



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 2, 2009

Ms. Lisa Adelman
Legal Counsel
Alamo Regional Mobility Authority
1222 North Main Avenue, Suite 1000
San Antonio, Texas 78212

OR2009-13913

Dear Ms. Adelman:

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# 357182.

The Alamo Regional Mobility Authority (the "authority") received a request for ten categories of information related to two specified construction projects.¹ You state that the authority will release some of the responsive information to the requestor. You claim that the submitted information is excepted from disclosure under section 552.111 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.²

¹We note that the authority requested and received clarification regarding this request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *see also* Open Records Decision No. 663 (1999) (discussing tolling of deadlines during period in which governmental body is awaiting clarification).

²We assume that 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 that those records contain substantially different types of information than that submitted to this office.

Initially, we note some of the submitted information, which we have marked, is not responsive to this request as it was created after the authority received the request. This ruling does not address the public availability of non-responsive information, and the authority is not required to release non-responsive information in response to this request. Accordingly, we will address your argument only with regard to the responsive information.

Next, we note portions of the remaining information are subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108." Gov't Code § 552.022(a)(1). The submitted information contains completed reports that are subject to section 552.022(a)(1). You raise section 552.111 of the Government Code for this information; however, section 552.111 is a discretionary exception under the Act and does not constitute "other law" for purposes of section 552.022. See Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (governmental body may waive section 552.111), 470 at 7 (1987) (statutory predecessor to section 552.111 is discretionary exception). Thus, the information subject to section 552.022 may not be withheld under this exception. As you raise no further exceptions to disclosure of this information, it must be released.

You claim the remaining information is excepted from disclosure under section 552.111 of the Government Code. 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. 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 ORD 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 information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

This office has also concluded that 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.

Section 552.111 can also encompass communications between a governmental body and a third party consultant. *See* ORD 631 (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). 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). 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 that the authority is working with the Texas Department of Transportation ("TxDOT") on the highway construction projects at issue in the submitted documents. You state that the remaining information consists of correspondence, drafts, and notes between the authority, TxDOT, and the Federal Highway Administration, as well as other agencies and outside consultants with which you claim the authority shares a privity of interest and common deliberative process regarding the policy matter at issue. You further assert that the information at issue includes draft policy documents, reflecting the advice, opinion, and recommendations of the drafter, which have been or will be released in their final form. Based upon your representations and our review, we agree portions of the remaining information consist of preliminary drafts and communications that represent the advice, opinions, and recommendations of the authority, the authority's outside consultants, and TxDOT regarding policy issues in which these entities share a privity of interest or common deliberative process. Therefore, the authority may withhold this information, which we have marked, under section 552.111 of the Government Code.

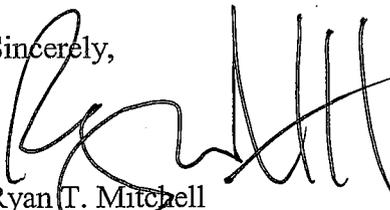
We note, however, that the Federal Highway Administration, the United States Fish & Wildlife Service, and the Texas Parks and Wildlife Department operate in a regulatory posture in relation to the highway construction projects at issue in the submitted documents. In this instance, you have not demonstrated how the authority shares a privity of interest or common deliberative process with these agencies. Further, you have not demonstrated how the authority shares a privity of interest with any of the remaining entities at issue in the submitted documents. Finally, some of the remaining information consists of either general administrative information that does not relate to policymaking or information that is purely factual in nature. Therefore, the authority has failed to establish the applicability of section 552.111 to the remaining information at issue. Accordingly, the authority may only withhold the information we have marked under section 552.111.

In summary, the authority may withhold the information we marked under section 552.111 of the Government Code. The remaining responsive 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, toll free, at (888) 672-6787.

Sincerely,



Ryan T. Mitchell
Assistant Attorney General
Open Records Division

RTM/dls

Ref: ID# 357182

Enc. Submitted documents

c: Requestor
(w/o enclosures)