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ATTORNEY GENERAL OF TEXAS

June 10, 2016

Ms. Lori Fixley Winland
Counsel for Cameron County Regional Mobility Authority
Locke Lord, L.L.P.
600 Congress, Suite 2200
Austin, Texas 78701

OR2016-13252

Dear Ms. Winland:

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# 614382.

The Cameron County Regional Mobility Authority (the "authority"), which you represent, received a request for a specified environmental assessment. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted 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. 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, 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, 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. *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).

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.

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 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. 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.

You inform us the HNTB Corporation ("HNTB"), working as a third-party engineering consultant to the authority, prepared the submitted environmental assessment as part of the environmental review process for the toll road project specified in the request. You state the environmental review process is an important policymaking function of the authority. You

also state the submitted information was intended for review and comment by the Texas Department of Transportation (the “department”). Further, you state the authority and the department share a privity of interest and common deliberative process with respect to the environmental review process for the toll project at issue, as the authority and the department share responsibility for the development of the environmental assessment for this project. Thus, we agree the department and HNTB share a privity of interest with the authority regarding the project. You explain, although the toll project which prompted the development of the information at issue is no longer being pursued, the authority may pursue the development of the project at issue as a non-tolled highway. You further explain, as the tolled and non-tolled versions of the project at issue have the same proposed location and limits, it is likely the information at issue will be used in the non-tolled version and incorporated into a final environmental review document. As it is unclear whether the information will be released in its final form, we must rule conditionally. Accordingly, to the extent the submitted information will be released to the public in its final form, the authority may withhold it in its entirety under section 552.111 of the Government Code.¹ If the submitted information will not be released to the public in its final form, the authority may not withhold it in its entirety under section 552.111 of the Government Code. In this instance, we find portions of the draft document constitute advice, opinions, or recommendations relating to the authority’s policymaking. Thus, to the extent the draft document will not be released in its final form, the authority may withhold the information we marked under section 552.111 of the Government Code. However, we find 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 remaining information may not be withheld under section 552.111 of the Government Code. Thus, we will consider your remaining argument against disclosure of the remaining information.

You raise section 552.101 of the Government Code in conjunction with section 771.119(c) of title 23 of the Code of Federal Regulations for the remaining information. Section 552.101 of the Government Code excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 771.119(c) provides “[an environmental assessment] is subject to [Federal Highway Administration (“administration”)] approval before it is made available to the public as an Administration document.” 23 C.F.R. § 771.119(c). Although section 771.119(c) requires administrative approval before an assessment is made public as an administration document, it does not make information expressly confidential under the Act. *See* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express, and confidentiality requirement will not be implied from statutory structure), 478 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to the public). Therefore, the authority may

¹In this instance, as our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

not withhold the remaining information under section 552.101 of the Government Code in conjunction with section 771.119(c) of title 23 of the Code of Federal Regulations.

In summary, to the extent the submitted information will be released to the public in its final form, the authority may withhold it in its entirety under section 552.111 of the Government Code. To the extent the draft document will not be released in its final form, the authority may withhold the information we marked under section 552.111. As no other exceptions to disclosure have been raised, 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,



Gerald A. Arismendez
Assistant Attorney General
Open Records Division

GAA/dls

Ref: ID# 614382

Enc. Submitted documents

c: Requestor
(w/o enclosures)