



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 20, 2011

Mr. Richard Muller, Jr.
Allen Boone Humphries Robinson LLP
3200 Southwest Freeway Suite 2600
Houston, Texas 77027

OR2011-07117

Dear Mr. Muller:

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# 418273.

The Westwood Magnolia Parkway Improvement District (the "district"), which you represent, received a request for all e-mails of the district's board of directors (the "board") before the district's website was established.¹ You claim the submitted information is exempted from disclosure under sections 552.107, 552.111, 552.117, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note a portion of the submitted information, which we have marked, is not responsive to the instant request for information because it was created after the district received the request for information. This ruling does not address the public availability of any information that is not responsive to the request and the district is not required to release such information in response to this request.

Section 552.107(1) of the Government Code protects information that comes 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. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate the information constitutes or

¹We note the district received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request).

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. *See* 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 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 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* TEX. R. EVID. 503(b)(1)(A)-(E). 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. *See 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 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 the information submitted as Folder 1 is protected by section 552.107(1) of the Government Code. You state the information at issue consists of communications between the district’s outside counsel and members of the board. You have identified most of the parties to the communications. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the district. You further inform us these communications were intended to be, and have remained, confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to most of the information in Folder 1. However, we find you have failed to demonstrate some of the communications at issue consist of or document privileged attorney-client communications. Further, some of the information at issue consists of communications to or from individuals whom you have failed to identify as privileged parties. Thus, we find you have failed to demonstrate the applicability of the attorney-client privilege to these communications. Accordingly, with the exception of the information we have marked for release, the district may generally withhold Folder 1 under section 552.107(1) of the Government Code. We note several of the individual e-mails contained in the otherwise privileged e-mail strings are communications with individuals

whom you have not shown to be privileged parties. Thus, to the extent these non-privileged e-mails, which we have marked, exist separate and apart from the otherwise privileged e-mail strings, they may not be withheld under section 552.107(1).

Section 552.111 of the Government Code excepts from disclosure "an interagency or intra-agency 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, 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 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. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); 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).

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 ORD 561.

You state the remaining information in Folder 1 and the information in Folder 2 consists of agency memoranda that are subject to section 552.111. You state the information at issue pertains to the policy decisions of the district. You inform us some of the information at issue consists of communications with outside consultants acting on behalf of the district. Thus, we understand you to argue these third party consultants, whom you have identified, have a privity of interest or common deliberative process with the district. Thus, upon review, we find portions of the remaining information in Folder 1 and portions of the information in Folder 2 consist of advice, opinions, or recommendations pertaining to the policymaking functions of the district. Accordingly, the district may withhold this information, which we have marked, under section 552.111 of the Government Code. However, some of the remaining information in Folders 1 and 2 has been shared with parties with whom you have not demonstrated the district has a privity of interest or common deliberative process. Further, some of the remaining information is purely factual in nature, pertains to routine internal administrative or personnel matters, or does not pertain to policymaking. Thus, we find you have failed to demonstrate how the remaining information at issue consists of advice, opinions or recommendations on the policymaking functions of the district. Accordingly, the remaining information in Folders 1 and 2 may not be withheld under section 552.111 of the Government Code.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."² Gov't Code § 552.101. This section encompasses common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) 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 demonstrated. *See id.* at 681-82. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 343 (1982) (references in emergency medical records to drug overdoses, acute alcohol intoxication, obstetrical or gynecological illnesses, convulsions or seizures, and emotional or mental distress), 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities protected from disclosure). Upon review, we find portions of the remaining information, which we have marked, are highly intimate or embarrassing and not of legitimate public concern. Therefore, the district must withhold the marked information in Folders 2 and 3 under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, and family member information of a current

²The Office of the Attorney General will raise a mandatory exception 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 former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). We note section 552.117 is also applicable to personal cellular telephone numbers and home facsimile numbers, provided the cellular telephone service and facsimile number are not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. You do not inform us whether the individuals whose personal information is at issue timely elected confidentiality under section 552.024. Accordingly, we must rule conditionally. To the extent the individuals whose personal information is at issue timely requested confidentiality under section 552.024, the district must withhold the information we have marked in Folders 1, 2, and 3 under section 552.117(a)(1); however, the district may only withhold the marked cellular telephone numbers and home facsimile numbers to the extent a governmental body did not pay for these services. Conversely, to the extent the individuals whose personal information is at issue did not timely request confidentiality under section 552.024, the district may not withhold the marked information in Folders 1, 2, and 3 under section 552.117(a)(1).

The remaining information in Folders 1, 2, and 3 contains e-mail addresses that may be subject to section 552.137 of the Government Code. 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). We note the requestor has a right to his own e-mail address under section 552.137(b). *Id.* § 552.137(b). We have marked e-mail addresses within Folder 1 and a representative sample of e-mail addresses within Folders 2 and 3 that may be subject to section 552.137. The district must withhold personal e-mail addresses within the remaining information under section 552.137 of the Government Code, unless their owners have affirmatively consented to their public disclosure or the e-mail addresses are of a type specifically excluded by subsection (c).³

In summary, with the exception of the information we have marked for release, the district may generally withhold Folder 1 under section 552.107(1) of the Government Code;

³We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

however, to the extent the marked non-privileged e-mails exist separate and apart from the otherwise privileged e-mail strings, they may not be withheld under section 552.107(1) of the Government Code. The district may withhold the information we have marked within Folders 1 and 2 under section 552.111 of the Government Code. The district must withhold the information we have marked in Folders 2 and 3 under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the individuals whose personal information is at issue timely requested confidentiality under section 552.024, the district must withhold the information we have marked in Folders 1, 2, and 3 under section 552.117(a)(1); however, the district may only withhold the marked cellular telephone numbers and home facsimile numbers to the extent a governmental body did not pay for these services. The district must withhold personal e-mail addresses within the remaining information under section 552.137 of the Government Code, unless their owners have affirmatively consented to their public disclosure or the e-mail addresses are of a type specifically excluded by subsection (c). 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, 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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/bs

Ref: ID# 418273

Enc. Submitted documents

c: Requestor
(w/o enclosures)