



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 14, 2008

Ms. Maria A. Smith
North Texas Tollway Authority
P.O. Box 260729
Plano, Texas 75026

OR2008-04926

Dear Ms. Smith:

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# 307393.

The North Texas Tollway Authority (the "authority") received a request for eight categories of information pertaining to the supplemental environmental impact statement ("SDEIS") for the Trinity Parkway. You state that you will release a portion of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.107, 552.111, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

Initially, we note that portions of Box 4 and Box 5 consist of a contract and completed cost estimates, both of which are subject to section 552.022 of the Government Code. Section 552.022 enumerates categories of information that are not excepted from required disclosure unless they "are expressly confidential under other law." Gov't Code § 552.022. Section 552.022(a)(3) provides for the disclosure of "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]" *Id.* § 552.022(a)(3). Section 552.022(a)(5) provides for the disclosure of "all working papers, research material, and information used to estimate the need for or expenditures of public funds or taxes by a governmental body, on completion of the estimate[.]" *Id.* § 552.022(a)(5). Thus, we conclude that section 552.022(a)(3) is applicable to the marked contract in Box 4 and section 552.022(a)(5) is applicable to the marked cost

¹We assume that 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.

estimate in Box 5. The authority may only withhold this information if it is confidential under other law. You claim that this information is excepted from public disclosure under section 552.111 of the Government Code. However, section 552.111 is a discretionary exception and therefore not "other law" for purposes of section 552.022. *See* Open Records Decision No. 470 at 7 (1987) (statutory predecessor to section 552.111 may be waived). Therefore, the authority may not withhold the marked contract and cost estimates under section 552.111. As you raise no other exception to disclosure of this information, it must be released to the requestor.

Next we address your arguments under section 552.111 for the information in Boxes 1, 2, and 3, and the remaining information in Boxes 4 and 5. You argue that this information is excepted from disclosure under the deliberative process privilege encompassed by section 552.111 of the Government Code. *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, no writ); 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 that 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). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5.

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.

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, 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 assert that the information submitted in Boxes 1 and 2 consists of draft versions of the SDEIS that have not been approved. You also explain that Boxes 3, 4, and 5 consist of communications related to the SDEIS, some with attached portions of the draft, between authority staff, attorneys, consultants, and third party governmental bodies that are the authority's partners in the Trinity Parkway Project. Furthermore, you indicate that the final version of the SDEIS will be released to the public in its final form. Based on your representations and our review, we find that you have established that the deliberative process privilege is applicable to the draft versions submitted in Boxes 1 and 2 and to portions of the communications, which we have marked, in Boxes 3, 4, and 5. However, you have failed to explain how the factual information and information pertaining to routine administrative matters contained in the remaining portions of the communications constitutes advice, recommendations, opinions, or material reflecting the policymaking processes of the authority. Further, we note that portions of the information at issue consist of communications with community activists, media outlets, and other non-project partner third parties. You have failed to establish how any of these parties share a privity of interest with the authority. Thus, section 552.111 is not applicable to this information. Accordingly, you may withhold Boxes 1 and 2, and the marked draft documents and marked portions of the communications in Boxes 3, 4, and 5 under section 552.111 of the Government Code.

We note that section 552.117(a)(1) of the Government Code may be applicable to a portion of the remaining information in Boxes 3, 4, and 5.² Section 552.117(a)(1) of the Government Code exempts from disclosure the current and former home addresses, 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 under section 552.024 of the Government Code. Gov't § 552.117(a)(1). Whether a particular piece of information is protected under section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Thus, pursuant

²The Office of the Attorney General will raise a mandatory exception, such as section 552.117, on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

to section 552.117(a)(1), if the employees at issue made a timely election to keep their information confidential, then the authority must withhold the employees' personal information. Accordingly, we have marked the information in Boxes 3, 4, and 5 that must be withheld under section 552.117(a)(1) if that section applies. However, you may not withhold this information under section 552.117(a)(1) if the employees did not make a timely election to keep their information confidential.

The remaining information in Boxes 3, 4, and 5 also contains e-mail addresses that are excepted from disclosure under section 552.137 of the Government Code, which requires a governmental body to withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See* Gov't Code § 552.137(b). We note that the submitted information contains a number of e-mail addresses belonging to third party contractors and consultants; section 552.137(b) does not apply to the e-mail address of a person who has a contractual relationship with the governmental body or by the contractor's agent. *Id.* § 552.137(c)(1). We have marked the e-mail addresses of individuals who do not appear to have a contractual relationship with a governmental body. You do not inform us that the owners of these marked e-mail addresses have affirmatively consented to release. Therefore, the authority must withhold the e-mail addresses we have marked under section 552.137.

Finally, you assert that Box 6 is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) 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 Tex. 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). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). 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).

In this case, you assert that the information in Box 6 consists of communications made for the purpose of facilitating the rendition of professional legal services. You state that the communications were between clients, client representatives, lawyers, lawyer representatives, and consultants identified by the authority, and that the communications were to be kept confidential among the intended parties. Finally, you state that the authority has not waived its privilege with respect to any of the communications at issue. Thus, based upon your representations and our review, we agree that you may withhold most of Box 6 under section 552.107. However, the remaining information, which we have marked for release, does not consist of communications for the rendition of professional legal services to the authority. Thus, with the exception of the information that we have marked for release, the authority may withhold the remaining information in Box 6 under section 552.107.

In summary, you may withhold Boxes 1 and 2 and the information that we have marked in Boxes 3, 4, and 5 under section 552.111. If the employees at issue timely elected to keep their personal information confidential, then you must withhold the information we have marked under section 552.117(a)(1) of the Government Code. You may not withhold this information under section 552.117(a)(1) if the employees did not make a timely election to keep their information confidential. Unless, you receive consent from the owner of the e-mail address, you must withhold the e-mail addresses we have marked under section 552.137. With the exception of the information we have marked for release, you may withhold Box 6 under section 552.107 of the Government Code. The remaining information 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge 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,



Justin D. Gordon
Assistant Attorney General
Open Records Division

JDG/jh

Ref: ID# 307393

Enc. Submitted documents

c: Mr. Bruce Tomaso
Staff Writer
The Dallas Morning News
P.O. Box 655237
Dallas, Texas 75265
(w/o enclosures)