



January 6, 2015

Mr. Robert Schell
Assistant Director of General Counsel
North Texas Tollway Authority
5900 West Plano Parkway, Suite 100
Plano, Texas 75093

OR2015-00142

Dear Mr. Schell:

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# 548965 (File No. 2014-01837).

The North Texas Tollway Authority (the "authority") received a request for (1) all studies, reports, investigations or other work related to the financing and revenue projections of a specified toll road project (the "project"), and (2) all studies, reports, memoranda, and investigations produced by the authority or a third party during a specified time period related to the financing and revenue projections of the project. You state some information was released to the requestor. You claim the submitted information is excepted from disclosure under section 552.111 of the Government Code. Additionally, you state some of the submitted information may implicate the proprietary interests of third parties. Accordingly, you state, and provide documentation showing, you have notified CDM Smith, Inc. ("CDM") and RBC Capital Markets ("RBC") of the request for information and of their rights to submit arguments to this office as to why the submitted information should not be released to the requestor. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 at 3 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain

circumstances). We have considered the exception you claim and reviewed the submitted representative sample of information.¹

Section 552.111 of the Government Code exempts from disclosure “[a]n 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, writ ref’d n.r.e.); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, we determined section 552.111 exempts 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, 364 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body’s policymaking functions 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 severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152, 157 (Tex. App.—Austin 2001, no pet.); *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, section 552.111 protects the factual information. *See* Open Records Decision No. 313 at 3 (1982).

This office has also concluded section 552.111 exempts from disclosure a preliminary draft of a document intended for public release in its final form because the draft necessarily represents the drafter’s advice, opinion, and recommendation with regard to the form and content of the final document. *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 of a preliminary draft of a policymaking document,

¹We 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 that those records contain substantially different types of information than that submitted to this office.

including comments, underlining, deletions, and proofreading marks, 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, including a consultant or other party, with which the governmental body establishes it has a privity of interest or common deliberative process. *See* Open Records Decision No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). 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.

You seek to withhold the preliminary studies and projections in Attachment B and a draft memorandum in Attachment C. You state the authority entered into an agreement with CDM, Halff Associates, Inc. (“Halff”), and RBC for purposes of providing expert advice, toll and revenue projections, and financial forecasting for various toll projects. Thus, we understand CDM, Halff, and RBC share a privity of interest with the authority regarding the project. You explain “[p]roject assumptions, plans, and projections are revised as circumstances” change. You state the “studies and projections are drafts for what will be the final study based on the [Finding of No Significant Impact.]” You also state the final study will be released. Based on your representations and our review, we find Attachment B consists of advice, opinions, or recommendations pertaining to policymaking matters of the authority. Accordingly, the authority may withhold Attachment B under section 552.111.

You state the draft memorandum in Attachment C was prepared by the authority’s staff and summarizes the project’s financial status and existing options. Further, you state the authority, the Texas Department of Transportation (the “department”), and the City of Dallas (the “city”) entered into an agreement for the development of the project. We find the authority has established it shares a privity of interest with the department and the city. However, you do not state whether the draft memorandum will be released to the public in its final form. Thus, to the extent the draft memorandum will be released to the public in its final form, the authority may withhold the draft memorandum in its entirety under section 552.111 of the Government Code. If the draft memorandum will not be released to the public in its final form, then the authority may not withhold it in its entirety under section 552.111 of the Government Code. To the extent the draft memorandum will not be released in final form, we note portions of the draft memorandum consist of advice, opinions, or recommendations relating to the project. Thus, the information we have marked may be withheld under section 552.111 of the Government Code. However, we find the remaining information at issue consists of either administrative matters or information that is purely factual in nature. Therefore, you have failed to demonstrate how the deliberative process privilege applies to the remaining information. Consequently, the authority may not withhold any of the remaining information at issue under section 552.111 of the Government Code.

We note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See Gov't Code* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from CDM or RBC explaining why the information at issue should not be released. Therefore, we have no basis to conclude CDM or RBC has protected proprietary interests in the submitted information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the authority may not withhold the submitted information on the basis of any proprietary interests CDM or RBC may have in the information.

In summary, the authority may withhold Attachment B under section 552.111. To the extent the draft memorandum in Attachment C will be released to the public in its final form, the authority may withhold the draft memorandum in its entirety under section 552.111 of the Government Code. To the extent the draft memorandum will not be released in final form, the authority may withhold the information we have marked under section 552.111 of the Government Code within the draft memorandum and 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.texasattorneygeneral.gov/open_orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Lauren Dahlstein
Assistant Attorney General
Open Records Division

LMD/som

Ref: ID# 548965

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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