



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 13, 2013

Mr. Justin Gordon and Mr. Chris Sterner  
Assistant General Counsel  
Office of the Governor  
P.O. Box 12428  
Austin, Texas 78711

OR2013-15974

Dear Mr. Gordon and Mr. Sterner:

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# 500516 (OOG ID Nos. 196-13 and 206-13).

The Office of the Governor (the "governor's office") received two requests from different requestors for the applications and materials pertaining to a specified Texas Enterprise Fund grant awarded to Chevron U.S.A., Inc. ("Chevron"), information and correspondence relating to the award, and all rules associated with the process of obtaining and awarding grants from the Texas Enterprise Fund. You state the governor's office is making most of the requested information available to both requestors. We understand the governor's office redacted from the submitted information a portion of information under section 552.117(a)(1) of the Government Code pursuant to section 552.024 of the Government Code and an e-mail address under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).<sup>1</sup> You claim portions of the submitted information are excepted from

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<sup>1</sup>Section 552.024 of the Government Code authorizes a governmental body to redact from public release a current or former official or employee's home address and telephone number, emergency contact information, social security number, and family member information excepted from disclosure under section 552.117(a)(1) of the Government Code without the necessity of requesting a decision from this office under the Act, if the individual timely elected to withhold such information. *See Gov't Code §§ 552.024(a)-(c), .117(a)(1)*. Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain 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.

disclosure under sections 552.102, 552.104, 552.107, and 552.111 of the Government Code. Additionally, although the governor's office takes no position with respect to the remaining requested information, you assert its release may implicate the interests of Chevron. Accordingly, you state, and provide documentation demonstrating, the governor's office notified Chevron of the request for information and of its right to submit arguments stating why its information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have considered the exceptions you claim and reviewed the submitted information, some of which you state constitutes a representative sample.<sup>2</sup>

Initially, an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) of the Government Code to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, this office has not received comments from Chevron explaining why its information should not be released to the requestor. Thus, we have no basis to conclude the release of any portion of the submitted information would implicate Chevron's interests, and none of the information at issue may be withheld on that basis. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3.

Section 552.102(a) of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" Gov't Code § 552.102(a). The Texas Supreme Court held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). Having carefully reviewed the information at issue, we find the information you have marked in Exhibit C must be withheld under section 552.102(a).

Section 552.104 of the Government Code excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. This exception protects a governmental body's interests in

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<sup>2</sup>This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

connection with competitive bidding and in certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). This office has held a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the “competitive advantage” aspect of this exception if it can satisfy two criteria. *See id.* First, the governmental body must demonstrate it has specific marketplace interests. *See id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *See id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body’s legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body’s demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *See id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

You contend the governor’s office has specific marketplace interests in the information you have marked in Exhibit D because the governor’s office is competing against other states attempting to recruit businesses to relocate or expand their businesses in their respective states. You state the information at issue identifies entities considering expansion or relocation to Texas. You explain that the governor’s office is currently negotiating potential approvals or contracts with the entities at issue, and contracts with these entities have not been executed. You argue release of this information, before contracts are signed or final approval given, would disadvantage Texas by permitting other states to directly approach these entities with competing incentives. Based on these representations and our review, we find you have demonstrated the governor’s office has specific marketplace interests and may be considered a “competitor” for purposes of section 552.104. Therefore, we find you have demonstrated release of the information at issue would cause specific harm to the governor’s office’s marketplace interests in a particular competitive situation. Accordingly, the governor’s office may withhold the information you have marked in Exhibit D under section 552.104.

Section 552.107(1) of the Government Code 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 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). 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 to only 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 to only 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, orig. proceeding). 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 the information you have marked in Exhibit B constitutes communications between governor’s office staff and attorneys that were made for the purpose of providing legal services to the governor’s office. You state the communications at issue were intended to be confidential and have remained confidential. Based on your representations and our review, we find the information you have marked consists of privileged attorney-client communications the governor’s office may withhold under section 552.107(1).<sup>3</sup>

Section 552.111 of the Government Code excepts from disclosure “[a]n 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. Section 552.111 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

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<sup>3</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

of the governmental body. ORD 615 at 5; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). 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). However, 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. ORD 615 at 5-6; *see also Dallas Morning News*, 22 S.W.3d at 364 (section 552.111 not applicable to personnel-related communications that did not involve policymaking).

Further, section 552.111 does not generally except from disclosure facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 157; 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).

This office also has concluded a preliminary draft of a document that has been or 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 seek to withhold some of the remaining information in Exhibit B, including draft documents you have marked, under section 552.111. You contend the information at issue constitutes internal communications providing advice, opinion, and recommendations regarding policy issues pertaining to a certain Texas Enterprise Fund project. Additionally, you state the draft documents at issue have been released to the public in their final form. Based on your representations and our review, we find the remaining information you have marked in Exhibit B constitutes policymaking advice, opinion, and recommendation. As such, the governor's office may withhold the information you have marked, including the draft documents at issue in their entirety, under section 552.111 on the basis of the deliberative process privilege.

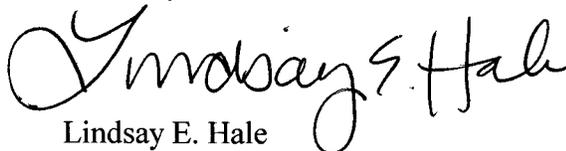
We note portions of the remaining information are subject to section 552.136 of the Government Code.<sup>4</sup> Section 552.136 states, "Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b); *see also id.* § 552.136(a) (defining "access device"). Accordingly, the governor's office must withhold the bank account and bank routing numbers we have marked in Exhibit E under section 552.136.

In summary, the governor's office must withhold the information you have marked in Exhibit C under section 552.102(a) of the Government Code. The governor's office may withhold the information you have marked in Exhibit D under section 552.104 of the Government Code. The governor's office may withhold the information you have marked in Exhibit B under section 552.107(1) of the Government Code. The governor's office may withhold the information you have marked in Exhibit B under section 552.111 of the Government Code. The governor's office must withhold the bank account and bank routing numbers we have marked in Exhibit E under section 552.136 of the Government Code. The governor's office must release the remaining 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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Lindsay E. Hale  
Assistant Attorney General  
Open Records Division

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<sup>4</sup>The 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).

Ref: ID# 500516

Enc. Submitted documents

c: Two Requestors  
(w/o enclosures)

Chevron U.S.A. Inc.  
c/o Justin Gordon and Chris Sterner  
Assistant General Counsel  
Office of the Governor  
P.O. Box 12428  
Austin, Texas 78711  
(w/o enclosures)