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June 30, 2022

Via Electronic Filing

Hon. Ken Paxton
Office of the Attorney General
Open Records Division
P. O. Box 12548
Austin, Texas 78711

Re: Request for Attorney General Decision pursuant to § 552.301 of the Texas Government Code (the “Code”) in connection with a Public Information Request to the Port of Corpus Christi Authority from Dr. Kathryn Masten

Dear Attorney General Paxton:

Welder Leshin LLP represents the Port of Corpus Christi Authority of Nueces County Texas (“PCCA”), a governmental body and political subdivision of the State of Texas operating under Chapters 60 and 62 of the Texas Water Code. PCCA submits this letter brief pursuant to Section 552.301(e), Texas Gov’t Code, in connection with our request for an open records decision which was assigned OAG Tracking ID OR96633322 and Texas.gov Request ID 66151640. All references to Sections herein are to sections of the Texas Government Code unless noted otherwise and all references to Exhibits herein are to the exhibits accompanying this letter. As noted in the Conclusion, a representative sample of the requested information is attached to this Brief.

On June 09, 2022, PCCA received an e-mail from Dr. Kathryn Masten (the “Requestor”) requesting the following information:

1. *AECOM. 2018. Draft Corpus Christi Ship Channel Deepening Project, Channel Maintenance Dredging Requirements. Prepared for the Port of Corpus Christi Authority (PCCA). November 14, 2018.*
2. *AECOM. 2020. Environmental Impact Assessment Information for Clean Water Act Section 404, Rivers and Harbors Act Section 10 Approval, and 22 U.S.C. Section 408 Approval Request, Port of Corpus Christi Authority Channel Deepening Project, Nueces and San Patricio Counties, Texas. March 2020.*

3. *Freese and Nichols, Inc. 2016. Texas coastal sediment sources general evaluation study. Prepared for the Texas General Land Office. Contract No. 13-333-004*
4. *Freese and Nichols, Inc. 2021b. Statement of Work and Sampling Analysis Plan: MPRSA Section 103 Evaluation of Sediment from the Port of Corpus Christi Authority Channel Deepening Project, Corpus Christi, Texas. Prepared for USACE and EPA. Version 2. July.*
5. *Freese and Nichols, Inc. 2021a. Corpus Christi New Work Ocean Dredge Material Disposal Site Proposed Expansion: Unconfined Open Water Disposal New Work Dredged Material Sediment Fate Numerical Modeling. Version 2. Prepared for the Port of Corpus Christi Authority. March 2021.*
6. *Furgo USA Land, Inc. 2019. Geotechnical Data Report Corpus Christi Ship Channel, Channel Deepening Project Port of Corpus Christi Authority Corpus Christi, Texas. Report No. 04.10180080. February 19, 2019.*
7. *Mott MacDonald. 2021. Waters and Wetlands Delineation Report for Five Beneficial Use Sites – Corpus Christi Ship Channel Deepening Project, Port of Corpus Christi Authority, Corpus Christi Ship Channel, Aransas and Nueces Counties, Texas. October 2021.*
8. *Mott MacDonald. 2022. Draft Waters and Wetlands Delineation Report for the San José Island Beneficial Use Site – Corpus Christi Ship Channel Deepening Project, Port of Corpus Christi Authority, Corpus Christi Ship Channel, Aransas County, Texas. January 2022.*
9. *Triton Environmental Solutions, LLC. 2021a. Aquatic Survey Report Port of Corpus Christi Authority Channel Deepening Project, Nueces and Aransas Counties, Texas, SWG-2019-00067. Prepared for the Port of Corpus Christi Authority. October 29, 2021.*
10. *Triton Environmental Solutions, LLC. 2022a. Draft Aquatic Survey Report San José Island Beneficial Use Site, Port of Corpus Christi Authority Channel Deepening Project, Aransas County, Texas, SWG-2019-00067. Prepared for the Port of Corpus Christi Authority. January 14, 2021.*
11. *Triton Environmental Solutions, LLC. 2022b. Threatened and Endangered Species Survey Report: San José Island Beneficial Use Site. Port of Corpus Christi Authority Channel Deepening Project. Aransas County, Texas. SWG-2019-00067. January 18, 2022.*
12. *Triton Environmental Solutions, LLC. 2021b. Threatened and Endangered Species Survey Report: Beneficial Use Placement Areas PA4, SS1, SS2, HI-E, and MI. Port of Corpus Christi Authority Channel Deepening Project. SWG-2019-00067. November 10, 2021.*
13. *W.F. Baird and Associates, Ltd. (Baird). 2021a. FNI PCCA 3rd Party EIS modeling – HRI storm surge modeling review. Memorandum to Freese and Nichols, Inc. October 4. ———. 2021b. Draft Port Corpus Christi Access Channel – Propeller Scour Study. Prepared for Freese and Nichols, Inc. October 4, 2021. ———. 2021c. Draft Port of Corpus Christi Authority Channel Deepening Project –*

Underkeel Clearance Study. Prepared for Freese and Nichols, Inc. October 4, 2021.

———. *2022a. Draft Environmental Impact Assessment for Channel Deepening, Port of Corpus Christi – Sediment Transport Modelling Study. April 1, 2022.*

———. *2022b. Draft Environmental Impact Assessment for Channel Deepening, Port of Corpus Christi Channel Deepening Project – Vessel Wake Analysis. Prepared for Freese and Nichols, Inc. January 25, 2022.*

———. *2022c. Draft Environmental Impact Assessment for Channel Deepening, Port of Corpus Christi – Hydrodynamic and Salinity Modeling Study. Prepared for Freese and Nichols, Inc. March 17, 2022.*

14. *Any other studies prepared for the Port of Corpus Christi re: the "Corpus Christi Ship Channel Deepening Project" since 12/01/2015.*

A copy of the Request is attached hereto as Exhibit A in accordance with Section 552.301(e)(1)(B) of the Code. The email date stamp on the request constitutes evidence sufficient to establish PCCA's receipt of the Request on June 9, 2022, as required under Section 552.301(e)(1)(C). This letter is submitted to your offices on or before the fifteenth (15th) business day following PCCA's receipt of the Request, in compliance with Section 552.301 of the Code.

PCCA elected to withhold certain requested information from disclosure (collectively, the "Withheld Information"), based on PCCA's belief that such information is excepted from disclosure by one or more of the following sections of Chapter 552 of the Code: Section 552.101 (governing confidentiality under common law privacy principles) and Section 552.111 (pertaining to agency memoranda). Consequently, on June 23, 2022, PCCA (a) notified Requestor of its decision to withhold the Withheld Information; and (b) requested an Attorney General's decision concerning whether the Withheld Information may be excepted from disclosure by PCCA pursuant to the exceptions noted therein. A copy of our initial request to your office, as well as PCCA's letter to Requestor regarding same, are attached hereto as Exhibits B and C, respectively. A representative sample of the Withheld Information is attached as Exhibit D.

Basis for Withholding Requested Information under Section 552.101 of the Code:

Section 552.101 of the Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Additionally, "if an agency of the federal government shares its information with a Texas governmental entity, the Texas entity *must* withhold the information that the federal agency determined to be confidential under federal law." Texas PIA handbook at 72-73 (2022) (emphasis added).¹ Here, the United States Army Corps of Engineers ("USACE") has asserted that the requested documents are

¹ Citing ORD No. 561 (1990); accord *United States v. Napper*, 887 F.2d 1528, 1530 (11th Cir. 1989) (documents that Federal Bureau of Investigation lent to city police department remained property of Bureau and were subject to any restrictions on dissemination of Bureau-placed documents).

confidential, and cannot be shared at this point in time. Specifically, the USACE maintains that FOIA Exemption Five, 5 U.S.C. §552(b)(5) precludes releasing these documents. PCCA's point of contact at the USACE stated that the "[r]ecords are being withheld because... they are pre-decisional and deliberative and therefore exempt from release under the deliberative process privilege contained in Exemption (b)(5) of the FOIA. One purpose of this privilege is to protect the quality of agency decisions by encouraging frank and open discussions of agency policy." Email Correspondence with USACE is attached as Exhibit E.

The Texas Legislature modeled the Texas Public Information Act on FOIA. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000) (referencing *Holmes v. Morales*, 924 S.W.2d 920, 925 (Tex. 1996); *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 676 (Tex. 1995); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 412 (Tex. App.--Austin 1992, no writ)). Additionally, "[f]ederal courts have consistently held that the FOIA's agency memorandum exception includes the deliberative process privilege, as well as the attorney work-product and attorney-client privileges." *Id.*

In addition to the above concerns, no fewer than three of the requested documents are in draft form. In the State of Texas, drafts of otherwise public information do not automatically render the documents exempt from disclosure. *See Id.* at 354.² That said, the USACE directed our office to a 2021 United States Supreme Court decision that stated, "[t]he deliberative process privilege protects from disclosure under FOIA in-house draft biological opinions that are both predecisional and deliberative, even if the drafts reflect the agencies' last views about a proposal." *United States Fish & Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777, 782 (2021). The USACE asserts that, in addition to FOIA Exemption 5 above, the *Sierra Club* ruling wholly precludes releasing these drafts. As such, PCCA requests that your office permit PCCA to withhold such information in responding to the Request.

Basis for Withholding Requested Information under Section 552.111 of the Code:

As your office has previously held, "Section 552.111 excepts interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's policymaking process." Open Records Decision 1994 Tex. AG LEXIS 335 *2 (1994) quoting 1993 Tex. Op. Atty Gen. No. 615 at 5. Policymaking functions include "administrative and personnel matters of broad scope that affect the governmental body's policy mission. Texas Public Information Act Handbook, 115 (citing Open Records Decision No. 631 at 3 (1995); *City of Garland v. Dallas Morning News*, 969 S.W.2d 548, 557 (Tex. App.—Dallas 1998), *aff'd*, 22 S.W.3d 351 (Tex. 2000)). Additionally, "Texas courts and the Attorney General have consistently recognized that this exception encompasses the common law deliberative process privilege, which protects certain agency

² "The mere creation of a draft is not transacting official business"

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communications from discovery.” *City of Garland* 22 S.W.3d 351 at 360. Texas and Federal courts recognize that “the deliberative process privilege covers only communications that are predecisional and deliberative.” *Id.*³ PCCA’s position is the same as that held by the USACE – the requested information is predecisional and deliberative, and thus precludes disclosure under 552.111 and FOIA Exemption 5.

Conclusion

In conclusion, PCCA believes that the aforementioned disclosure privileges and exceptions under the Public Information Act, protects the Withheld Information from required disclosure, and respectfully requests your consideration of this matter. If you have any questions about this request, please contact Dane Bruun at 361-561-8018.

Respectfully submitted,

WELDER LESHIN LLP

By: Dane C. Bruun 
Dane C. Bruun

DCB/pmm

cc: **Via E-Mail:** kathrynmasten@yahoo.com
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³ “Predecisional documents are those ‘prepared in order to assist an agency decisionmaker in arriving at his decision.’” *Id.* citing *Renegotiation Bd. v. Grumman Aircraft Eng’g Corp.*, [421 U.S. 168, 184, 44 L. Ed. 2d 57, 95 S. Ct. 1491 \(1975\)](#).