



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 12, 2010

Mr. Mark Adams  
Office of the General Counsel  
Office of the Governor  
P.O. Box 12428  
Austin, Texas 78711

OR2010-06789

Dear Mr. Adams:

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# 379262.

The Office of the Governor (the "OOG") received a request for all documents referencing BAE Systems, all correspondence between the OOG and BAE Systems employees/lobbyists/consultants, all documents relating to meetings that discussed BAE Systems, and all correspondence between the OOG and the U.S. Department of Housing and Urban Development ("HUD") relating to a specified grant or any other matter, all since a specified date. You state you have released some of the information to the requestor. You claim that the remaining information is excepted from disclosure under section 552.111 of the Government Code. We have considered the exception you claim and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

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. 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 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 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 that 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 state that the documents in Exhibit C are draft versions of letters that were sent in final form by the OOG to federal agencies. You state that final versions of these letters have been provided to the requestor. You state that Exhibit B consists of communications between members of the OOG staff deliberating as to policies and strategies. You state that the information in Exhibit D consists of interagency deliberations on determining policy matters between the OOG and another governmental entity. You state that Exhibits E and F contain interagency deliberations of a coalition of entities, of which the OOG was a part, and a memorandum prepared by a firm retained by the coalition related to a policy of mutual interest. You state that Exhibit G is the audio recording of an interagency conference call in which the OOG sought guidance from HUD on determining state policy regarding funding made available from HUD. You state that these communications contain opinions and thought processes and were used to formulate policy and were intended to assist in the internal decision-making process. Upon review, we find you have established that the deliberative process privilege is applicable to Exhibit C in its entirety and portions of Exhibit B, which we have marked. However, we find the remaining information in Exhibit B consists of either general information that does not relate to policymaking or information that is purely factual in nature. Thus, you have failed to demonstrate, and the information does not reflect on its face, that this information reveals advice, opinions, or recommendations that pertain to policymaking. Additionally, although you state Exhibit D consists of interagency deliberations on determining the best policy on a matter of shared interest between the OOG and another governmental entity and Exhibits E and F consist of communications related to a coalition of entities, you have not explained, nor does the information reflect on its face, how the OOG and these third parties share a common deliberative process or privity of interest. Further, we note Exhibit G consists of a conference call between the OOG and HUD concerning federal grants for which the OOG is applying. Accordingly, we find that you have also failed to establish a common deliberative process or privity of interest with HUD. Thus, we find that the remaining information is not excepted from disclosure under section 552.111, and it may not be withheld on that basis. As you raise no further exceptions to disclosure, 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](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,



Kate Hartfield  
Assistant Attorney General  
Open Records Division

KH/dls

Ref: ID# 379262

Enc. Submitted documents

c: Requestor  
(w/o enclosures)