



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 2, 2008

Ms. Bian E. Beverly
Director of Legal Services
North Texas Tollway Authority
P. O. Box 260729
Plano, Texas 75026

OR2008-00036

Dear Ms. 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 #298545.

The North Texas Tollway Authority (the "authority") received three requests from different requestors for recent cost estimate information pertaining to the Trinity Toll Road (or Trinity Parkway). You state that you are releasing some information to the requestors. You claim that the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, you inform us that the majority of the information at issue was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2007-17013 (2007). In Open Records Letter No. 2007-17013, we ruled that certain communications may be withheld under section 552.107 of the Government Code. We also ruled that certain e-mail addresses must be withheld under section 552.137 of the Government Code. We ruled that the remaining information at issue was subject to section 552.022(a)(5) of the Government Code and must be released to the requestor. As we have no indication that the law, facts, and circumstances on which the prior ruling was based

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.

have changed, the authority may continue to rely on that ruling as a previous determination.² *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, we note that Attachment C-3 from the “Watson Request” 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-3 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 the information at issue, 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). Therefore, the authority may not withhold any of Attachment C-3 from the Watson Request under section 552.111.

We note, however, that Attachment C-3 of the Watson Request contains e-mail addresses subject to section 552.137 of the Government Code.³ Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov’t Code § 552.137 (a)-(c). The e-mail addresses that we have marked within Attachment C-3 of the Watson Request are not of a type specifically excluded by section 552.137(c). Accordingly, the authority must withhold these e-mail addresses pursuant to section 552.137.

We note that two e-mails within Attachment B of the Watson and Kofler Requests, which we have marked, were not ruled upon in Open Records Letter No. 2007-17013. You assert that these e-mails are subject to section 552.107 of the Government Code.

²As our ruling on this information is dispositive, we need not address your further arguments against disclosure of this information.

³The Office of the Attorney General will raise a mandatory exception of the Government Code on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Section 552.107(1) 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 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, lawyer representatives, and lawyers representing another party in a pending action concerning a matter of common interest therein. 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. *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 submitted information contains e-mails between authority attorneys and authority employees, and that these communications were made in furtherance of the rendition of legal services and advice for the authority. You further state that all of these communications were made in confidence, intended for the sole use of the authority and its attorneys, and that they have not been shared or distributed to others. Based on our review of your representations and the submitted information, we find that you have demonstrated the applicability of the attorney-client privilege to the e-mails at issue. Accordingly, these e-mails, which we have marked, may be withheld under section 552.107.

Section 552.111 of the Government Code excepts from disclosure “an interagency or intra-agency 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 (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* 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). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5.

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 state that the information within Attachment C-3 of the “Kofler Request” pertains to discussions regarding the modification of the authority’s interlocal agreement with the City of Dallas. You state that this information was used to explore adding the U.S. Army Corps of Engineers as a party to this agreement. You also assert that the draft report within Attachment C-5 of the Kofler Request consists of a draft used in support of developing the authority’s toll rate policy. You state that the final version of this report has already been

released to the requestor. Upon review of both attachments and your representations, we conclude that the information at issue reflects the policymaking process of the authority. Accordingly, the authority may withhold Attachment C-3 and the draft report within Attachment C-5 from the Kofler Request under section 552.111.

In summary, the authority may rely upon our ruling in Open Records Letter No. 2007-17013 with regards to the majority of the information at issue. Unless it received consent for their release, the authority must withhold the e-mail addresses we have marked within Attachment C-3 of the Watson request under section 552.137 of the Government Code. The authority may withhold the e-mails we have marked under section 552.107(1) of the Government Code. From the Kofler Request, the authority may withhold Attachment C-3 and the draft report within Attachment C-5 under section 552.111 of the Government Code. The remaining information must be released to the requestors.

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,



Reg Hargrove
Assistant Attorney General
Open Records Division

RJH/eeg

Ref: ID# 298545

Enc. Submitted documents

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