



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 20, 2016

Mr. David V. Bryce
Office of General Counsel
Houston Housing Authority
2640 Fountain View Drive
Houston, Texas 77057

OR2016-08918

Dear Mr. Bryce:

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# 606436.

The Houston Housing Authority (the "authority") received two requests from the same requestor for 1) e-mails sent by two named individuals pertaining to a specified project, 2) any social impact studies pertaining to the specified project, and 3) text messages sent by the two named individuals pertaining to the specified project.¹ You state you will release some information responsive to the first and second categories of the request to the requestor. You state you will redact some personal e-mail addresses under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).² You claim the remaining information responsive to the first category of the request is excepted from disclosure under sections 552.104, 552.107, and 552.111 of the Government Code. We have

¹We note this office issued a withdrawal letter¹ for this matter on March 29, 2016. Upon review, we have determined the issuance of this withdrawal letter was in error. We issue this ruling as a substitute for this withdrawal letter. *See* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of the Act).

²Open Records Decision No. 684 serves as a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. *See* ORD 684.

considered the exceptions you claim and reviewed the submitted representative sample of information.³

Initially, we note, in a letter dated March 3, 2016, the authority states it wishes to withdraw its request for an open records decision with regard to the information responsive to the third category of the request because the authority has released this information to the requestor. This ruling does not address the public availability of information the authority no longer seeks to withhold.

Next, you state some of the remaining information responsive to the first category of the request was the subject of a previous request for a ruling, as a result of which this office issued Open Records Letter No. 2016-07708 (2016). In that ruling, we determined the authority may withhold the information at issue under section 552.104(a) of the Government Code. We have no indication the law, facts, or circumstances on which the prior ruling was based have changed. Thus, the authority may continue to rely on Open Records Letter No. 2016-07708 as a previous determination and withhold the information at issue in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, we note the submitted information in Exhibit 7 reflects the portions of information you seek to withhold in Exhibit 7 were previously provided to the requestor. Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law. *See* Gov't Code § 552.007; Open Records Decision Nos. 518 at 3 (1989), 400 at 2 (1983). Although you seek to withhold this information under section 552.104 of the Government Code, this exception does not prohibit the release of information or make information confidential. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 592 at 8 (1991) (statutory predecessor to section 552.104 subject to waiver). Thus, the authority may not withhold the information you have marked in Exhibit 7 under section 552.104. As you raise no further exceptions to disclosure for this information, it must be released.

³We assume that 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 that those records contain substantially different types of information than that submitted to this office.

Section 552.104(a) of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” *Id.* § 552.104(a). The “test under section 552.104 is whether knowing another bidder’s [or competitor’s information] would be an advantage, not whether it would be a decisive advantage.” *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). The authority states it has specific marketplace interests in the information at issue because the authority is competing for financing with other parties seeking financing for similar projects. The authority states disclosure of the information you have indicated in Exhibit 6 would put it at a competitive disadvantage in the financing marketplace as competitors could frame their own finance solicitations in a more favorable fashion, thereby squeezing it out of the market for financing or investments. After review of the information at issue and consideration of the arguments, we find the authority has established the release of the information at issue would give advantage to a competitor. Thus, we conclude the authority may withhold the information you have indicated in Exhibit 6 under section 552.104(a) of the Government Code.

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. *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 “to facilitate 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 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)(A), (B), (C), (D), (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: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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 state Exhibit 1 and the information you have marked in Exhibits 2, 3, 4, 5, and 9 consist of communications between attorneys for the authority, employees of the authority, and officials of the authority that were made for the purpose of providing legal services to the authority. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the information at issue consists of privileged attorney-client communications. Therefore, the authority may withhold Exhibit 1 and the information you have marked in Exhibits 2, 3, 4, 5, and 9 under section 552.107(1) of the Government Code.⁴

Section 552.111 of the Government Code exempts 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 exempts 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,

⁴As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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 Exhibit 8 and the information you have marked in Exhibit 9 under section 552.111 of the Government Code. You state the information at issue consists of advice, opinions, and recommendations of employees and officials of the authority regarding policymaking matters. Upon review, we find the authority may withhold the information we have marked under section 552.111 of the Government Code. However, we find the remaining information at issue consists of information that is administrative or purely factual in nature. Thus, you have failed to demonstrate the remaining information reveals advice, opinions, or recommendations that pertain to policymaking. Accordingly, the authority may not withhold any portion of the remaining information at issue under section 552.111 of the Government Code on the basis of the deliberative process privilege.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code.⁵ *See* Gov't Code §§ 552.117(a)(1), .024. Section 552.117(a)(1) also applies to the personal cellular telephone number of a current or former official or employee of a governmental body, provided the cellular telephone service is not paid by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988). 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). Accordingly, information may be withheld under section 552.117(a)(1) only 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. Therefore, if the employees whose information is at issue timely requested confidentiality under section 552.024 of the Government Code and the cellular telephone services are not paid for by a governmental body, the authority must withhold the cellular telephone numbers we have marked under section 552.117(a)(1) of the Government Code. Conversely, if the employees at issue did not timely request confidentiality under section 552.024 or the cellular telephone services are paid for by a governmental body, the authority may not withhold the information at issue under section 552.117(a)(1).

⁵The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

In summary, the authority may continue to rely on Open Records Letter No. 2016-07708 as a previous determination and withhold the previously ruled on information in accordance with that ruling. The authority may withhold the information you have indicated in Exhibit 6 under section 552.104(a) of the Government Code. The authority may withhold Exhibit 1 and the information you have marked in Exhibits 2, 3, 4, 5, and 9 under section 552.107(1) of the Government Code. The authority may withhold the information we have marked under section 552.111 of the Government Code. If the employees whose information is at issue timely requested confidentiality under section 552.024 of the Government Code and the cellular telephone services are not paid for by a governmental body, the authority must withhold the cellular telephone numbers we have marked under section 552.117(a)(1) of the Government Code. The authority must release the remaining responsive 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, 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,



Meredith L. Coffman
Assistant Attorney General
Open Records Division

MLC/bw

Ref: ID# 606436

Enc. Submitted documents

c: Requestor
(w/o enclosures)