

The ruling you have requested has been modified pursuant to a court order. The court judgment has been attached to this document.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 16, 2009

Ms. Pauline E. Higgins
Ms. Jakki A. Hansen
Metropolitan Transit Authority of Harris County
P.O. Box 61429
Houston, Texas 77208-1429

OR2009-09817

Dear Ms. Higgins and Ms. Hansen:

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# 349200 (MTA No. 2009-0157).

The Metropolitan Transit Authority of Harris County ("METRO") received a request for all documents regarding the work and background of a named consultant in 2008 and 2009. You state that METRO has made some of the requested information available to the requestor. You claim the submitted information is excepted from disclosure under sections 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 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).

You claim that Exhibit 3 contains communications made for the purpose of facilitating the rendition of professional legal services. You state that the communications were between METRO employees and attorneys representing METRO. You further state that the communications were intended to be confidential. However, we note that one of the submitted communications was sent to a non-privileged party. Accordingly, we find that METRO has failed to demonstrate that the information we have marked consists of a confidential attorney-client communication. Therefore, with the exception of the information we have marked for release, METRO may withhold the information in Exhibit 3 under section 552.107 of the Government Code.

Next, section 552.111 of the Government Code 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, 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 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) (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). 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 also have 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 explain that METRO hired a third party consultant to assist METRO in negotiations of various contracts, including a development agreement for transit improvements. You argue that the information in Exhibit 4 represents a draft policymaking document and contains the consultant's "advice, opinions, and/or recommendations to METRO." Although you state that the development agreement has been finalized and is available for public inspection, upon review of the submitted information, we note that Exhibit 4 does not contain a draft of the development agreement. We agree, however, that Exhibit 4 contains information that consists of advice, opinion, or recommendations on a policy matter of METRO.

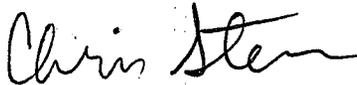
Accordingly, METRO may withhold the information we have marked under section 552.111 of the Government Code. However, the remaining information in Exhibit 4 consists purely of factual information. Therefore, METRO may not withhold any of the remaining information under section 552.111.

In summary, (1) with the exception of the non-privileged communication, which we have marked, METRO may withhold the information in Exhibit 3 under section 552.107 of the Government Code; and (2) METRO may withhold the information we have marked in Exhibit 4 under section 552.111 of the Government Code. The remaining information must be released to the requestor.

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, 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,



Christopher D. Sterner
Assistant Attorney General
Open Records Division

CDSA/eeg

Ref: ID# 349200

Enc. Submitted documents

c: Requestor
(w/o enclosures)

METROPOLITAN TRANSIT AUTHORITY
OF HARRIS COUNTY, TEXAS,
Plaintiff,

V.

GREG ABBOTT, AS ATTORNEY
GENERAL OF THE STATE OF TEXAS,
Defendant.

§ IN THE DISTRICT COURT OF
§
§
§ 345TH JUDICIAL DISTRICT
§
§
§ TRAVIS COUNTY, TEXAS
§

Filed in The District Court
of Travis County, Texas

JL OCT 12 2009
At 10:28 A.M.
Amalia Rodriguez-Mendoza, Clerk

FINAL JUDGMENT

On October 12, 2009, a hearing was held on the Motion for Summary Judgment filed by Defendant Greg Abbott, Attorney General of Texas. Defendant appeared by his counsel of record. Plaintiff appeared by its counsel of record. The Court, having reviewed and considered the motion for summary judgment, including the accompanying exhibits, the other pleadings on file and argument of counsel, finds that Defendant Attorney General's Motion for Summary Judgment should be granted, as there is no genuine issue of material fact and Defendant is entitled to judgment as a matter of law. The Court also finds that Defendant's objections to Plaintiff's Exhibits 2 and 3 to its Response to Defendant's Motion for Summary Judgment should be sustained.

IT IS THEREFORE ORDERED that Defendant Attorney General's objections to Plaintiff's Exhibits 2 and 3 are sustained, and the Court has not considered them in determining its decision.

IT IS FURTHER ORDERED that Defendant Attorney General's Traditional Motion for Summary Judgment and No Evidence Motion for Summary Judgment **ARE**

GRANTED, except the parties stipulate that the marked information on emails dated April 4, 2009 and February 11, 2009
IT IS FURTHER ORDERED that:

is accepted from disclosure by Tex. Gov't Code § 552.111.

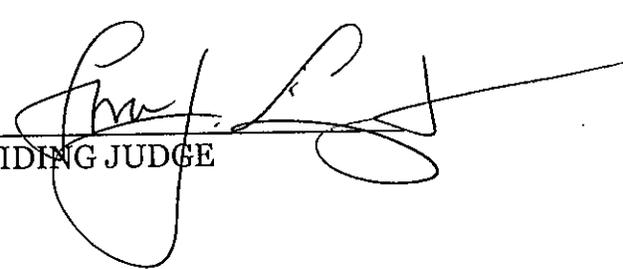
1. The information that the Attorney General did not mark for exception in Exhibit 4 to Metro's request for an open records' ruling, dated May 19, 2009 (Exhibit 2 to Plaintiff's Original Petition for Declaratory Judgment), as determined in Tex. Att'y Gen. OR2009-09817, is not excepted from disclosure under the Public Information Act, Tex. Gov't Code § 552.111 or any other exception and must be disclosed to the requestor; *except as provided by this judgment.*

VT
~~2. Defendant Attorney General have and recover from Plaintiff Metropolitan Transit Authority of Harris County, Texas attorney fees, pursuant to Tex. Gov't Code § 552.323(b), in the amount of \$1500.00 for expenses in the trial court; if this lawsuit is appealed and the Attorney General prevails, an additional \$5000.00 is awarded through the court of appeals, and if the lawsuit is further appealed to the Texas Supreme Court and the Attorney General prevails, an additional \$3750.00 is awarded. The Attorney General is also awarded court costs.~~

The Court **DENIES** all relief requested by Plaintiff.

This Judgment resolves all issues between the parties. Any relief not specifically granted by this Judgment **IS DENIED**. This is a final judgment.

SIGNED this 12th day of October, 2009.


PRESIDING JUDGE