



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 2, 2008

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

OR2008-11992

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# 320441.

The Public Utility Commission of Texas (the "commission") received a request for three categories of communication concerning "the wholesale power price spikes of the past month and the power line congestion, as well as the accompanying retail electric provider financial troubles and discussion of possible market manipulation." The three categories of communication are as follows: (1) between commissioners or staff and law makers, local officials, or the governor; (2) between commissioners or staff and employees or owners of power companies, electric delivery companies, or electricity providers; and (3) between commissioners and staff. You state that you have released the majority of the responsive information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You inform us that some of the requested information was the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2008-11044 (2008) and 2008-11066 (2008). Based on your representation, we conclude that, to the extent that information responsive to the current request is identical to the information previously requested and ruled upon by this office, and the law, facts and circumstances on which the prior rulings were based have not changed, the commission may continue to rely on those rulings as previous determinations and withhold or release any such information in accordance with Open Records Letter Nos. 2008-11044 (2008) and 2008-11066 (2008). *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). To the extent the submitted information is not identical, we will consider your arguments.

We turn to your arguments under section 552.101 and the Protocols of the Electric Reliability Council of Texas ("ERCOT"). The ERCOT is the independent system operator established by section 39.151 of the Public Utility Regulatory Act, Title II of the Texas Utilities Code. *See* Util. Code § 39.151. Under section 39.151, ERCOT is directly responsible and accountable to the commission. *See id.* § 39.151(d). Pursuant to section 39.151(d) of the Utilities Code, the commission has adopted Substantive Rule 25.362(e)(2), which provides that "[c]ommission employees, consultants, agents, and attorneys who have access to protected information pursuant to this section shall not disclose such information except as provided in this subsection and in accordance with the provisions of the Texas Public Information Act[.]" P.U.C. Subst. R. 25.362(e)(2); *see also* Util. Code §§ 14.001 (granting commission "general power to regulate and supervise the business of each public utility within its jurisdiction and to do anything specifically designated or implied by this title that is necessary and convenient to the exercise of that power and jurisdiction"), 39.151(d) (providing that the commission shall adopt and enforce rules related to production and delivery of electricity among all market participants, and may delegate to independent organization responsibilities for establishing or enforcing such rules).

Section 552.101 of the Government Code excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses confidentiality statutes. Section 1.3.1 of the ERCOT Protocols states that ERCOT or any market participant may not disclose "protected information" received from the other to "any person, corporation, or any other Entity except as specifically permitted in this Subsection and in these Protocols." Among other things, "protected information" is defined as follows:

Status of Resources including but not limited to Outages or limitations or scheduled or metered Resource data. The Protected Information status of this information shall expire if and when posted on the MIS pursuant to Section 12, Marked Information System, but no later than one hundred and eighty (180) days after the applicable Operating Day.

*See* ERCOT Protocols § 1.3.1(3). You state that a portion of the submitted information "reflects a discussion between the commission and the Independent Market Monitor based on information provided by ERCOT relating to the status of resources and potential outages or limitations in the market," and therefore, it falls within the definition of protected information and that status has not expired. Based on your representations and our review of the relevant provisions, we agree that the submitted information you have marked must be withheld under section 552.101 in conjunction with ERCOT's Protocols.

Next, you assert that a portion of the submitted information reflects the giving or seeking of legal advice and is excepted from disclosure under section 552.107(1) of the Government Code, which 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* TEX. R. EVID. 503(b)(1)(A)-(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 pages you have marked under section 552.107 document communications between privileged parties. You state that the communications were made to facilitate the rendition of professional legal services to the commission. You further state that the communications were only exchanged between privileged parties and their confidentiality has been maintained. Based on your representations and our review, we find that the commission may withhold the information you have marked under section 552.107.

You assert that the remaining submitted information is 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." See Gov't Code § 552.111. Section 552.111 encompasses the deliberative process privilege. See Open Records Decision No. 615 at 2 (1993). In Open Records Decision No. 615, this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, and opinions reflecting the policymaking processes of the governmental body. See *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); see also *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin, 2001, no pet.). The purpose of section 552.111 is "to protect from public disclosure advice and opinions on policy matters and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.).

An agency's policymaking functions do not encompass internal administrative or personnel matters. Disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. See ORD 615 at 5-6. However, 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, a preliminary draft of a policymaking document that has been released or is intended for release in final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document. See Open Records Decision No. 559 at 2 (1990). Section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. 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).

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 at 9.

You state that the information you have marked under section 552.111 "implicate[s] the policy-making functions of the [commission] in that [it] reflect[s] advice, recommendations, and opinions of [commission] officials and employees with respect to larger policy matters of the [commission] ." You state that some of the marked communications relate to "the balancing energy settlement formula and procedure and other pricing issues as well as to the formulation of the [commission]'s position with respect to standard [c]ommission responses to inquiries related to current conditions of the electric market, an issue of great public concern." You state that other submitted communications "reflect the consultative process of [commission] staff with respect to deciding proper [commission] actions, decisions, and steps to be taken in various situations." The submitted information also contains draft policy documents and communications with third-party consultants. You state that the drafts "are excepted from public disclosure because they represent the drafters' advice, opinion, and recommendation with regard to the form and content of the final documents." With regard to the exchange of information between the commission and third-party consultants, you explain that the commission entered into contracts with these third-party consultants to fulfill the commission's obligation to monitor the market.

Upon review, we find that portions of the information at issue, which we have marked, are excepted from disclosure under section 552.111 of the Government Code. However, we find that the remaining information is not excepted from disclosure under section 552.111 in that the commission has not identified all of the parties to the communications or otherwise has failed to demonstrate how it constitutes internal communications consisting of advice, opinion, or recommendation that reflect the policymaking processes of the department. Accordingly, no portion of the remaining information may be withheld on this basis.

In summary: (1) to the extent that information responsive to the current request is identical to the information previously requested and ruled upon by this office, and the law, facts and circumstances on which the prior rulings were based have not changed, the commission may continue to rely on those rulings as previous determinations and withhold or release any such information in accordance with Open Records Letter Nos. 2008-11044 (2008) and 2008-11066 (2008); (2) the commission must withhold the information you have marked under section 552.101 of the Government Code in conjunction with ERCOT's Protocols; (3) the commission may withhold the information you have marked under section 552.107 of the Government Code; and (4) the commission may withhold the information we have marked pursuant to section 552.111 of the Government Code. The remaining 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 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). If the governmental body does not file suit over 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,



Kay Hastings  
Assistant Attorney General  
Open Records Division

KH/jh

Ref: ID# 320441

Enc. Submitted documents

c: Ms. Elizabeth Souder  
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(w/o enclosures)