



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

OR2009-05926

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# 341742.

The Alamo Regional Mobility Authority (the "authority"), which you represent, received a request for all correspondence relating to the authority's proposed merger with VIA Metropolitan Transit ("VIA") and the Advanced Transportation District and information related to the authority's director's schedule for a specified time period. You state that the authority will release some information responsive to this request. 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) 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). 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.*, 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).

You state that Attachments B and D consist of communications between authority employees and attorneys for the authority. You assert that these communications were made in furtherance of the rendition of professional legal services, that the communications were intended to be confidential, and that the confidentiality of the communications has been maintained. After reviewing your arguments and the information at issue, we find that Attachments B and D constitute privileged attorney-client communications that the authority may withhold under section 552.107.¹

Next, we address your claim of section 552.106 of the Government Code. Section 552.106(a) excepts from required public disclosure “[a] draft or working paper involved in the preparation of proposed legislation[.]” Gov’t Code § 552.106(a). Section 552.106(a) ordinarily applies only to persons with a responsibility to prepare information and proposals for a legislative body. *See Open Records Decision No. 460 at 1 (1987)*. The purpose of this exception is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body; therefore, section 552.106 encompasses only policy judgments, recommendations, and proposals involved in the preparation of proposed legislation and does not except purely factual

¹As our ruling is dispositive with regard to Attachment B, we need not address your remaining arguments for this attachment.

information from public disclosure. *Id.* at 2. However, a comparison or analysis of factual information prepared to support proposed legislation is within the ambit of section 552.106. *Id.*

You state that the submitted draft legislation and comments in Attachments C and E deal with the consolidation of the authority and VIA. We note, section 552.106 only applies to drafts and working papers prepared by persons with some official responsibility to prepare such materials for the legislative body. Open Records Decision No. 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). It does not apply to materials prepared by an agency or other entity that has no official responsibility to do so but only acts as an interested party that wishes to influence the legislative process. *Id.* 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 none of the information in Attachments C and E is excepted from disclosure under section 552.106.

Next, you claim Attachments C and F are excepted from disclosure under section 552.111 of the Government Code. 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." 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, opinions, and recommendations 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). 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. But if factual information is so inextricably intertwined with material involving advice, opinions,

or recommendations 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 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.

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 entities between which the memorandum is passed share a privity of interest or common deliberative process with regard to the policy matter at issue. *See* ORD 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. 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 (1990).

You state that Attachments C and E contain the advice, opinions, and recommendations of authority employees and representatives involving authority policymaking matters. You also inform us that some of the communications are between the authority and representatives of VIA and are related to a proposed consolidation of the two entities. We understand the authority and VIA shared a privity of interest and common deliberative process in this effort. Based on your representations and our review of the information at issue, we find that the authority has established that the deliberative process privilege is applicable to some of the information at issue. We also find some the information consists of drafts. You state the authority has released the final version of these drafts to the requestor. However, you have failed to demonstrate, and the information does not reflect on its face, that the remaining information consists of advice, recommendations, or opinions that pertain to policymaking. Therefore, the authority may only withhold the information we have marked in

Attachments C and F under section 552.111 of the Government Code. We find that the remaining information is not excepted from disclosure under section 552.111 and it may not be withheld on that basis.

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 may withhold Attachments B and D pursuant to section 552.107 of the Government Code. In addition, the authority may withhold the information we have marked in Attachments C and F under section 552.111. The authority 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. 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.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,



Tamara Wilcox
Assistant Attorney General
Open Records Division

TW/eeg

Ref: ID# 341742

Enc. Submitted documents

c: Requestor
(w/o enclosures)