



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 1, 2006

Mr. Robert Martinez
Acting Deputy Director
Environmental Law Division
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

OR2006-05764

Dear Mr. Martinez:

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# 250471.

The Texas Commission on Environmental Quality (the "commission") received a request for information relating to a train derailment. You inform us that the commission has released some of the requested information. You claim that the information that you have submitted as Exhibits C and D is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. You believe that the information submitted as B may implicate the interests of private parties. You notified two private parties, Ms. Linda Unger and Mr. Ronnie Jones, of this request for information and of their right to submit arguments to this office as to why the requested information should not be released.¹ We received correspondence from Mr. Jones. We have considered all of the submitted arguments and have reviewed the submitted information.

Initially, we note that some of the submitted information is not responsive to the instant request. Information that is not responsive to this request, which we have marked, need not be released. Moreover, we do not address such information in this ruling.

Next, we note that an interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 to submit its reasons, if any,

¹See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

as to why information relating to that party should not be released. See Gov't Code § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from Ms. Unger. Thus, Ms. Unger has not demonstrated that any of the information in Exhibit B is excepted from disclosure. See Gov't Code §§ 552.101, .107, .110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

Mr. Jones has submitted arguments under sections 552.101, 552.103, 552.107, and 552.110 of the Government Code for the information submitted as Exhibit B; the commission takes no position with respect to the public availability of Exhibit B.² We note that the common law informer's privilege, which Mr. Jones claims under section 552.101 of the Government Code on behalf of the commission, is held by the governmental body and serves to protect its interests in preserving the flow of information to the governmental body.³ See *Roviaro v. United States*, 353 U.S. 53, 59 (1957). Accordingly, a governmental body may waive the informer's privilege. See Gov't Code § 552.007; Open Records Decision No. 549 at 6 (1990). Likewise, sections 552.103 and 552.107, which Mr. Jones raises on behalf of the commission, are discretionary exceptions that protect the governmental body's interests and may be waived. See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (governmental body may waive sections 552.103 and 552.107). In this instance, the commission has not claimed either the informer's privilege, section 552.103, or section 552.107 for Exhibit B. Therefore, the commission may not withhold any of the information in Exhibit B under section 552.101 on the basis of the informer's privilege or under sections 552.103 or 552.107.

Mr. Jones also contends that Exhibit B must be withheld from disclosure under section 552.110(b) of the Government Code. Section 552.110(b) excepts from public disclosure "commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." Gov't Code § 552.110(b). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. See also Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

²Our discussion of Mr. Jones' arguments is limited to their applicability to the information that the commission submitted as Exhibit B. We do not address the public availability of the information that Mr. Jones submitted to this office. See Gov't Code § 552.301(e)(1)(D).

³Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses the common law informer's privilege. See Open Records Decision No. 549 at 5 (1990).

Mr. Jones asserts that disclosure of Exhibit B could substantially reduce or eliminate the market value of property to which the information pertains and thereby cause the owner of the property substantial competitive harm. However, having considered Mr. Jones's arguments, we conclude that he has not provided specific factual evidence that the release of Exhibit B would be likely to cause his client substantial competitive injury. We therefore conclude that the commission may not withhold any of the information in Exhibit B under section 552.110(b) of the Government Code.

Next, we address the commission's claim under section 552.107(1) of the Government Code for the information in Exhibit C. When asserting the attorney-client privilege under section 552.107(1), 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 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. 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 Texas 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. See 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 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, no writ). 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).

The commission asserts that the information submitted as Exhibit C consists of communications protected by the attorney-client privilege. The commission indicates that

the communications occurred between attorneys for the commission and their clients in connection with the provision of legal services to the commission. The commission has identified three attorneys who were parties to the communications. The commission also states that the communications were made in confidence and that the attorney-client privilege has not been waived. Based on these arguments and our review of the information in Exhibit C, we conclude that the commission may withhold some of the information in question under section 552.107(1) of the Government Code. We have marked that information accordingly. We find that the commission has not demonstrated that any of the remaining information in Exhibit C either consists of or documents a communication protected by the attorney-client privilege. *See* Open Records Decision No. 676 at 7-10. We therefore conclude that the commission may not withhold any of the remaining information in Exhibit C under section 552.107(1).

The commission also claims section 552.111 of the Government Code. This section excepts from public disclosure "an 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 (1993), 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 that 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* Open Records Decision No. 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. The 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. *See* Open Records Decision No. 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 that 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.

The commission seeks to withhold the documents submitted as Exhibit D under section 552.111. The commission states that these documents contain a draft of a letter and other information relating to an environmental matter. Having considered the commission's arguments and reviewed the information at issue, we conclude that the commission may withhold some of the information in question under section 552.111 of the Government Code. We have marked that information accordingly. We conclude that the commission has not shown that any of the remaining information in Exhibit D is excepted from disclosure under section 552.111.

Lastly, we note that section 552.137 of the Government Code is applicable to some of the remaining information in Exhibits C and D.⁴ This exception provides in part:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137(a)-(b). Section 552.137 excepts from public disclosure certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with a governmental body, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. We have marked e-mail addresses that the commission must withhold under

⁴Unlike other exceptions to disclosure, this office will raise section 552.137 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

section 552.137, unless the owner of the e-mail address has affirmatively consented to its public disclosure.

In summary: (1) the commission may withhold the marked information in Exhibit C under section 552.107(1) of the Government Code; (2) the commission may withhold the marked information in Exhibit D under section 552.111 of the Government Code; and (3) the commission must withhold the marked e-mail addresses in Exhibits C and D under section 552.137 of the Government Code, unless the owner of the e-mail address has affirmatively consented to its public disclosure. The rest of the submitted information must be released.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling,

be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



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Open Records Division

RAA/JWM/eb

Ref: ID# 250471

Enc: Submitted documents

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