



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 7, 2010

Ms. Jacqueline Hojem  
Public Information Officer and Senior Paralegal  
Metropolitan Transit Authority of Harris County  
P.O. Box 61429  
Houston, Texas 77208

OR2010-04969

Dear Ms. Hojem:

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# 376237 (MTA No. 2010-0104).

The Metropolitan Transit Authority of Harris County (the "authority") received a request for sixteen categories of information related to certain travel expenses, e-mail communications, and human resources documents involving seven named individuals during specific time periods. In a brief to this office dated February 17, 2010, you state the authority has made all existing information responsive to categories 1-3, 5-10, and 12-16 of the request available to the requestor. However, the date for determining whether information is responsive to a request for information is the date a governmental body receives the request for information, not the date a governmental body requests a ruling from this office. *C.f. Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed) (Act does not require governmental body to release information that did not exist when a request for information was received); Open Records Decision No. 452 at 3 (1986). The authority received the request for information on January 27, 2010. Consequently, all requested information that existed on January 27, 2010 is responsive. We assume all responsive information existing at the time the authority received the request, other than the information submitted for our review, has been released. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible). If not, such information must be released at this time. You state the submitted information is responsive to the remaining two categories of the request, and claim

it is excepted from disclosure under sections 552.101, 552.105, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You raise section 552.101 of the Government Code for Exhibit 2. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. However, determinations under common-law privacy must be made on a case-by-case basis. *See* Open Records Decision No. 373 at 4 (1983).

Section 552.101 also encompasses the doctrine of constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. ORD 455 at 4. The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* at 7. The scope of information protected is narrower than that under the common-law doctrine of privacy; constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985)).

The e-mail communications in Exhibit 2 pertain to the scheduling of doctor appointments for authority employees during the employees' work hours. This office has found some kinds of medical information or information indicating disabilities or specific illnesses to be excepted from required public disclosure under common-law privacy. *See* Open Records Decision No. 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). However, information pertaining to an employee's performance as a public servant generally cannot be considered to be beyond the realm of legitimate public interest. *See* Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of governmental employees), 423 at 2 (1984) (scope of public employee privacy is narrow), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest). We have also held the public's need to know information related to the work behavior of a public employee generally outweighs the employee's privacy interests for purposes of constitutional privacy. *See* Open Records Decision Nos. 329 at 2 (1982) (information relating to

complaints against public employees and discipline resulting therefrom not protected under statutory predecessor to section 552.101 or predecessor to section 552.102), 208 at 2 (1978) (information relating to complaint against public employee and disposition of complaint not protected under either constitutional or common-law right of privacy). Upon review, we have marked the portions of Exhibit 2 that reveal personal medical information. We find this marked information is of no legitimate public interest, and the authority must withhold it under section 552.101 in conjunction with common-law privacy. However, the remaining information in Exhibit 2 does not reveal any personal medical information, and you have not explained how this remaining information is otherwise highly intimate or embarrassing. Further, we find this information relates to authority employees' actions while performing their official duties, and is thus of legitimate public interest. You also have not explained how the remaining information in Exhibit 2 falls within one of the constitutional zones of privacy. Accordingly, we conclude you have not established the remaining information is confidential under the principles of common-law privacy or constitutional privacy. As you raise no other exceptions to this information, the remaining information in Exhibit 2 must be released.

You raise section 552.105 of the Government Code for the information in Exhibit 3. Section 552.105 excepts from disclosure information relating to:

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Gov't Code § 552.105. Section 552.105 is designed to protect a governmental body's planning and negotiating position with regard to particular transactions. *See* Open Records Decision Nos. 564 (1990), 357 (1982), 310 (1982). Information excepted from disclosure under section 552.105 that pertains to such negotiations may be excepted from disclosure so long as the transaction relating to that information is not complete. *See* ORD 310. But, the protection offered by section 552.105 is not limited solely to transactions not yet finalized. This office has concluded that information about specific parcels of land obtained in advance of other parcels to be acquired for the same project could be withheld where release of the information would harm the governmental body's negotiating position with respect to the remaining parcels. *See* ORD 564 at 2. A governmental body may withhold information "which, if released, would impair or tend to impair [its] 'planning and negotiating position in regard to particular transactions.'" ORD 357 at 3 (quoting Open Records Decision No. 222 (1979)). The question of whether specific information, if publicly released, would impair a governmental body's planning and negotiating position with regard to particular transactions is a question of fact. Accordingly, this office will accept a governmental body's good-faith determination in this regard, unless the contrary is clearly shown as a matter of law. *See* ORD 564.

You state the information in Exhibit 3 pertains to the consideration of certain real estate locations for relocation of an authority Park & Ride facility. You also represent the authority is in negotiations with respect to these locations, and that release of Exhibit 3 would harm the authority's negotiating position with respect to the property's acquisition. Based on your representations and our review of the information in question, we conclude the authority may withhold the information in Exhibit 3 under section 552.105 of the Government Code.<sup>1</sup>

You next raise section 552.107 of the Government Code for the e-mails submitted in Exhibit 4. Section 552.107 protects information coming within the attorney-client privilege. 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. 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 pet.). 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). We note that communications with third party consultants with which a governmental body

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<sup>1</sup>As our ruling is dispositive for this information, we need not address your remaining argument against its disclosure.

shares a privity of interest are protected. Open Records Decision Nos. 464 (1987), 429 (1985).

Most of the e-mails in Exhibit 4 reflect they are confidential communications between and among parties identified as authority employees and attorneys who represent the authority. You represent these e-mails were made for the purpose of facilitating the rendition of legal services, and were intended to be, and have remained, confidential. Based on your representations and our review, we conclude most of the e-mails in Exhibit 4 may be withheld under section 552.107. However, the remaining e-mail in Exhibit 4 reflects it was sent from an individual who is not identified in the submitted information as privileged. You do not otherwise explain the authority's relationship with this individual, or how he is a privileged party with respect to the e-mail at issue. Accordingly, you failed to show how this e-mail is privileged. However, because the non-privileged e-mail was submitted in an otherwise privileged e-mail chain, to the extent this e-mail does not exist separate and apart from the string in which it was submitted, it may be withheld along with the e-mail string as a privileged attorney-client communication. If the marked non-privileged e-mail exists separate and apart from the e-mail string in which it is submitted, it may not be withheld under section 552.107. In such case, we consider your remaining raised exception to its disclosure.

You raise the deliberative process privilege encompassed by section 552.111 of the Government Code for the remaining e-mail in Exhibit 4. 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 section 552.111 excepts from disclosure only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. See ORD 615 at 5. 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 No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). 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 *id.*

As noted above, the remaining e-mail in Exhibit 4 is a communication between an authority employee and an individual whose relationship with the authority is not explained. You do not provide any arguments demonstrating the authority shared any privity of interest or

common deliberative process with this individual. Accordingly, we conclude you failed to establish the applicability of section 552.111 to the remaining e-mail in Exhibit 4, and it may not be withheld on that basis. *See* ORD 561 at 9.

In summary, the authority must withhold the information we marked in Exhibit 2 under section 552.101 of the Government Code in conjunction with common-law privacy. The remaining information in Exhibit 2 must be released. The authority must also withhold Exhibit 3 under section 552.105 of the Government Code. The authority may generally withhold the information in Exhibit 4 under section 552.107 of the Government Code, but must release the marked non-privileged e-mail if it exists separate and apart from the e-mail chain in which it was submitted.

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](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, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read 'Bob Davis', with a long horizontal flourish extending to the right.

Bob Davis  
Assistant Attorney General  
Open Records Division

RSD/cc

Ref: ID# 376237

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)