



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 29, 2009

Ms. Pauline E. Higgins
Sr. Vice President & General Counsel
Metropolitan Transit Authority
P.O. Box 61429
Houston, Texas 77208-1429

OR2009-10510

Dear Ms. Higgins:

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# 350447 (METRO Request No. 2009-0165).

The Metropolitan Transit Authority ("METRO") received a request for a list of accidents, Q-card revenue statements, fixed-route bus fare box revenue, TVM sales/revenue, fixed-route bus boardings, METRO rail boarding, information related to "stray current," corrosion committee meetings, the requestor's Title VI Civil Rights complaint, and communications concerning urban rail. You state you are providing information responsive to categories one through six of the request. You state you have no information responsive to category eight.¹ You claim that the submitted information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that a portion of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2009-05922 (2009). In that ruling, we found that METRO may withhold a report

¹ The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

pertaining to stray current under rule 192.5 of the Texas Rules of Civil Procedure. With regard to the requested information that is identical to the information previously submitted and ruled upon by this office in the prior ruling, we conclude that, as we have no indication that the law, facts, or circumstances on which the prior ruling was based have changed, METRO may continue to rely upon Open Records Letter No. 2009-05922 as a previous determination and withhold the identical information in accordance with that ruling.² See Open Records Decision No. 673 (2001) (so long as law, facts, circumstances, on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). We will address your arguments regarding the remaining information, which has not been previously ruled upon.

You claim that the remaining information is excepted from disclosure under section 552.111 of the Government Code, which provides that “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” 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 that 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. 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

² As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

This office has also 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.

We note that section 552.111 can encompass communications between a governmental body and a third party. *See* Open Records Decision Nos. 631 at 2 (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). 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* Open Records Decision No. 561 at 9 (1990).

You assert that the information responsive to Item 9 of the request is currently in draft form only. You state the U.S. Department of Transportation is assisting METRO with compliance advice, making recommendations, and working cooperatively with METRO to address matters discussed throughout the report. You state the final report will be made available to the public. Accordingly, we find METRO may withhold the information responsive to item 9 under section 552.111 of the Government Code.

You state the information responsive to Item 10 of the request is also subject to section 552.111. You state METRO is seeking funding under the Federal Transit Administration's Major Capital Investments program. You further state the information at issue represents METRO's possible decisions on how to implement the US 90A Commuter Rail. In addition, you state the document at issue outlines problems, the identified alternatives, and the general approach METRO will take to define and evaluate the alternatives leading to the selection of a "Locally Preferred Alternative" for the US 90A Commuter Rail. Based on your representations and our review, we determine METRO may withhold portions of the information, which we have marked, under section 552.111 of the Government Code. However, we find the remaining information consists of purely factual information and does not reveal advice, opinions, or recommendations. Accordingly, you

may only withhold the marked portions of the remaining information under section 552.111 of the Government Code.

In summary, METRO may continue to rely upon Open Records Letter No. 2009-05922 as a previous determination and withhold the identical information at issue in accordance with that ruling. METRO may withhold the information we have marked under section 552.111 of the Government Code. The remaining information must be released.

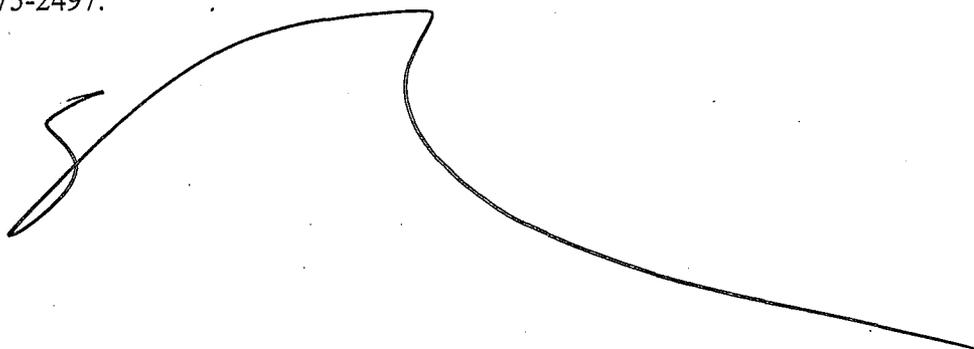
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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 at (512) 475-2497.

Sincerely,



Chris Schulz
Assistant Attorney General
Open Records Division



CS/cc

Ref: ID# 350447

Enc. Submitted documents

cc: Requestor
(w/o enclosures)