ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 20, 2010

Ms. Jacqueline Hojem
Public Information Officer and Senior Paralegal
Metropolitan Transit Authority of Harris County
P.O. Box 61429
Houston, Texas 77208

OR2010-07290

Dear Ms. Hojem:

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# 380013 (MTA No. 2010-0375).

The Metropolitan Transit Authority of Harris County (the "authority") received a request for a named authority employee's e-mail and text messages from January 1, 2010 through February 25, 2010. You state the authority will release a portion of the requested information. You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, 552.111, 552.136, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.[1]

We first note that one of the submitted e-mails is not responsive to the request for information because it was not sent to or from the named authority employee. This ruling does not address the public availability of any information that is not responsive to the

[1]We 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.

request, and the authority is not required to release this information, which we have marked, in response to this request.

You raise section 552.107 of the Government Code for most of the submitted information. Section 552.107 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). We note that communications with third party consultants with which a governmental body shares a privity of interest are protected. Open Records Decision Nos. 464 (1987), 429 (1985).

Most of the e-mails you marked under section 552.107 reflect they are communications between and among individuals identified as authority employees, attorneys who represent the authority, and representatives of those employees and attorneys. You represent these

e-mails were made for the purpose of facilitating the rendition of legal services, and were intended to be, and have remained, confidential. Thus, based on your representations and our review, we conclude most of the e-mails you marked are protected by the attorney-client privilege and may be withheld under section under section 552.107 of the Government Code.[2] However, the remaining e-mails reflect they were sent from or received by individuals who are not identified. You have not explained the authority's relationship with these individuals or how they are privileged parties with respect to the remaining e-mails. Accordingly, you failed to show how these remaining e-mails, which we have marked as non-privileged, fall within the attorney-client privilege. However, one of these non-privileged e-mails is submitted in an otherwise privileged e-mail string. If this e-mail does not exist separate and apart from the privileged string in which is was submitted, it may be withheld along with the attached e-mail string as a privileged attorney-client communication. If this non-privileged e-mail exists separate and apart from the e-mail string in which it is submitted, it may not be withheld under section 552.107. The other non-privileged e-mail may not be withheld under section 552.107.

Next, you claim some of the remaining information is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 excepts from 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. This exception encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *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 work product as

> (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. In order for this office to conclude the information was made or developed in anticipation of litigation, we must be satisfied

> 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

[2]As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

> 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 193, 207 (Tex. 1993). 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. In the case of a communication, a governmental body must show the communication was between a party and the party's representatives. ORD 677 at 7-8. A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. TEX. R. CIV. P. 192.5; ORD 677 at 6-8.

You raise the work product privilege for the remaining non-privileged e-mails. However, as noted above, these communications were sent from or received by parties you have not identified as privileged. Accordingly, because you have failed to demonstrate the remaining e-mails you marked under the work product privilege are communications among the authority and its representatives, we conclude the work product privilege cannot attach to these communications. *See* ORD 677 at 7-8. Thus, the remaining e-mails may not be withheld on the basis of the attorney work product privilege under section 552.111.

You claim a portion of the remaining information is excepted from disclosure under the deliberative process privilege, which is also 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 recommendations 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 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.

Section 552.111 can also encompass communications between a governmental body and a third-party, including a consultant or other party with a privity of interest. *See* Open Records Decision No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See id.*

You state the e-mails you marked under the deliberative process privilege are communications related to the ongoing negotiations of various contracts, contract modifications, and agreements, as well as draft copies of those contracts, contract modifications, and agreements. Upon review, some of this information reflects it was communicated with individuals you do not identify. You do not provide any information explaining the nature of the authority's relationship with the unidentified individuals, or how they share a privity of interest or common deliberative process with the authority. Thus, you have failed to demonstrate how this information is protected by the deliberative process privilege, and it may not be withheld under section 552.111. Additionally, some of the remaining e-mails and attached drafts pertain to the authority's retention of legal counsel. You do not provide an explanation for how these e-mails and attached drafts, which pertain to administrative matters concerning the authority, contain advice, opinion, or recommendations on policy matters of the authority. Accordingly, you failed to establish the applicability of section 552.111 to these documents and they may not be withheld on that basis. We have marked the portions of the remaining information for which you raise the deliberative process that consist of the advice, opinion, or recommendations of parties who share a common deliberative process with the authority and that pertain to authority policy matters. Accordingly, we conclude this marked information is subject to the deliberative process privilege, and the authority may withhold it under section 552.111 of the Government Code. The remaining information you seek to withhold as privileged is factual in nature and is separable from the marked advice, opinion, and recommendations. Thus, because you do not demonstrate this remaining factual information is protected by the deliberative process privilege, it may not be withheld under section 552.111.

You next claim the some of the remaining information contains information subject to 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." Gov't Code § 552.136(b). Section 552.136(a) defines "access device" as "a card, plate, code, account number, personal identification number, electronic serial number,

mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to . . . obtain money, goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument." *Id.* § 552.136(a). Although you raise section 552.136, you have not provided any arguments explaining the applicability of this exception to the information you marked. *See id.* § 552.301(e)(1) (requiring the governmental body to explain the applicability of the raised exception). Accordingly, you have not established the applicability of section 552.136 to any of the submitted information, and no information may be withheld on that basis.

The remaining information contains private e-mail addresses that are subject to section 552.137 of the Government Code. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). The e-mail addresses we marked are not specifically excluded by section 552.137(c). Accordingly, the authority must withhold the e-mail addresses we marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their disclosure.[3]

In summary, with the exception of the information we marked as non-privileged, the authority may withhold the information you marked under section 552.107 of the Government Code. With respect to the e-mails we marked as non-privileged, the authority may only withhold the e-mail that was submitted in an otherwise privileged e-mail string under section 552.107 if it does not exist separate and apart from that string. The authority may withhold the information we marked under section 552.111 of the Government Code pursuant to the deliberative process privilege. The authority must withhold the e-mail addresses we marked under section 552.137 of the Government Code unless the owners of the addresses consent to their disclosure. The remaining responsive information must be released.

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,

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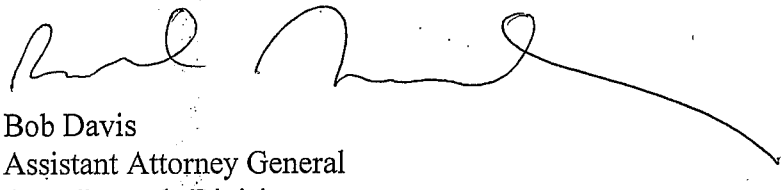
[3]We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including private e-mail addresses under section 552.137, without the necessity of requesting an attorney general decision.

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,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/eeg

Ref: ID# 380013

Enc. Submitted documents

cc: Requestor
(w/o enclosures)