



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

June 4, 2015

Ms. Hadassah Schloss  
Director of Open Government  
Texas General Land Office  
P.O. Box 12873  
Austin, Texas 78711-2873

OR2015-11005

Dear Ms. Schloss:

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# 566020.

The Texas General Land Office (the "GLO") received a request for four categories of information concerning the Bersinger Building, the use of disaster recovery funds, and the appraisal of a specified property. You state the GLO does not have information concerning some of the items requested.<sup>1</sup> You also state the GLO released some of the requested information regarding the appraisal. You claim some of the submitted information is excepted from disclosure under section 552.111 of the Government Code. In addition, you state the proprietary interests of certain third parties might be implicated. Accordingly, you notified AECOM, EFI Global, Inc. ("EFI"), and URS of the request and of their right to submit arguments to this office explaining why their information should not be released. *See*

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<sup>1</sup>The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1–2 (1990).

Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have considered the exception you claim and reviewed the submitted information, a portion of which consists of a representative sample.<sup>2</sup> We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments to this office stating why the information at issue should or should not be released).

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received arguments from AECOM, EFI, or URS. Thus, none of these parties has demonstrated it has a protected proprietary interest in any of the submitted information. *See id.* § 552.110(a)–(b); 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 GLO may not withhold the information in Attachment C on the basis of any proprietary interests AECOM, EFI, or URS may have in the information.

Section 552.111 of the Government Code excepts 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. Section 552.111 encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of this exception 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, 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 section 552.111 excepts from disclosure only those internal communications that consist of advice, opinions, recommendations, and other material reflecting the policymaking processes

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<sup>2</sup>We 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 those records contain substantially different types of information than those submitted to this office.

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. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (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, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

Section 552.111 can also encompass communications between a governmental body and a third-party, including a consultant or other party with a privity of interest. *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). For section 552.111 to apply in this situation, 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 contend the documents in Attachment B are excepted from disclosure under section 552.111.

You state the GLO has contracted with other third party grant administrators for disaster recovery services related to Hurricane Ike in the City of Galveston (the "city"). You state the GLO receives federal grant money and uses that money for programs related to the disaster recovery. We find the GLO shares a privity of interest with the city and the grant administrators for the purposes of carrying out these disaster recovery programs. You explain the e-mails submitted in Attachment B consist of communications between these parties concerning the recovery program. Based on your representations and our review, we find the information we marked consists of advice, opinion, and recommendations concerning a policymaking function. Accordingly, the GLO may withhold the information we marked under section 552.111 of the Government Code. However, the GLO has not demonstrated the remaining information consists of advice, opinion, and recommendation

related to a policy making function. Accordingly, the GLO may not withhold the remaining information in Attachment B under section 552.111 of the Government Code.

Section 552.137 of the Government Code provides, “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act],” unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c).<sup>3</sup> Gov’t Code § 552.137(a)–(c). The information in Attachment B contains e-mail addresses that might be confidential under section 552.137. The GLO must withhold those e-mail addresses under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release or they are specifically excluded from the confidentiality provision by subsection (c).

We note some of the information in Attachment C is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). However, a governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the GLO must withhold the e-mail addresses of members of the public in Attachment B under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release or they are specifically excluded from the confidentiality provision by subsection (c). The GLO must release the remaining information in accordance with copyright law.

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.

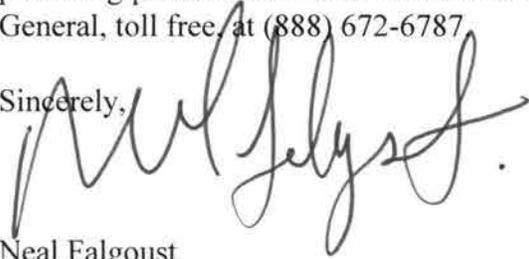
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), or call the Office of the Attorney General’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for

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<sup>3</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Neal Falgoust  
Assistant Attorney General  
Open Records Division

NF/bhf

Ref: ID# 566020

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Mr. Tom Allemand  
Senior Environmental Scientist  
ARCOM  
19219 Katy Freeway, Suite 100  
Houston, Texas 77094  
(w/o enclosures)

Mr. Timothy J. Herbert  
Senior Project Manager  
EFI Global  
11000 Richmond Avenue, Suite 250  
Houston, Texas 77042  
(w/o enclosures)

Mr. Arnold Ashburn  
Project Manager  
URS  
9400 Amberglen Boulevard  
Austin, Texas 78729  
(w/o enclosures)

Mr. Gary L. Bates  
Director, Environmental & Remediation  
Services  
11000 Richmond Avenue, Suite 250  
Houston, Texas 77042  
(w/o enclosures)