



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 11, 2009

Ms. Sharon Alexander
Associate General Counsel
Texas Department of Transportation
DeWitt G. Greer State Highway Building
125 East 11th Street
Austin, Texas 78701

OR2009-06325

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# 342657.

The Texas Department of Transportation (the "department") received a request for six categories of information pertaining to a specified advertising sign and the removal thereof. You claim that the requested information is excepted from disclosure under sections 552.105, 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹ We have also received comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit written comments concerning disclosure of requested information).

Initially, we note that Exhibit D is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part, as follows:

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.

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). Exhibit D, which consists of a contract, is subject to section 552.022(a)(3). Therefore, the department may only withhold this information if it is confidential under "other law." You seek to withhold Exhibit D under sections 552.105 and 552.111 of the Government Code. However, sections 552.105 and 552.111 are discretionary in nature and do not constitute "other law" for purposes of section 552.022. *See* Open Records Decision Nos. 665 at 2 n.5 (discretionary exceptions generally), 564 (1990) (statutory predecessor to 552.105 subject to waiver), 470 at 7 (1987) (statutory predecessor to section 552.111 may be waived). Thus, Exhibit D may not be withheld under these exceptions.

You also contend, however, that Exhibit D is confidential under section 409 of title 23 of the United States Code, which is "other law" for the purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001); *see also Pierce County v. Guillen*, 123 S.Ct. 720 (2003) (upholding constitutionality of section 409, relied on by county in denying request under state's Public Disclosure Act). Section 409 provides that:

[n]otwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

23 U.S.C. § 409. You state that the information at issue concerns IH 10 and IH 610, which are part of the National Highway system under 23 U.S.C. § 103 and, thus, are federal-aid highways within the meaning of 23 U.S.C. § 409. You further state that the information at issue involves a railway-highway crossing. You inform us that "[r]ailway-highway crossings are always eligible for federal aid under section 130 of title 23 of the United States Code and are therefore federal-aid highways for the purposes of section 409 of title 23. You also state

that the information subject to section 552.022 was generated for highway safety purposes. Based on your representations and our review of that information, we conclude that Exhibit D is confidential under section 409 of title 23 of the United States Code and must be withheld from disclosure on that basis.

We now address your claims for the information not subject to 552.022 of the Government Code. Section 552.105 of the Government Code excepts from disclosure information relating to "appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property." Gov't Code § 552.105(2). Section 552.105 is designed to protect a governmental body's planning and negotiating position with regard to particular transactions. *See* Open Records Decision Nos. 564 (1990), 357 (1982), 310 (1982). Information protected by section 552.105 that pertains to such negotiations may be withheld for so long as the transaction is not complete. *See* ORD 310. Under section 552.105, a governmental body may withhold information "which, if released, would impair or tend to impair [its] 'planning and negotiating position in regard to particular transactions.'" ORD 357 at 3 (quoting Open Records Decision No. 222 (1979)). The question of whether specific information, if publicly released, would impair a governmental body's planning and negotiating position with regard to particular transactions is a question of fact. Accordingly, this office will accept a governmental body's good-faith determination in this regard, unless the contrary is clearly shown as a matter of law. *See* ORD 564. In this instance, you state that the submitted information, which relates to the removal of a specified advertising sign, is excepted under section 552.105 of the Government Code. However, we note that the information at issue relates only to the temporary removal of the advertising sign and not to the appraisal or purchase of the advertising sign for a public purpose. Thus, we find that the department has failed to demonstrate how release of the remaining submitted information would impair its negotiating position with regard to a particular transaction. Thus, we conclude that the department may not withhold the remaining submitted information under section 552.105 of the Government Code.

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 claim Exhibit B consists of communications made for the purpose of requesting and providing confidential legal advice. You state that the communications contained in Exhibit B were between attorneys representing the department, department employees, and department agents. You further state that the department has not waived its attorney-client privilege regarding the information at issue. Upon review, we find the department may withhold the information we have marked in Exhibit B under section 552.107 of the Government Code. However, you have not demonstrated that the remaining information in Exhibit B constitutes privileged attorney-client communications made for the purpose of facilitating the rendition of professional legal services to the department. Therefore, you may not withhold any of the remaining information in Exhibit B under section 552.107 of the Government Code.

Next, you assert that Exhibit C and the remaining information in Exhibit B are 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)*. Section 552.111 excepts from disclosure “an interagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. 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*, 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. 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 Exhibits B and C contain 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. Therefore, you may withhold the information we have marked in Exhibits B and C under section 552.111 of the Government Code. However, you have failed to explain how the remaining information in these exhibits constitutes advice, recommendations, opinions, or material reflecting the policymaking processes of the department. Therefore, you may not withhold the remaining information in Exhibits B and C under section 552.111.

We note that some of the remaining information appears 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 copyrighted. 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 copyrighted materials, 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

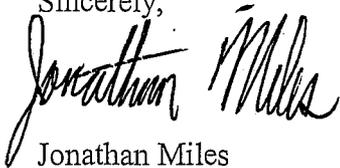
law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the department must withhold Exhibit D under section 409 of title 23 of the United States Code. The department may withhold the attorney-client privileged information we have marked under section 552.107 of the Government Code. The department may also withhold the information we have marked in Exhibits B and C under section 552.111 of the Government Code. The remaining information must be released, but only in accordance with copyright law.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/cc

Ref: ID# 342657

Enc. Submitted documents

c: Requestor
(w/o enclosures)