



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 27, 2007

Mr. Brian Beverly
Director of Legal Services
North Texas Tollway Authority
P.O. Box 260729
Plano, Texas 75026

OR2007-17013

Dear Mr. Beverly:

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# 297997.

The North Texas Tollway Authority (the "authority") received a request for information regarding cost estimates and designs pertaining to the Trinity Toll Road project. You state that some of the requested information has been released to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code and privileged under Rule 503 of the Texas Rules of Evidence. We have considered the arguments and reviewed the submitted information.¹

Initially, we note that some of the information you have submitted to us for review is not responsive to the request for information because it was created after the authority received the request. This ruling does not address the public availability of any information that is not responsive to the request, and the authority is not required to release this information, which

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

we have marked, in response to this request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.App.—San Antonio 1978, writ dismissed).

Next, we note that Attachment C is subject to section 552.022 of the Government Code. Section 552.022 enumerates categories of information that are not excepted from required disclosure unless they “are expressly confidential under other law.” Gov’t Code § 552.022. Under section 552.022(a)(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 are also public information unless they are expressly confidential under other law. *See id.* §§ 552.022(a)(5). You acknowledge, and the information reflects, that the information in Attachment C pertains to completed cost estimates used to evaluate different toll road project alternatives. Thus, we conclude that section 552.022(a)(5) is applicable to Attachment C, and the authority may only withhold this information if it is confidential under other law. Section 552.111 of the Government Code is a discretionary exception and therefore not “other law” for purposes of section 552.022. *See Open Records Decision No. 470 at 7 (1987)* (statutory predecessor to section 552.111 may be waived). As such, section 552.111 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the authority may not withhold any of Attachment C under section 552.111.

We note however that Attachment C contains e-mail addresses. Section 552.137 makes certain e-mail addresses confidential, providing the following:

- (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.
- (c) Subsection (a) does not apply to an e-mail address:
 - (1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor’s agent;
 - (2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor’s agent;
 - (3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or

information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Gov't Code § 552.137. Under section 552.137, a governmental body must withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See id.* § 552.137(b). The e-mail addresses we have marked are not of a type specifically excluded by section 552.137(c) of the Government Code. Therefore, unless the authority receives consent to release them, the authority must withhold the marked e-mail addresses in accordance with section 552.137.

Next, we address your argument under section 552.107 for the responsive information in Exhibit B. 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 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). 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 assert that the responsive information in Attachment B consists of communications made for the purpose of facilitating the rendition of professional legal services. You have identified the parties to the communications. Finally, you state that the authority has confirmed that the communications have remained confidential. Thus, you may withhold the responsive information in Attachment B under section 552.107(1) of the Government Code.

In summary, unless the authority receives consent to release them, you must withhold the e-mails we have marked under section 552.137. You may withhold the responsive information in Attachment B under section 552.107. The remaining 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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).

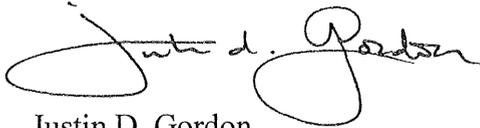
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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 challenge 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,

A handwritten signature in black ink, appearing to read "Justin D. Gordon". The signature is fluid and cursive, with a large loop at the end.

Justin D. Gordon
Assistant Attorney General
Open Records Division

JDG/jh

Ref: ID# 297997

Enc. Submitted documents

c: Mr. Jim Schutze
Dallas Observer
2501 Oak Lawn Avenue
Dallas, Texas 75219
(w/o enclosures)