



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 19, 2010

Mr. Mark Adams
Office of the General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711



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OR2010-07215

Dear Mr. Adams:

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# 379910.

The Office of the Governor (the "governor") received a request for communications regarding Facebook, Inc. during a specified time interval. You state that some of the requested information either has been or will be released. You claim that most of the submitted information is excepted from disclosure under sections 552.104, 552.107, and 552.111 of the Government Code.¹ You also contend that some of the submitted information is not subject to disclosure under the Act. Additionally, you believe that the submitted information may implicate the interests of Facebook. You inform us that Facebook was notified of this request for information and of its right to submit arguments

¹We note that you also claim section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. We note, however, that this exception does not encompass discovery privileges. *See* Open Records Decision No. 676 at 1-3 (2002). Thus, information may not be withheld under section 552.101 on the basis of rule 503 or rule 192.5.

to this office as to why the submitted information should not be released.² We have considered your arguments and reviewed the information you submitted.

We first note that an interested third party is allowed ten business days from the date of its receipt of a governmental body's notice under section 552.305 of the Government Code to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from Facebook. Therefore, because Facebook has not demonstrated that any of the information at issue is proprietary for the purposes of the Act, the governor may not withhold any of the submitted information on the basis of any proprietary interest that Facebook may have in the information. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

Turning to the governor's arguments, we begin with your claim that some of the submitted information is not subject to disclosure under the Act. The Act is applicable to "public information," which consists of

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov't Code § 552.002(a). In Open Records Decision No. 581 (1990), this office determined that certain computer information, such as source codes, documentation information and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information that is made public under section 552.021. *See* ORD 581 at 6 (construing predecessor statute). You contend that the Internet Protocol, Subnet, Gateway and DNS numbers in Exhibit C are not public information, as defined by section 552.002. Based on your representations and our review of Exhibit C, we agree that the Internet Protocol, Subnet, Gateway and DNS numbers are not public information, for the purposes of section 552.002, and thus are not subject to disclosure under the Act. *See* Gov't Code § 552.021. Therefore, the Internet Protocol, Subnet, Gateway and DNS numbers need not be released in response to this request for information.

Next, we consider your arguments under section 552.104 of the Government Code, as it is the most inclusive exception you claim. Section 552.104 excepts from disclosure

²*See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

“information that, if released, would give advantage to a competitor or bidder.” *Id.* § 552.104(a). The protections of section 552.104 serve two purposes. One purpose is to protect the interests of a governmental body by preventing one competitor or bidder from gaining an unfair advantage over others in the context of a pending competitive bidding process. *See* Open Records Decision No. 541 (1990). The other purpose is to protect the legitimate marketplace interests of a governmental body when acting as a competitor in the marketplace. *See* Open Records Decision No. 593 (1991). In both instances, the governmental body must demonstrate actual or potential harm to its interests in a particular competitive situation. *See* Open Records Decision Nos. 593 at 2 (1987), 463, 453 at 3 (1986). A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104. *See* ORD 593 at 2. Furthermore, section 552.104 generally is not applicable once a competitive bidding situation has concluded and a contract has been executed. *See* ORD 541.

You claim section 552.104 for the information submitted as Exhibits B, D, and E. You state that this information pertains to parties seeking incentives through the Texas Enterprise Fund (the “TEF”). You contend that release of this information would give advantage to other entities seeking funding from the TEF and severely harm the economic interests of the State of Texas. You also contend that release of this information would reveal economic incentives the State of Texas is offering, as well as its negotiating strategies and procedures, and thereby undermine the state’s ability to compete with other states in attracting business. Having considered your arguments, we first note that prior to the governor’s receipt of the instant request for information, his office announced the investment of \$1.4 million in Facebook from the TEF to create a sales and operation office in Austin.³ Thus, we find that you have not demonstrated that the information at issue pertains to a competition for TEF funds that existed on the date of the governor’s receipt of this request. We therefore conclude that none of the information may be withheld on that basis. We also find that you have not demonstrated that the release of the information at issue would harm the legitimate marketplace interests of the state in a particular competitive situation. We therefore conclude that none of the information may be withheld on that basis. Thus, none of the submitted information may be withheld under section 552.104 of the Government Code.

Next, we address your claims under sections 552.107 and 552.111 of the Government Code. Section 552.107(1) protects information that comes 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. *See* 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. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or

³The governor’s press release, dated February 25, 2010, is available online at <http://governor.state.tx.us/news/press-release/14293>.

representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. See *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 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. 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. See *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 claim the attorney-client privilege for the information submitted as Exhibit B. You contend that the information at issue consists of confidential communications that were made in furtherance of the rendition of professional legal services to the governor. You also assert that these communications were not intended to be and have not been disclosed to parties other than those to whom disclosure was made in furtherance of the rendition of legal services. You have identified some of the parties to the communications. Based on your representations and our review of the information at issue, we conclude that Exhibit B may generally be withheld under section 552.107(1). We note, however, that some of the e-mail strings in Exhibit B include communications with non-privileged parties. We have marked those communications. To the extent that they exist separate and apart from the e-mail strings in which they appear, the marked communications with non-privileged parties may not be withheld under section 552.107(1).

Section 552.111 of the Government Code 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 attorney work product privilege found at Texas Rule of Civil Procedure 192.5. See TEX. R. CIV. P. 192.5; *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines attorney work product as consisting of

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX.R.CIV.P. 192.5. A governmental body that seeks to withhold information on the basis of the attorney work product privilege under section 552.111 bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *See id.*; ORD 677 at 6-8. In order for this office to conclude that information was created or developed in anticipation of litigation, we must be satisfied that

(a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and (b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat'l Tank Co. v. Brotherton, 851 S.W.2d at 207. A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7.

You also contend that the information in Exhibit B constitutes attorney work product. You have not demonstrated, however, that any of the marked communications with non-privileged parties in Exhibit B contain material prepared, mental impressions developed, or communications made in anticipation of litigation or for trial. *See* TEX.R.CIV.P. 192.5. Moreover, because the information in those communications has been disclosed to non-privileged parties, any privilege that might otherwise have attached to those communications has been waived. *See* TEX. R. EVID. 511; *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 554 (Tex. 1990); *Jordan v. Fourth Supreme Judicial Dist.*, 701 S.W.2d 644, 649 (Tex.1986). Therefore, to the extent that the marked communications with non-privileged parties in Exhibit B exist separate and apart from the e-mail strings, so as not to be protected by section 552.107(1) of the Government Code, they likewise may not be withheld on the basis of the attorney work product privilege under section 552.111 of the Government Code.

Section 552.111 also 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 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. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (Gov't Code § 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).

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 seek to withhold the remaining information in Exhibit B and the information submitted as Exhibit D under section 552.111. You contend that this information consists of communications and draft documents that contain advice, opinion, and recommendations relating to policy matters pertaining to the TEF. Having considered your arguments and reviewed the information at issue, we have marked information the governor may withhold on the basis of the deliberative process privilege under section 552.111. We find that much of the remaining information in Exhibit D is entirely factual. To the extent that the remaining information in Exhibit D is not entirely factual, we find that it consists of communications with third parties who do not share a privity of interest or common deliberative process with the governor. *See* Open Records Decision No. 561 at 9 (1990). Likewise, the marked communications in Exhibit B involve private parties who do not share a privity of interest or common deliberative process with the governor. *Id.* We therefore

conclude that the governor may not withhold any of the remaining information in Exhibit D or Exhibit B under section 552.111.

We note that the governor may be required to withhold some of the information in Exhibit E under section 552.117 of the Government Code.⁴ Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code §§ 552.117, .024. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request under section 552.024 that the information be kept confidential. The governor must withhold the personal information we have marked in Exhibit E under section 552.117(a)(1) if the employee to whom it pertains timely requested confidentiality for the information under section 552.024.

We also note that some of the submitted information may be protected by copyright. A governmental body must allow inspection of copyrighted information unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). An officer for public information also must comply with copyright law, however, and is not required to furnish copies of copyrighted information. *Id.* A member of the public who wishes to make copies of copyrighted information 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 at 8-9 (1990).

In summary: (1) the Internet Protocol, Subnet, Gateway and DNS numbers in Exhibit C are not public information that is subject to disclosure under the Act and need not be released in response to this request for information; (2) the information in Exhibit B may generally be withheld under section 552.107(1) of the Government Code, but the marked communications with non-privileged parties must be released to the extent they exist separate and apart from the e-mail strings in which they appear; (3) the information we have marked in Exhibit D may be withheld on the basis of the deliberative process privilege under section 552.111 of the Government Code; and (4) the marked personal information in Exhibit E must be withheld under section 552.117(a)(1) of the Government Code if the employee to whom it pertains timely requested confidentiality for the information under

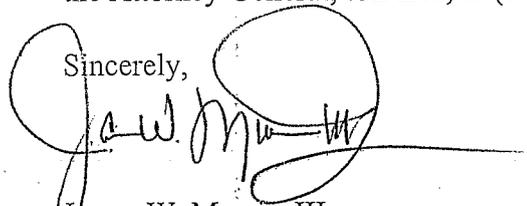
⁴This office will raise section 552.117 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

section 552.024 of the Government Code. The rest of the submitted information must be released, but any information that is protected by copyright may only be released in compliance 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, toll free, at (888) 672-6787.

Sincerely,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/rl

Ref: ID# 379910

Enc: Submitted documents

c: Requestor
(w/o enclosures)

Facebook, Inc.
c/o Mark Adams
Office of the Governor
P.O. Box 12428
Austin, Texas 78711
(w/o enclosures)