



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 8, 2010

Ms. Ashley R. Allen
Staff Attorney
Administrative Law Section
Texas General Land Office
P.O. Box 12873
Austin, Texas 78711

OR2010-04988

Dear Ms. Allen:

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# 375271.

The Texas General Land Office (the "GLO") received a request for internal memoranda, e-mails, briefing packages, and meeting notes sent to or from five named individuals that pertain to a specified easement. You state you have released some information to the requestor. 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 information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note a portion of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part:

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:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). In this instance, the submitted information contains a completed report made for or by the GLO, which the GLO must release under section 552.022(a)(1) of the Government Code unless it is excepted from disclosure under section 552.108 of the Government Code or is expressly confidential under other law. Although you raise section 552.111 of the Government Code for this information, this is a discretionary exception that protects a governmental body's interests and may be waived. As such, it is not other law that makes information confidential for purposes of section 552.022. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 470 at 7 (1987) (statutory predecessor to section 552.111 may be waived). Therefore, the submitted report that is subject to 552.022 may not be withheld under section 552.111. As you raise no further exceptions to the disclosure of this information, it must be released to the requestor.

We note that some of the information subject to section 552.022 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. *See* Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of materials that are subject to copyright protection unless an exception applies to the information. *See 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).

Section 552.107 of the Government Code protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). 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, 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.*, 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 pet.). 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 assert that portions of Attachments C and D are subject to section 552.107. You state that the information at issue consists of e-mails and memoranda between individuals you identify as GLO employees and attorneys. You state these communications were made to provide legal advice, and that they were intended to be confidential. You also state the confidentiality of these communications has been maintained. Upon review, we agree some of the information at issue, which we have marked, is privileged, and the GLO may withhold this information under section 552.107(1) of the Government Code. However, we find you have failed to demonstrate how the remaining information at issue consists of or documents communications between privileged parties made for the purpose of facilitating the rendition of professional legal services. Therefore, this information does not constitute privileged attorney-client communications and may not be withheld under section 552.107.

Next, you assert portions of the remaining information are subject to section 552.111 of the Government Code.¹ 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.” 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

¹ Although your brief only raises section 552.111 for Attachment D, based on your markings of the documents, we understand you to raise section 552.111 for portions of the remainder of Attachment C as well.

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). Moreover, 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).

You state that some of the remaining information pertains to the decisional process regarding the establishment of a potential easement. You also inform us this information contains the advice and recommendations of GLO employees regarding the easement. Upon review of your arguments and the information at issue, we find the GLO may withhold the information we have marked under section 552.111 of the Government Code. However, we find the remaining information at issue consists either of general administrative information that does not relate to policymaking or information that is purely factual in nature. Thus, you have failed to demonstrate, and the remaining information does not reflect on its face, that it reveals advice, opinions, or recommendations that pertain to policymaking. Accordingly, we find none of the remaining information is excepted from disclosure under section 552.111, and it may not be withheld on that basis.

We note a portion of the remaining information may be subject to section 552.117 of the Government Code.² Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code §§ 552.117(a)(1), .024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it was made. *See* Open Records Decision No. 530 at 5 (1989). Accordingly, if the employee at issue timely elected to keep her personal information confidential, the GLO must withhold the information we have marked under section 552.117. However, the GLO may not withhold this information

² The Office of the Attorney General will raise a mandatory exception like section 552.117 on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

under section 552.117 if the employee did not make a timely election to keep her information confidential.

In summary, the information that is subject to section 552.022(a)(1) of the Government Code must be released; however, any copyrighted information may only be released in accordance with copyright law. The GLO may withhold the information we have marked under section 552.107(1) of the Government Code. The GLO may withhold the information we have marked under section 552.111 of the Government Code. The GLO must withhold the information we have marked under section 552.117 of the Government Code if the GLO employee to whom it pertains made a timely election under section 552.024 of the Government Code, but may not withhold such information if she did not make a timely election. The remaining information must be released to the requestor.

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, toll free, at (888) 672-6787.

Sincerely,



James McGuire
Assistant Attorney General
Open Records Division

JM/cc

Ref: ID# 375271

Enc. Submitted documents

c: Requestor
(w/o enclosures)