111 of the Government Code. *See* Open Records Decision No. 462 (1987) (predecessor to section 552.111 applies to memoranda prepared by outside consultants of governmental body).<sup>2</sup>

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<sup>2</sup> Based on this finding, we need not reach the remainder of your arguments.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Nathan E. Bowden  
Assistant Attorney General  
Open Records Division

NEB/sdk

Ref: ID# 162705

Enc: Submitted documents

c: Mr. Richard I. Colton  
2550 North Loop West, Suite 260  
Houston, Texas 77092  
(w/o enclosures)