



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 9, 2016

Ms. Hadassah Schloss
Director
Open Government
Texas General Land Office
P.O. Box 12873
Austin, Texas 78711-2873

OR2016-13138

Dear Ms. Schloss:

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# 613630.

The Texas General Land Office (the "GLO") received a request for specified correspondence sent or received by five named individuals during a specified time period.¹ You state the GLO is withholding certain information pursuant to Open Records Decision No. 684 (2009).² You state the GLO will release some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.104, 552.107, 552.110, 552.111, and 552.143 of the Government Code. Additionally, you state release of the submitted information may implicate the proprietary interests of Event Network; Photogenic, Inc. ("Photogenic"); First Reserve; and Dykema. Accordingly, you state, and provide documentation showing, you notified Event Network, Photogenic, First Reserve, and Dykema of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d);

¹You state the GLO 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 overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain information without the necessity of requesting an attorney general decision.

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 representatives of Photogenic and First Reserve. We have reviewed the submitted arguments and the submitted representative sample of information.³

Initially, we note some of the submitted information is 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[.]

Gov't Code § 552.022(a)(5). A portion of the information submitted as Attachment F, which we have marked, consists of a draft document related to the GLO's budget that is subject to section 552.022(a)(5). The GLO must release this information pursuant to section 552.022(a)(5) unless it is made confidential under the Act or other law. *See id.* You seek to withhold the information subject to section 552.022(a)(5) under section 552.111 of the Government Code. However, section 552.111 is discretionary in nature and does not make information confidential under the Act. *See* Open Records Decision Nos. 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 GLO may not withhold the information at issue under section 552.111 of the Government Code.

Next, we note some of the information submitted as Attachment I is subject to section 552.0225 of the Government Code. Section 552.0225(b) provides as follows:

The following categories of information held by a governmental body relating to its investments are public information and not excepted from disclosure under [the Act]:

(1) the name of any fund or investment entity the governmental body is or has invested in;

³We 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.

(2) the date that a fund or investment entity described by Subdivision (1) was established;

(3) each date the governmental body invested in a fund or investment entity described by Subdivision (1);

(4) the amount of money, expressed in dollars, the governmental body has committed to a fund or investment entity;

(5) the amount of money, expressed in dollars, the governmental body is investing or has invested in any fund or investment entity;

(6) the total amount of money, expressed in dollars, the governmental body received from any fund or investment entity in connection with an investment;

(7) the internal rate of return or other standard used by a governmental body in connection with each fund or investment entity it is or has invested in and the date on which the return or other standard was calculated;

(8) the remaining value of any fund or investment entity the governmental body is or has invested in;

(9) the total amount of fees, including expenses, charges, and other compensation, assessed against the governmental body by, or paid by the governmental body to, any fund or investment entity or principal of any fund or investment entity in which the governmental body is or has invested;

(10) the names of the principals responsible for managing any fund or investment entity in which the governmental body is or has invested;

(11) each recusal filed by a member of the governing board in connection with a deliberation or action of the governmental body relating to an investment;

(12) a description of all of the types of businesses a governmental body is or has invested in through a fund or investment entity;

(13) the minutes and audio or video recordings of each open portion of a meeting of the governmental body at which an item described by this subsection was discussed;

(14) the governmental body's percentage ownership interest in a fund or investment entity the governmental body is or has invested in;

(15) any annual ethics disclosure report submitted to the governmental body by a fund or investment entity the governmental body is or has invested in; and

(16) the cash-on-cash return realized by the governmental body for a fund or investment entity the governmental body is or has invested in.

Gov't Code § 552.0225(b). The GLO and First Reserve argue Attachment I is excepted under section 552.143 of the Government Code. However, the exceptions to disclosure found in the Act, including sections 552.110 and 552.143 of the Government Code, do not apply to information that is made public by section 552.0225. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Accordingly, the types of information enumerated in section 552.0225(b) of the Government Code may not be withheld under section 552.110 or section 552.143 of the Government Code.

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses the doctrine of 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 satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. You seek to withhold the information submitted as Attachment C under section 552.101 of the Government Code in conjunction with common-law privacy. Upon review, we find you have not demonstrated any of the information at issue is highly intimate or embarrassing and not of legitimate public concern. Thus, the GLO may not withhold any portion of the Attachment C under section 552.101 in conjunction with common-law privacy.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* 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 "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 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 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. *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 submitted as Attachments D and E consists of communications involving attorneys for the GLO, including those at the Office of the Attorney General, and GLO employees and officials in their capacities as clients. You state these communications were made in furtherance of the rendition of professional legal services to the GLO. You state 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 the information at issue. Accordingly, the GLO may withhold Attachments D and E under section 552.107(1) of the Government Code.⁴

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.*

⁴As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

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).

This office has also concluded a preliminary draft of a document that 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.

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 submitted as Attachment F consists of communications between GLO employees. You state the communications reveal the advice, opinion, and recommendations of the employees regarding a variety of issues. Based on your representations and our review of the information at issue, we find the GLO has demonstrated some of the information at issue, which we have marked, consists of advice,

opinions, or recommendations on the policymaking matters of the GLO. Thus, the GLO may withhold the information we marked under section 552.111 of the Government Code. Upon review, however, we find the remaining information at issue is general administrative and purely factual information or does not pertain to policymaking. Further, some of the remaining information was received from an individual with whom you have not demonstrated the GLO shares a privity of interest or common deliberative process. Thus, we find you have failed to show the remaining information at issue consists of internal communications containing advice, opinions, or recommendations on the policymaking matters of the GLO. Accordingly, the GLO may not withhold any of the remaining information in Attachment F under section 552.111 of the Government Code.

You also state the information submitted as Attachment G consists of drafts of documents that have been or will be made available to the public in their final form. Based on your representations and our review of the information at issue, we find the GLO may withhold the information we marked in Attachment G under section 552.111 of the Government Code. However, the remaining information in Attachment G does not consist of drafts of documents. Thus, the GLO may not withhold the remainder of Attachment G under section 552.111 of the Government Code.

Next, 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, we have not received comments from Event Network or Dykema explaining why the remaining information should not be released. Therefore, we have no basis to conclude Event Network or Dykema has a protected proprietary interest in the remaining 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 GLO may not withhold any of the remaining information on the basis of any proprietary interest Event Network or Dykema may have in the information.

Section 552.104(a) of the Government Code exempts 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). The GLO represents the information submitted as Attachment H pertains to ongoing discussions on procurement issues that have not been finalized. In addition, the GLO states release of the information at issue would cause harm to its negotiating position with respect to the contracts at issue. After review of the information at issue and consideration of the arguments, we find the GLO has established the release of the information would give advantage to a competitor or bidder. Thus, we conclude the GLO may withhold Attachment H under section 552.104(a) of the Government Code.

Section 552.104 of the Government Code may also be invoked by a private third party. Photogenic argues portions of its information submitted with Attachment J are protected by section 552.104. Photogenic states it has competitors. In addition, Photogenic states release of the information at issue would cause harm to its competitive position because the information could be used by its competitors to undercut its pricing or otherwise to gain an unfair competitive advantage. After review of the information at issue and consideration of the arguments, we find Photogenic has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the GLO may withhold the information at issue, which we have marked within Attachment J, under section 552.104(a) of the Government Code.

Section 552.143(a) of the Government Code provides, in relevant part, the following:

- (a) All information prepared or provided by a private investment fund and held by a governmental body that is not listed in Section 552.0225(b) is confidential and excepted from the requirements of Section 552.021.

Gov't Code § 552.143(a). The GLO explains Attachment I consists of a proposal regarding possible investment opportunities presented to the GLO by First Reserve. Thus, the GLO and First Reserve argue Attachment I consists of information prepared by or received from private investment funds. *See id.* § 552.143(a). The GLO states the information does not contain post-investment diligence information that has been publicly released. Based on these representations and our review, we find with the exception of information subject to section 552.0225(b) of the Government Code, which may not be withheld, the GLO must withhold Attachment I under section 552.143(a) of the Government Code.⁵

In summary, the GLO may withhold Attachments D and E under section 552.107(1) of the Government Code. The GLO may withhold the information we marked in Attachments F and G under section 552.111 of the Government Code. The GLO may withhold Attachment J and the information we marked within Attachment H under section 552.104 of the Government Code. With the exception of information subject to section 552.0225(b) of the Government Code, which may not be withheld, the GLO must withhold Attachment I under section 552.143(a) of the Government Code. The GLO 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.

⁵As our ruling is dispositive for this information, we need not address First Reserve's remaining argument against its disclosure.

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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/som

Ref: ID# 613630

Enc. Submitted documents

c: Requestor
(w/o enclosures)

4 Third Parties
(w/o enclosures)