



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 4, 2008

Ms. Sarah F. Churchill
Assistant County Attorney
County of Travis
P.O. Box 1748
Austin, Texas 78767

OR2008-13965A

Dear Ms. Churchill:

This office issued Open Records Letter No. 2008-13965 (2008) on October 10, 2008. We have examined this ruling and determined that we made an error. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306, and that error resulted in an incorrect decision, we will correct the previously issued ruling. Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on October 10, 2008. *See generally* Gov't Code 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act (the "Act"))).

You ask whether certain information is subject to required public disclosure under the Act, chapter 552 of the Government Code. Your request was assigned ID# 324214.

The Travis County Healthcare District (the "district") received a request for twenty categories of information related to a proposed clinic on Braker Lane. You state that some responsive information will be released to the requestor. You claim that portions of the remaining requested information are excepted from disclosure under sections 552.107, 552.111, 552.117, 552.1175, 552.136, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

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.

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.* 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 marked portions of Exhibits B-1, B-2, B-3, B-4, and C-1 consist of confidential attorney-client communications between members of the Travis County Commissioners Court, district staff, and attorneys representing the district pertaining to real estate transactions involving the district. You explain that the Travis County Attorney’s Office (the “county attorney”), by statute, serves as counsel for the district. *See Health & Safety Code* § 281.056(b-1)(3). You further explain that the Commissioners Court is required by statute to approve district real estate transactions. *Id.* § 281.050. You state that the communications at issue were made for the purpose of facilitating the rendition of professional legal services. You also indicate that these communications were intended to be confidential and their confidentiality has been maintained. Based upon your representations and our review, we agree that the information at issue consists of privileged attorney-client communications. Therefore, you may withhold the information you have marked in Exhibits B-1, B-2, B-3, B-4, and C-1 under section 552.107(1). Because our determination on this issue is dispositive, we need not address your remaining arguments against disclosure for this information.

Next, we address your arguments under section 552.111 of the Government Code, which excepts from public 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. Section 552.111 encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of this exception 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 ORD 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, and opinions that reflect 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. The 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). Furthermore, 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).

This office also has 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 Exhibits C-2 and C-3 consist of draft documents that will be released in their final form. You inform us that the draft documents “reflect the deliberations of the [district] Board and staff [and] include comments and notations that necessarily represent advice, opinion, and recommendations” pertaining to district policy. Based on your representations and our review, we agree that the district may withhold Exhibits C-2 and C-3 under section 552.111.

You assert that some of the remaining information is protected by section 552.1175 of the Government Code, which provides in part the following:

(a) This section applies only to:

(5) employees of a district attorney, criminal district attorney, or county or municipal attorney whose jurisdiction includes any criminal law or child protective services matters.

...

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Id. § 552.1175(a)(5), (b). You inform this office that the individual whose information is at issue is an employee of the county attorney, and that the county attorney has criminal jurisdiction in criminal cases in the county. You state, and have provided documentation showing, that the individual elected to restrict access to this information in accordance with section 552.1175(b). Thus, pursuant to section 552.1175, the district must withhold the home address and telephone number you have marked in accordance with section 552.1175(b).²

You also assert that Exhibits E-1 and E-2 contain account numbers and other pieces of information that are confidential under section 552.136 of the Government Code. Section 552.136 states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” *Id.* § 552.136(b). We agree that the district must withhold the bank account and routing numbers you have marked under section 552.136 of the Government Code.

You state that the internet log-in name and password you have marked belong to an attorney representing the district. You assert that an individual with access to this information “could impersonate the attorney and obtain information” related to a variety of matters, including

²As we are able to make this determination, we do not address your remaining arguments against disclosure of this information.

litigation and real estate transactions. You fail to demonstrate, however, that the log-in name and password constitute access device numbers that are excepted under section 552.136. Therefore, section 552.136 is inapplicable to the log-in name and password, and this information may not be withheld on that basis.

We next address your assertion that the e-mail addresses you have marked are excepted from disclosure under section 552.137 of the Government Code. Section 552.137 states that "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 [the Act]," unless the owner of the e-mail address has affirmatively consented to its public disclosure. Gov't Code § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. You state that some of the e-mail addresses you are seeking to withhold are the personal e-mail addresses of officials or employees of the district. The e-mail addresses at issue are not of a type specifically excluded by section 552.137(c). You do not state that the owners of these e-mail addresses have consented to their public disclosure. Therefore, the district must withhold the e-mail addresses you have marked, and the e-mail addresses we have marked, under section 552.137 of the Government Code, unless the owners affirmatively consent to their disclosure.

Finally, we note that some of the materials at issue appear to be 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 district may withhold the marked information in Exhibits B-1, B-2, B-3, B-4, and C-1 under section 552.107(1) of the Government Code, and the information in Exhibits C-2 and C-3 under section 552.111 of the Government Code. The district must withhold (1) the home address and telephone number you have marked pursuant to section 552.1175 of the Government Code; (2) the bank account and routing numbers you have marked under section 552.136 of the Government Code, and (3) the marked e-mail addresses under section 552.137 of the Government Code, unless the owners affirmatively consent to their disclosure. The remaining information must be released to the requestor, 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 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).

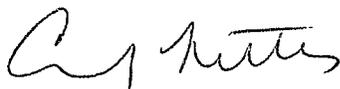
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 324214

Enc. Submitted documents

c: Ms. Janet Fulk
North Park Estates Neighborhood Association
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(w/o enclosures)