



ATTORNEY GENERAL OF TEXAS  
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OR2014-07423

Dear Mr. Brown:

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# 521965.

The Houston Ship Channel Security District (the "district"), which you represent, received a request for several categories of information, including communications with several named individuals and specified entities, pertaining to district's jurisdictional boundaries; assessments paid and refunds of assessments paid by the district to specified entities; the cost of security services, personnel, and equipment; and appeals by members of the district. You state the district does not have information responsive to some categories of the request.<sup>1</sup> You state the district has released some of the information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code.<sup>2</sup> Additionally, you state release of some of the

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<sup>1</sup>The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

<sup>2</sup>Although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, this office has concluded section 552.101 does not encompass discovery privileges. Further, although you claim Texas Rule of Evidence 503, we note the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code is

submitted information may implicate the proprietary interests of several third parties. Accordingly, you state, and provide documentation showing, you notified the third parties of the request and of their right to submit arguments to this office as to why their information should not be released.<sup>3</sup> See Gov't Code § 552.305(d); see also Open Records Decision No. 542 (1990) (determining the statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>4</sup>

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) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. See Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from any of the third parties explaining why their information should not be released. Therefore, we have no basis to conclude any of the third parties have a protected proprietary interest in the submitted information. 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. Accordingly, the district may not withhold any of the information at issue on the basis of any proprietary interest a third party may have in it.

Section 552.101 of the Government Code 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 information protected by other statutes, including federal law. See *English v. Gen. Elec. Co.*, 496 U.S. 72, 79(1990). On November 25, 2002, the President signed the Homeland Security Act ("HSA") and the Maritime Transportation Security Act ("MTSA"). The HSA created the Department of Homeland Security ("DHS") and transferred the Coast Guard and the Transportation Security Administration ("TSA"), a new agency created in the Department of Transportation the previous year to oversee the security of air travel, to DHS. See 6 U.S.C. §§ 111, 203, 468. The MTSA, among other

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section 552.107 of the Government Code. See Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

<sup>3</sup>The third parties notified pursuant to section 552.305 are: APM Terminals Houston; The Chertoff Group; Cletex Trucking, Inc.; Clorox Manufacturing Company; Holcim (US), Inc.; Industrial Terminals, LP; Inert Gas Services, Inc.; Jacintoport International, LLC; Stolthaven Houston; Targa Downstream, LLC; Witt O'Brien's; and two named individuals.

<sup>4</sup>We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

things, added chapter 701 to title 46 of the United States Code, consisting of new provisions enhancing the security of seagoing vessels and port and harbor facilities. Under the MTTSA, the Secretary of DHS is responsible for regulation of port security through the Coast Guard and the TSA, along with the Maritime Administration of the Department of Transportation.

In connection with the transfer of TSA to DHS, the HSA also transferred TSA's authority concerning sensitive security information ("SSI") under section 40119 of title 49 of the United States Code to section 114 of title 49 of the United States Code, and amended section 40119 to vest similar SSI authority in the Secretary of the Department of Transportation.<sup>5</sup> Section 114(r) of title 49 states in relevant part:

Notwithstanding [the Federal Freedom of Information Act (the "FOIA"),] the Under Secretary [for Transportation Security, head of TSA] shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act . . . if the Under Secretary decides disclosing the information would-

- (A) be an unwarranted invasion of personal privacy;
- (B) reveal a trade secret or privileged or confidential commercial or financial information; or
- (C) be detrimental to the security of transportation.

49 U.S.C. § 114(r). This provision requires the TSA's Under Secretary to "prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act." *Id.* It authorizes the Under Secretary to prescribe regulations that prohibit disclosure of information requested not only under the FOIA, but also under other disclosure statutes. *Cf. Public Citizen, Inc. v. Federal Aviation Administration*, 988 F.2d 186, 194 (D.C. Cir. 1993) (former section 40119 authorized FAA Administrator to prescribe regulations prohibiting disclosure of information under other statutes as well as under the FOIA). Thus, the Under Secretary is authorized by section 114(r) to prescribe regulations that prohibit disclosure of information requested under the Act.

Pursuant to the mandate and authority of section 114(r) of title 49, TSA published regulations found in title 49 of the Code of Federal Regulations, which took effect June 17, 2004. See 69 Fed. Reg. 28066. Section 1520.1(a) of these regulations provides that the regulations govern the disclosure of records and information that TSA has determined to be SSI as

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<sup>5</sup>This ruling does not construe the parallel federal statutes and regulations which apply to the Department of Transportation.

defined in section 1520.5 of title 49 of the Code of Federal Regulations. 49 C.F.R. § 1520.1(a). Section 1520.5 defines SSI to include information obtained or developed in the conduct of security activities, including research and development, the disclosure of which TSA has determined would be detrimental to the security of transportation. *Id.* § 1520.5(a)(3).

Section 1520.5 lists sixteen categories of information that constitute SSI, including “[s]pecific details of . . . maritime . . . transportation security measures[.]” *Id.* § 1520.5(b)(8). Section 1520.9 provides that those covered by the regulation, which, among others, includes the operator of a maritime facility required to have a security plan under the MTSA, “must [t]ake reasonable steps to safeguard SSI . . . from unauthorized disclosure” and must “[r]efer requests by other persons for SSI to TSA or the applicable component or agency within DOT or DHS.” *Id.* § 1520.7(a), .9(a). You inform us the district is an operator of a maritime facility required to have a security plan under the MTSA. *See* 46 U.S.C. § 70103(c); 33 C.F.R. § 105.400 (requiring owner or operator of maritime facility to submit security plan to DHS).

You claim the information in Exhibit A relates to the security of the district and the Port of Houston (the “port”). Specifically, you assert the information submitted as Exhibit A describes in detail “geographic and other attributes of the district, the identity and locations of the district’s membership, projects, deployed equipment and personnel, budgets, and . . . an evaluation of the relative effectiveness . . . each element of the district’s deployed security methods has achieved, gaps in security that remain, and initiatives needed to close those gaps.” You contend the information at issue could be used by a potential physical or cyber-intruder to discover vulnerabilities, seek access to, or disable the district’s surveillance equipment and computer infrastructure. Based on the above described statutory and regulatory scheme and our review of the information at issue, we find the decision to release or withhold the Exhibit A is not for this office or the district to make, but rather is a decision for the TSA and the Coast Guard. *See English*, 496 U.S. at 79 (state law is preempted to extent it actually conflicts with federal law). Consequently, we conclude the district may not release any of the information at issue at this time under the Act and, instead, must allow the TSA and the Coast Guard to make a determination concerning disclosure.<sup>6</sup>

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 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

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<sup>6</sup>As we are able to make this determination, we do not address the remaining arguments against disclosure of this information.

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). 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. See *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 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 portions of the information submitted as Exhibit B are protected by section 552.107(1) of the Government Code. You state the information at issue consists of communications between district attorneys and district officials, in their capacities as clients. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the district and these communications have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the district may withhold the information you have marked in Exhibit B under section 552.107(1) of the Government Code.

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. 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, writ ref'd n.r.e.); 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 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).

You seek to withhold a portion of the remaining information in Exhibit B under section 552.111 of the Government Code. You state the information you have marked consists of advice, opinions, and recommendations of district officials regarding policy matters of the district. Based on your representations and our review, we find the district has demonstrated the applicability of section 552.111 to most of the information you have marked. Upon review, however, we find the information we have marked for release to be either general administrative information that does not relate to policymaking or information that is purely factual in nature. Thus, we find you have failed to demonstrate how this information, which we have marked for release, is excepted under section 552.111 and it may not be withheld on that basis. Accordingly, except for the information we marked for release, the district may withhold the information you marked in Exhibit B under section 552.111 of the Government Code.

In summary, the district may not release Exhibit A at this time under the Act and, instead, must allow the TSA and the Coast Guard to make a determination concerning disclosure. The district may withhold the information it has marked in Exhibit B under section 552.107 of the Government Code. With the exception of the information we have marked for release, the district may withhold the remaining information it has marked in Exhibit B under

section 552.111 of the Government Code. The district 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,



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Assistant Attorney General  
Open Records Division

LLF/eb

Ref: ID# 521965

Enc. Submitted documents

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