



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 2, 2016

Mr. David V. Bryce
Office of General Counsel
Houston Housing Authority
2640 Fountain View Drive, Suite 409
Houston, Texas 77057

OR2016-12537

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# 610826.

The Houston Housing Authority (the "authority") received a request for information pertaining to two specified low income housing developments and specified disaster relief funds.¹ You state the authority will release some information to the requestor. You also state the authority will redact account numbers under section 552.136(c) of the Government Code.² You claim portions of the submitted information are excepted from disclosure under sections 552.103, 552.104, 552.107, 552.111, and 552.139 of the Government Code. Additionally, you state release of the submitted information may implicate the proprietary

¹We note the authority sought and 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); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). Additionally, you state the requestor modified his request in response to a cost estimate. *See* Gov't Code § 552.263(e-1) (modified request is considered received on the date the governmental body receives the written modification).

²Section 552.136(c) of the Government Code allows a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e).

interests of certain third parties.³ Accordingly, you provide documentation showing you notified these third parties of the request for information and of their rights to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from Alden.⁴ We have considered the submitted arguments and reviewed the submitted representative samples of information.⁵

Initially, the authority contends its IP addresses are not subject to the Act. The Act is applicable only to "public information." Gov't Code §§ 552.002, .021. Section 552.002(a) defines "public information" as:

information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body;
- (2) for a governmental body and the governmental body:
 - (A) owns the information;
 - (B) has a right of access to the information; or
 - (C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or

³The third parties whose information is at issue are Affordable Housing Partners, Inc.; BBVA Compass; Bellweather Enterprise; Berkadia Commercial Mortgage, LLC; Boston Capital Corporation ("Boston"); Boston Financial Investment Management, LP; Capital One; City Real Estate Advisors, Inc.; Davis-Penn Mortgage Co.; First Sterling Financial, Inc.; Hudson Housing Capital; National Equity Fund, Inc.; PNC Real Estate; R4 Capital, LLC; Stifel Financial Corp.; Walker & Dunlop, Inc.; CBRE, Inc.; Environmental Data Resources, Inc.; Tele Atlas North America, Inc.; Geotech Engineering & Testing; Schultz Berman Engineering; Valbridge Property Advisors; Alden Capital Partners; Alden Torch Financial ("Alden"); Centerpoint Energy, Inc.; and MDRC.

⁴Although we also received correspondence from Boston, we note Boston does not object to disclosure of its information.

⁵We 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.

(3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.

Id. § 552.002(a). In Open Records Decision No. 581 (1990), this office determined that certain computer information such as source codes, documentation information and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property, is not the kind of information made public under section 552.021 of the Government Code. *See* ORD 581 at 6 (construing predecessor to Act). We understand the authority to assert its IP addresses have no significance other than their use as tools for the maintenance, manipulation, or protection of public property. We disagree. The information at issue pertains to the use of authority computers and networks by employees of the authority. Thus, we find the authority's IP addresses do have public significance other than their use as tools for the maintenance, manipulation, or protection of public property. Accordingly, we find the information at issue is public information subject to the Act, and, thus, we will address your argument under the Act for this information.

Next, the authority informs us some of the submitted information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2016-07708 (2016). In Open Records Letter No. 2016-07708, we determined the authority may withhold the submitted information under section 552.104 of the Government Code. We have no indication the law, facts, or circumstances on which the prior ruling was based have changed. Accordingly, the authority may continue to rely on Open Records Letter No. 2016-07708 as a previous determination and withhold the identical information in accordance with that ruling. *See* Open Records Decision No. 673 at 6-7 (2001) (discussing criteria for first type of previous determination). We will address the authority's arguments against release of the submitted information that is not encompassed by Open Records Letter No. 2016-07708.

Next, we note portions of the submitted information are subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate; [and]

...

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code § 552.022(a)(5), (16). The submitted information includes draft documents relating to the authority's budget and information in an attorney fee bill that are subject to sections 552.022(a)(5) and 552.022(a)(16), respectively. This information must be released unless it is made confidential under the Act or other law. *See id.* The authority seeks to withhold the information subject to section 552.022(a)(5) under section 552.111 of the Government Code and the information subject to section 552.022(a)(16) under section 552.107 of the Government Code. However, sections 552.107 and 552.111 are discretionary in nature and do not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). Therefore, the information subject to section 552.022, which we have marked, may not be withheld under section 552.107 or section 552.111 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider your assertion of the attorney-client privilege for the information subject to section 552.022(a)(16) of the Government Code under rule 503 of the Texas Rules of Evidence. Further, as information encompassed by section 552.022 may be withheld under section 552.104, we will consider your argument under section 552.104 for the information subject to section 552.022(a)(5). *See* Gov't Code § 552.104(b) (information protected by section 552.104 not subject to required public disclosure under section 552.022(a)). We will also consider your remaining arguments against disclosure of the information not subject to section 552.022.

Texas Rule of Evidence 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

(A) between the client or the client's representative and the client's lawyer or the lawyer's representative;

(B) between the client's lawyer and the lawyer's representative;

(C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;

(D) between the client's representatives or between the client and the client's representative; or

(E) among lawyers and their representatives representing the same client.

Tex. R. Evid. 503(b)(1). A communication is "confidential" if it is 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).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding).

You assert the entirety of the submitted attorney fee bill in Exhibit 2, which is subject to section 552.022(a)(16) of the Government Code, is subject to the attorney-client privilege. However, section 552.022(a)(16) provides information "that is *in* a bill for attorney's fees" is not excepted from required disclosure unless it is confidential under other law or privileged under the attorney-client privilege. *See Gov't Code* § 552.022(a)(16) (emphasis added). This provision, by its express language, does not permit the entirety of an attorney fee bill to be withheld. *See also* Open Records Decisions Nos. 676 (attorney fee bill cannot be withheld in entirety on basis it contains or is attorney-client communication pursuant to language in section 552.022(a)(16)), 589 (1991) (information in attorney fee bill excepted only to extent information reveals client confidences or attorney's legal advice). Accordingly, the authority may not withhold the entirety of the attorney fee bill at issue under Texas Rule of Evidence 503.

However, we note portions of the submitted fee bill may be withheld under rule 503. You assert the submitted fee bill includes privileged attorney-client communications between the authority's attorneys and authority officials and staff in their capacities as clients. You state the communications at issue were made for the purpose of the rendition of legal services to the authority. You indicate the communications at issue have not been, and were not intended to be, disclosed to third parties. Based on your representations and our review of the information at issue, we find the authority has established the information we have marked constitutes attorney-client communications under rule 503. Thus, the authority may withhold the information we have marked within Exhibit 2 pursuant to rule 503 of the Texas

Rules of Evidence. However, as we find you have failed to demonstrate any of the remaining information at issue consists of privileged attorney client communications, no portion of the remaining information at issue may be withheld under rule 503.

Section 552.103 of the Government Code provides, in relevant part, as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

You assert portions of the information in Exhibit 13 pertain to pending civil litigation. However, we note the information at issue indicates the case concluded in a settlement. Further, you provide no explanation as to how the submitted information relates to pending litigation. Thus, we find the authority has failed to demonstrate litigation was pending on the date the authority received the request. Therefore, the authority may not withhold the information at issue under section 552.103 of the Government Code.

You claim section 552.107 of the Government Code for the portions of Exhibit 2 that are not subject to section 552.022 and for Exhibits 3 through 7. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* Gov't Code § 552.107(1). The elements of the privilege under section 552.107(1) are the same as those discussed above for rule 503. 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. ORD 676 at 6-7. 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).

The authority states the information at issue consists of communications involving attorneys for the authority, authority representatives, and other authority employees and officials. The authority states the communications were made for the purpose of facilitating the rendition of professional legal services to the authority and these communications have remained confidential. Upon review, we find the authority has demonstrated the applicability of the attorney-client privilege to the information at issue. Therefore, the authority may generally withhold the information you have indicated under section 552.107(1) of the Government Code. However, we note some of these e-mail strings include attachments received from or sent to non-privileged parties. Furthermore, if these attachments are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, to the extent the authority maintains these non-privileged attachments, which we have marked, separate and apart from the otherwise privileged e-mail strings in which they appear, the authority may not withhold these non-privileged attachments 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*, 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, 364 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body’s policymaking functions 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, 157 (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, section 552.111 protects the factual information. *See* Open Records Decision No. 313 at 3 (1982).

This office has also concluded section 552.111 exempts from disclosure a preliminary draft of a document intended for public release in its final form because the draft necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document. *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 of a preliminary draft of a policymaking document, including comments, underlining, deletions, and proofreading marks, that will be released to the public in its final form. *See id.* at 2.

The authority asserts some of the remaining information at issue consists of advice, opinions, and recommendations relating to the authority's policymaking. The authority also states some of the information at issue consists of draft documents that will be released to the public in final form. Upon review, we find the authority may withhold some of the information at issue, which we have marked, under section 552.111.⁶ However, we find some of the remaining information at issue consists of either general administrative information that does not relate to policymaking or information that is purely factual in nature. Thus, we find the authority has failed to demonstrate the remaining information at issue is excepted under section 552.111. Accordingly, the authority may not withhold the remaining information at issue under section 552.111 of the Government Code.

Section 552.104(a) of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 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). A private third party may also invoke this exception. *Id.* at 833. You represent some of the information in Exhibits 8, 9, 10, and 13 pertains to competitive bidding situations, and the release of that information, which the authority has indicated, would harm the authority's ability to obtain the most favorable offers for these bids. Additionally, Alden indicates it has competitors and the release of portions of its information would give advantage to its competitors. After review of the information at issue and consideration of the arguments, we find the authority and Alden have established the release of the information at issue would give advantage to a competitor or bidder. Thus,

⁶As our ruling is dispositive, we need not address the authority's remaining arguments against disclosure of this information.

we conclude the authority may withhold the information you have indicated and the information Alden has indicated under section 552.104(a) of the Government Code.⁷

Section 552.139 of the Government Code provides:

(a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; [and]

(2) any other assessment of the extent to which data processing operations, a computer, a computer program, network, system, or system interface, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use[.]

Gov't Code § 552.139(a), (b)(1)-(2). Section 2059.055 of the Government Code provides in pertinent part:

(b) Network security information is confidential under this section if the information is:

(1) related to passwords, personal identification numbers, access codes, encryption, or other components of the security system of a state agency;

(2) collected, assembled, or maintained by or for a governmental entity to prevent, detect, or investigate criminal activity; or

(3) related to an assessment, made by or for a governmental entity or maintained by a governmental entity, of the vulnerability of a network to criminal activity.

⁷As our ruling is dispositive, we need not address Alden's remaining arguments against disclosure of the information at issue.

Id. § 2059.055(b). We understand the authority to assert the IP addresses it has marked relate to the security of the authority's computer network. However, upon review, we find the authority has failed to demonstrate the information at issue is protected by section 552.139. Thus, the authority may not withhold the information at issue on that basis.

Finally, we note 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 id.* § 552.305(d)(2)(B). As of the date of this letter, no other interested third party has submitted comments explaining why any of the remaining information should not be released. Therefore, we have no basis to conclude any of the remaining 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 authority may not withhold any portion of the remaining information on the basis of any proprietary interests the remaining third parties may have in the information.

We note some of the remaining information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the authority may continue to rely on Open Records Letter No. 2016-07708 as a previous determination and withhold the identical information in accordance with that ruling. The authority may withhold the information we have marked within Exhibit 2 pursuant to rule 503 of the Texas Rules of Evidence. The authority may generally withhold the information you have indicated under section 552.107(1) of the Government Code; however, the authority must release the non-privileged attachments we have marked if the authority maintains them separate and apart from the otherwise privileged e-mail strings in which they appear. The authority may withhold the information we have marked under section 552.111 of the Government Code. The authority may withhold the information you and Alden have indicated under section 552.104(a) of the Government Code. The authority must generally release the remaining information; however, any information subject to copyright may be released only in accordance with copyright law.

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,



Lee Seidlits
Assistant Attorney General
Open Records Division

CLS/bw

Ref: ID# 610826

Enc. Submitted documents

c: Requestor
(w/o enclosures)

23 Third Parties
(w/o enclosures)