



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 8, 2008

Ms. Sharon Alexander
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2008-12293

Dear Ms. Alexander:

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# 321018.

The Texas Department of Transportation (the "department") received a request for four categories of information pertaining to retro-reflective sign sheeting of Beaded Type C High Intensity or High Intensity Prismatic Sheeting for the time period of the year 2005 to the present. You claim that portions of the requested information are excepted from disclosure under sections 552.107 and 552.111 of the Government Code.¹ In addition, although you take no position as to the disclosure of the information submitted as Exhibit B, you state that release of this information may implicate the property or privacy rights of a third party. Accordingly, you state, and include documentation showing, that you notified 3M Company ("3M") of its right to submit arguments to this office as to why the requested information should not be released. *See Gov't Code § 552.305(d); see also Open Records Decision*

¹Although we also understand you to raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, this office has concluded that section 552.101 does not encompass discovery privileges. *See Open Records Decision No. 676 at 1-2 (2002)*. We also note that the proper exception to raise when asserting the attorney-client privilege is section 552.107. *See Open Records Decision Nos. 677 (2002), 676 at 6.*

No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have considered the department's arguments and reviewed the submitted information.² In addition, we have received and considered 3M's arguments.

We begin with 3M's claims. 3M claims that an email dated July 31, 2007, from Mr. E.B. Southwall to Mr. Jerry Howell is excepted from disclosure under section 552.110(b) of the Government Code. Section 552.110(b) excepts from disclosure "[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). The governmental body, or interested third party, raising this exception must provide a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from disclosure. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

The information at issue includes pricing information. The pricing information of a winning bidder is generally not excepted under section 552.110(b). *See* Open Records Decision Nos. 514 (1988) (public has interest in knowing prices charged by government contractors), 319 at 3 (1982) (information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing is not ordinarily excepted from disclosure under statutory predecessor to section 552.110). *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). Thus, upon review of the submitted arguments and information at issue, we find that on the condition that 3M was not the winning bidder in this situation, 3M has established that release of the pricing information we have marked would cause substantial competitive injury to the company and the commission must withhold this information under section 552.110(b). On the other hand, if 3M was the winning bidder, the pricing information is subject to public disclosure. In addition, we find that 3M has not established that the release of the remaining information in the email at issue would cause the company substantial competitive injury. Thus, the department may not withhold the remaining information in the email at issue based on section 552.110(b). As the department raises no other grounds for withholding the remaining information in Exhibit B, the department must release it to the requestor.

²We 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.

You assert that Exhibit C is excepted from disclosure under section 552.107 of the Government Code. 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 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.* 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).

In this case, you assert that the information in Exhibit C consists of communications made for the purpose of facilitating the rendition of professional legal services between a department lawyer and department non-lawyers. Upon review, we find that the information in Exhibit C consists of confidential attorney-client communications. Thus, the department may withhold Exhibit C based on section 552.107(1) of the Government Code.

Next, you assert that Exhibit D is excepted from disclosure under the deliberative process privilege encompassed by section 552.111 of the Government Code. *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. 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. We also note that section 552.111 encompasses external communications with a third party with which a governmental body shares a privity of interest or a common deliberative process with respect to the policy matter at issue. See Open Records Decision No. 561 at 9 (1990) (addressing statutory predecessor).

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 Exhibit D consists of internal agency memoranda, pre-decisional advice, recommendations, and opinions reflecting the policymaking process of the department. Based on your representations and our review, we find that you have established that the deliberative process privilege is applicable to the portions of the records that we have marked. However, you have failed to explain how the remaining information, which generally consists of routine non-policy matters and factual information, constitutes advice, recommendations, opinions, or material reflecting the policymaking processes of the department. Therefore, you may not withhold the remaining information in Exhibit D under section 552.111 and, as you raise no additional arguments for this information, it must be released.

In summary, the department must withhold the information we have marked in exhibit B based on section 552.110(b) if 3M was not the winning bidder in this situation. If 3M was the winning bidder, the department must release all of Exhibit B to the requestor. The department may withhold Exhibit C under section 552.107 and may withhold the marked portions of Exhibit D under section 552.111 of the Government Code. The remaining information must be released to the requestor.

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# 321018

Enc. Submitted documents

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