



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 4, 2009

Ms. Lori Fixley Winland
Locke Lord Bissell & Liddell, L.L.P.
100 Congress Avenue, Suite 300
Austin, Texas 78701

OR2009-05924

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# 341743.

The Alamo Regional Mobile Authority (the "authority"), which you represent, received a request for (1) all correspondence related to the authority's "consideration of hiring a lobbyist(s) in Austin and/or Washington D.C." and (2) schedules and travel expenses for four named individuals over a specified time frame. You state that the authority will release some responsive information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.106, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. *See* Gov't Code § 552.107(1). 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. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *See 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. See *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). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. See 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, 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. See *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).

You state that the information you have marked as Exhibits B and D consists of communications among authority employees, authority subcontractors, attorneys and legal personnel from the authority’s outside counsel, and representatives of other regional mobility authorities that share with the authority a common legal interest with respect to the subject matter of the communications. See generally TEX. R. EVID. 503(b)(1)(c) (discussing privilege among parties “concerning a matter of common interest”); see also *In re Monsanto*, 998 S.W.2d 917, 922 (Tex. App.—Waco 1998, no pet.) (discussing the “joint-defense” privilege incorporated by Rule 503(b)(1)(C)), *In re Auclair*, 961 F.2d 65, 69 (5th Cir. 1992) (citing *Hodges, Grant & Kaufmann v. United States Government*, 768 F.2d 719, 721 (5th Cir. 1985)) (attorney-client privilege not waived if privileged communication is shared with third person who has common legal interest with respect to subject matter of communication). You have identified all of these parties. You state that these communications were made in furtherance of the rendition of legal services to the interested regional mobility authorities, and you inform this office that these communications have remained confidential. Based on your representations and our review, we agree that Exhibits B and D consist of privileged attorney-client communications. Accordingly, the authority may withhold these communications under section 552.107 of the Government Code.¹

¹As this ruling is dispositive with regard to these exhibits, we need not address your remaining arguments against disclosure of Exhibit B.

You also raise section 552.111 for Exhibit C and section 552.106 for Exhibits C and E. Section 552.106 of the Government Code excepts from disclosure “[a] draft or working paper involved in the preparation of proposed legislation[.]” Gov’t Code § 552.106(a). Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency” and encompasses the deliberative process privilege. *Id.* § 552.111; *see* Open Records Decision No. 615 at 2 (1993). Section 552.106 resembles section 552.111 in that both exceptions protect advice, opinion, and recommendation on policy matters in order to encourage frank discussion during the policymaking process. *See* Open Records Decision No. 460 at 3 (1987). The purpose of section 552.106 is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body. *See id.* at 2. Therefore, section 552.106 is narrower than section 552.111 and is applicable only to the policy judgments, recommendations, and proposals of persons who are involved in the preparation of proposed legislation and who have an official responsibility to provide such information to members of the legislative body. *See id.* at 1; *see also* Open Records Decision Nos. 429 at 5 (1985) (statutory predecessor to section 552.106 not applicable to information relating to governmental entity’s efforts to persuade other governmental entities to enact particular ordinances). In this instance, you have not established that the authority has an official responsibility to provide policy judgments, recommendations, and proposals to the involved legislative body. Therefore, we conclude that the authority may not withhold any of the submitted information under section 552.106 of the Government Code. As you raise no other exceptions against disclosure of Exhibit E, the authority must release this portion of the submitted information. Because you also raise section 552.111 with respect to Exhibit C, we will consider your claims under that exception for that portion of the submitted information.

The purpose of section 552.111 is to protect advice, recommendations, and opinions 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 from disclosure only those internal communications that consist of advice, recommendations, and opinions that reflect 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) (Gov’t Code § 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). Moreover, 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. 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).

We note that section 552.111 can encompass communications between a governmental body and a third party. *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). When determining if an interagency memorandum is excepted under section 552.111, we must also consider whether the agencies between which the memorandum is passed share a privity of interest or common deliberative process with regard to the policy matter at issue. *See* Open Records Decision No. 561 at 9 (1990). For section 552.111 to apply in such instances, the governmental body must identify the third party and explain the nature of its relationship with the governmental body.

We have 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.

You state that Exhibit C contains the advice, opinions, and recommendations of authority employees, authority subcontractors, the authority's outside counsel, and representatives of third parties that share a privity of interest and common deliberative process with the authority with respect to the subject matter of the communications. You also inform us that the information in the communications at issue was shared among these parties in an effort to respond to a request for comments from an agency proposing to file new legislation. Based on your representations and our review of the information at issue, we find that you have established that the deliberative process privilege is applicable to some of the information within Exhibit C. Therefore, the authority may withhold the information we have marked under section 552.111 of the Government Code. However, the remaining information appears to consist either of general administrative information that does not relate to policymaking or information that is purely factual in nature. You have failed to demonstrate, and the information does not reflect on its face, that this information consists of advice,

recommendations, or opinions that pertain to policymaking. Accordingly, the authority may not withhold the remainder of Exhibit C under the deliberative process privilege of section 552.111.

We note that some of the remaining information consists of e-mail addresses subject to section 552.137 of the Government Code.² Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See Gov’t Code* § 552.137(a)-(c). Subsection (c)(1) states that subsection (a) does not apply to an e-mail address “provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor’s agent” and subsection (c)(2) states that subsection (a) does not apply to an e-mail address “provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor’s agent[.]” *Id.* § 552.137(c)(1), (2). We also note that section 552.137(a) applies only to e-mail addresses belonging to “member[s] of the public.” Thus, professional e-mail addresses belonging to representatives of other governmental bodies are not excepted from disclosure under this section. Accordingly, the authority must withhold the e-mail addresses we have marked, except to the extent that any such address: (1) is the professional address of a person who has or is seeking a contractual relationship with the authority; (2) is the professional address of a representative of another governmental body; or (3) belongs to a person who consents to release of such information.

In summary, the authority: (1) may withhold Exhibits B and D under section 552.107 of the Government Code; (2) may withhold the portions of Exhibit C that we have marked under section 552.111 of the Government Code; (3) must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, except to the extent that any such address: (a) is the professional address of a person who either has or is seeking a contractual relationship with the authority; (b) is the professional address of a representative of another governmental body; or (c) belongs to a person who consents to release of such information; and (4) must release the remainder of the submitted information.

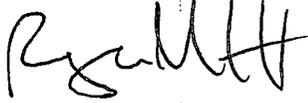
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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.oag.state.tx.us/open/index_orl.php,

²The Office of the Attorney General will raise a mandatory exception, such as section 552.137, on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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 must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,

A handwritten signature in black ink, appearing to read "Ryan T. Mitchell". The signature is stylized and cursive.

Ryan T. Mitchell
Assistant Attorney General
Open Records Division

RTM/jb

Ref: ID# 341743

Enc. Submitted documents

cc: Requestor
(w/o enclosures)