ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 3, 2007

Ms. Sarah Irwin Swanson
Deputy Director of General Law
Public Utility Commission of Texas
P.O. Box 13326
Austin, Texas 78711

OR2007-12897

Dear Ms. Swanson:

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# 291264.

The Public Utility Commission of Texas (the "commission") received a request for copies of any memoranda, e-mails, or other communications between the commission and parties involved in the buyout of TXU, the governor and his staff, or the legislators and legislative staff. The requestor also seeks copies of calendar entries showing dates, times, attendees, and meetings between the commission and buyout representatives. You state that you have released a portion of the requested information. You claim that portions of the submitted information are excepted from disclosure under sections 552.106, 552.107, and 552.111 of the Government Code. You also state that releasing a portion of the submitted information may implicate the interests of third parties. Accordingly, you have notified Boston Pacific Company, Inc. ("Boston"), Primus Security & Consulting, LLC, Schumaker & Company Solutions, Inc., and Jacobs Consultancy of the request and of their opportunity to submit arguments to this office. *See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 allows a governmental body to rely on an interested third party to raise and explain the applicability of the exception to disclosure in certain circumstances). We have considered the submitted arguments and reviewed the submitted information.

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, only Boston has submitted comments to this office explaining why its information should not be released to the requestor. The remaining third parties have not submitted to this office any reasons explaining why their information should not be released. Therefore, the remaining third parties have provided us with no basis to conclude that they have protected proprietary interests in Group B-7. *See id.* § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990). Accordingly, we conclude that the commission may not withhold any portion of Group B-7 on the basis of any proprietary interest the remaining third parties may have in their information.

Section 552.106 of the Government Code excepts from public disclosure "[a] draft or working paper involved in the preparation of proposed legislation [.]" Gov't Code § 552.106(a). Section 552.106 ordinarily applies only to persons with a responsibility to prepare information and proposals for a legislative body. *See* Open Records Decision No. 460 at 1 (1987). The purpose of section 552.106 is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body. *Id.* at 2. Therefore, section 552.106 is applicable only to the policy judgments, recommendations, and proposals of persons who are involved in the preparation of proposed legislation and does not except purely factual information from disclosure. *Id.* at 2. However, a comparison or analysis of factual information prepared to support proposed legislation is within the scope of section 552.106. *See* ORD 460 at 2.

You state that the submitted information in Groups B-1, B-4, and B-6 "reflect[s] policy judgments, recommendations, analysis, and comment[s] by the [commission] regarding proposed legislation." You also state that this information "reflect[s] the seeking or giving of [commission] input regarding proposed legislation in the form of discussions between [commission] staff and various legislative offices and committees, the Office of the Lieutenant Governor, and the Office of the Governor." *See* Gov't Code § 301.028(b) (each state agency shall assist any legislative committee that requests assistance). Based on these representations and our review, we conclude that the commission may withhold the information we have marked in Groups B-1, B-4, and B-6 under section 552.106. You have not demonstrated, however, how the remaining information constitutes drafts or working papers involved in the preparation of proposed legislation; therefore, the remaining information in Groups B-1, B-4, and B-6 may not be withheld on this basis.

Next, you claim section 552.107 for Groups B-2, B-5, and the remaining information in B-6. Boston also claims section 552.107 for its information in Group B-7. 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. 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. 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 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 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). 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. *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).

You state that the information in Groups B-2, B-5, and the remaining information in B-6 reflect or consist of confidential communications between commission attorneys, commission staff, and a third party consultant and were made for the purpose of rendering professional legal advice. You also state that the confidentiality of the communications has been maintained. Based on these representations and our review of the information at issue, we agree that the information we have marked in Group B-6 and all of the information in Groups B-2 and B-5 consist of privileged attorney-client communications that the commission may withhold under section 552.107.[1] You have failed, however, to demonstrate how the remaining information at issue constitutes confidential communications between privileged parties. Therefore, the remaining information may not be withheld under section 552.107.

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[1]As our ruling is dispositive, we need not address your remaining argument against disclosure for Group B-5.

Boston states that its information in Group B-7 was provided to the commission with the understanding that if Boston was chosen through the request for proposal, its information would be protected under the attorney-client privilege. We note that the commission did not submit arguments for this information. Upon review of Boston's representations and the information in Group B-7, we find that Boston has not demonstrated that it was a privileged party or that it had privity of interest with the commission at the time the communications were made. Therefore Boston has not demonstrated that any portion of its information reflects a confidential communication between privileged parties in furtherance of the rendition of legal services. Therefore, the commission may not withhold any portion of Boston's information in Group B-7 under section 552.107.

You assert that portions of the remaining information are excepted under section 552.111 of the Government Code. Section 552.111 excepts from 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. 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, no writ); 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 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* 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. *See* ORD 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 has also 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.

You assert that some of the information at issue reflects the "advice, recommendations, and opinions of [commission] officials and employees . . . with respect to the scope of the [commissions] authority under section 14.101 of PURA and the formulation of the [commissions] position with respect to the transaction." Based on these representations, we find that the commission may withhold the information we have marked in Group B-3 under section 552.111 of the Government Code. You have not demonstrated how the remaining information at issue consists of advice, opinion, or recommendation about a policymaking decision; therefore, the commission may not withhold any portion of the remaining information under section 552.111.

Boston also claims section 552.111 for its information in Group B-7. We note that section 552.111 protects the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. *See* Open Records Decision No. 522 (1989) (discretionary exceptions generally). Therefore, because the commission did not submit any arguments in support of withholding Group B-7 pursuant to section 552.111, the commission may not withhold any portion of Group B-7 under section 552.111 of the Government Code.

We note that section 552.117 in applicable to a portion of the remaining information.[2] Section 552.117(a)(1) excepts from disclosure the current and former home addresses and telephone numbers, 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. Gov't Code § 552.117(a)(1). Whether information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Pursuant to section 552.117(a)(1), the commission must withhold personal information that pertains to a current or former employee who elected, prior to the commission's receipt of the request for information, to keep such information confidential. Such information may not be withheld for individuals who did not make timely elections. Therefore, we have marked the information that must be withheld under section 552.117 if the employees whose information is at issue made timely elections to keep that information confidential.

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[2]The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Boston also claims section 552.110(b) for its information in Group B-7. Section 552.110(b) protects "[c]ommercial 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). This exception to disclosure 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. *Id.* § 552.110(b); Open Records Decision No. 661 (1999).

A portion of the information Boston seeks to withhold in Group B-7 is pricing information and customer lists. We note that Boston is the winning bidder and that pricing information contained in a contract with a governmental body is generally not excepted under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). We find that Boston has sufficiently shown that the release of a portion of its customer list would result in significant competitive harm to its interests for purposes of section 552.110(b). However, Boston has published the identities of some of its customers on its website. Thus, we have marked the information that the commission must withhold under section 552.110. We also determine, however, that Boston has not made a specific factual or evidentiary showing that the release of the remaining information would cause Boston substantial competitive harm. *See* ORD 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue). Accordingly, we determine that the commission must withhold the information we have marked in Group B-7 under section 552.110(b). As Boston raises no further arguments against disclosure of its remaining information, it must be released.

We note that a portion of Group B-7 is 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 protected by copyright. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of materials protected by copyright, 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. *See* Open Records Decision No. 550 (1990).

In summary, the commission may withhold the information we have marked in Groups B-1, B-4, and B-6 under section 552.106 of the Government Code. The commission also may withhold Groups B-2, B-5, and the information we have marked in Group B-6 under section 552.107. The commission may withhold the information we have marked in Group B-3 under section 552.111. The commission must withhold the information we have marked

under section 552.117, if the employees whose information is at issue made timely elections for confidentiality. Finally, the commission must withhold the information we have marked in Group B-7 under section 552.110. The remaining information must be released, but any copyrighted information may only be released in accordance with copyright law.

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).

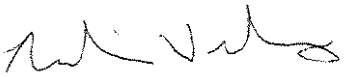
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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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MJV/jb

Ref: ID# 291264

Enc. Submitted documents

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