



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 18, 2006

Ms. Anastasia Breloff
Attorney
Texas State Preservation Board
P.O. Box 13286
Austin, Texas 78711-3286

OR2006-05211

Dear Ms. Breloff:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 249314.

The Texas State Preservation Board (the "board") received a request for all records produced from January 2004 until the present relating to certain acquisitions and modifications to the State Capitol Building. You assert that some of the responsive information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. We have considered your claimed exceptions to disclosure and have reviewed the submitted information.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel,

such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

The board explains that the records in Exhibit B constitute and reflect confidential internal communications generated by attorneys and other employees of the board for the purpose of providing legal advice regarding proposed and ongoing projects. You state that these communications were intended to be confidential and that their confidentiality has been maintained. Having carefully considered these arguments and the records at issue, we agree that these documents are privileged attorney-client communications. Therefore, the board may withhold Exhibit B in its entirety under section 552.107(1).

Next you assert that the records submitted as Exhibit A are excepted under section 552.111 of the Government Code. Section 552.111 excepts from public 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. 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, no writ); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615 (1993), 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 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. The Dallas Morning News*, 22

S.W.3d 351 (Tex. 2000) (stating that Gov't Code § 552.111 is not applicable to personnel-related communications that did not involve policymaking). 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. If, however, the 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 may also 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. Finally, section 552.111 does not apply unless the agencies between which the information is passed are shown to share a privity of interest or common deliberative process with regard to the policy matter at issue. Open Records Decision No. 561 at 9 (1990).

You assert that Exhibit A consists of the advice, opinions, and recommendations of employees of the board and other state agencies on specific policy issues. After reviewing Exhibit A, we agree the agencies share a privity of interest and that much of the information in these documents consists of advice, opinions, and recommendations relating to a policy issue of the board. We have marked the information that may be withheld under section 552.111. The board has failed to demonstrate, however, that the remaining information in Exhibit A is excepted under the deliberative process prong of section 552.111. *See* ORD 615 (stating that factual information is generally not excepted under Gov't Code § 552.111); *see also* Gov't Code § 552.301(e)(1)(a) (stating that governmental body must provide sufficient written comments to explain applicability of claimed exceptions).

These documents, nevertheless, contain e-mail addresses that may be protected from disclosure under section 552.137 of the Government Code. Section 552.137 provides:

- (a) Except as otherwise provided by this section, 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 this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

- (1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;
- (2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;
- (3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or
- (4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Gov't Code § 552.137. Section 552.137 requires the board to withhold an e-mail address of a member of the public that is provided for the purpose of communicating electronically with the board, unless the member of the public has affirmatively consented to its release or the e-mail address is specifically excluded under section 552.137(c). We have marked the e-mail addresses that do not appear to be of a type specifically excluded by section 552.137(c). Consequently, unless the individuals to whom these e-mail addresses belong have consented to their release, the board must withhold the marked e-mail addresses from disclosure under section 552.137. We note, however, that if the board determines that any of the e-mail addresses we have marked are of a type specifically excluded by section 552.137(c), those e-mail addresses must be released.

Finally, we note that Exhibit A may contain information that is protected from disclosure under section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential in accordance with section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Section 552.117 also encompasses a personal cellular telephone number, provided that the cellular phone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (stating that Gov't Code § 552.117 is not applicable to cellular mobile phone numbers paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See*

Open Records Decision No. 530 at 5 (1989). You do not state whether the employees at issue timely elected to withhold their personal information in accordance with section 552.024. Therefore, if the employees at issue timely elected to withhold their personal information, you must withhold the marked information pursuant to section 552.117(a)(1). If the employees at issue did not timely elect to withhold their personal information, the marked information must be released.

In summary, Exhibit B may be withheld in its entirety under section 552.107(1). The board may withhold the marked portions of Exhibit A under section 552.111. If their owners did not consent to release, the marked e-mail addresses must be withheld under section 552.137 unless they are specifically excluded under section 552.137(c). If the employees at issue timely elected to withhold their personal information, you must withhold the marked information pursuant to section 552.117(a)(1). The remaining information in Exhibit A must be released.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

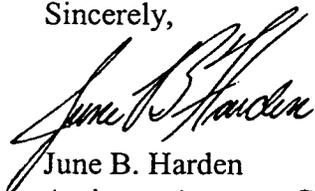
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



June B. Harden
Assistant Attorney General
Open Records Division

JBH/sdk

Ref: ID# 249314

Enc: Submitted documents

c: Mr. Jay D. Root
Fort Worth Star-Telegram, Austin Bureau
1005 Congress Avenue, Suite 920
Austin, Texas 78701
(w/o enclosures)