



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

This ruling has been modified by court action  
The ruling and judgment can be viewed in PDF  
format below.



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 1, 2010

Mr. Carlyle H. Chapman, Jr.  
Locke Lord Bissell & Liddell, LLP  
2200 Ross Avenue, Suite 2200  
Dallas, Texas 75201-6776

**The ruling you have requested has been amended as a result of litigation and has been attached to this document.**

OR2010-07877

Dear Mr. Chapman:

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# 381146.

The North Texas Tollway Authority (the "authority"), which you represent, received three requests from different requestors for documents relating to the construction and remediation of the failure of a specified retaining wall. You state you will make a portion of the requested information available to the requestors. You claim that the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We begin by noting that you have submitted information to this office that is not responsive to the instant requests. The requests seek information related to the failure of a specified retaining wall. You have submitted information, which we have marked, that does not pertain to the retaining wall or was created after the date the authority received these requests. This ruling does not address the public availability of any information that is not responsive to these requests, and the authority need not release that information in response to these requests.

Next, we address the authority's obligations under section 552.301 of the Government Code. Pursuant to section 552.301, a governmental body that receives a request for information that it wishes to withhold must ask for the attorney general's decision and state the exceptions

that apply within ten business days after receiving the written request. Gov't Code § 552.301(a), (b). You inform us that the authority received the requests on March 12, 2010 and March 15, 2010. While the authority raised sections 552.107 and 552.111 within the ten-business-day time period as required by subsection 552.301(b), the authority did not raise section 552.103 until April 2, 2010, past the ten-business-day deadline. Generally, if a governmental body fails to timely raise an exception, that exception is waived. *See generally id.* § 552.302; Open Records Decision No. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). Section 552.103 is a discretionary exception that protects a governmental body's interests and may be waived by a governmental body's failure to comply with the procedural requirements of the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas, no pet.) (governmental body may waive section 552.103). In failing to timely raise section 552.103, we find the authority waived its claim under this exception, and none of the responsive submitted information may be withheld on that basis. However, we will consider the applicability of your timely-raised exceptions.

Section 552.107(1) of the Government Code 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 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 state the information you have marked constitutes attorney-client communications in the form of letters, e-mails, and attachments created by the authority's general counsel and staff. You have identified the parties to the communications. You state the communications were intended to be confidential, and you indicate that the communications have maintained their confidentiality. Based upon your representations and our review, we conclude that the authority may withhold most of the responsive information you have marked under section 552.107(1) of the Government Code. We note, however, that you have failed to demonstrate how some of the remaining information at issue consists of privileged attorney-client communications. We have marked this information that must be released. Furthermore, we note that some non-privileged documents are attached to a portion of the privileged e-mails. These non-privileged documents on their own are responsive to the requests. Thus, to the extent these non-privileged attachments exist separate and apart from the e-mails to which they are attached, they may not be withheld under section 552.107 of the Government Code. We have marked the attachments that must be released if they exist separate and apart from the otherwise privileged e-mails.

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 section 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, this office reexamined the predecessor to the section 552.111 exception 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 consisting of advice, recommendations, and opinions reflecting the policymaking processes of the governmental body. See ORD 615 at 5. A governmental body's policymaking functions do not encompass internal administrative or personnel matters, and disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. *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). However, 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).

Further, 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). When determining if an interagency memorandum is excepted from disclosure under section 552.111, we must consider whether the agencies between which the memorandum is passed share a privity of interest or common deliberative process with regard to the policy matter at issue. *See* Open Records Decision No. 561 at 9 (1990).

This office has also concluded a preliminary draft of a policymaking document that is intended for release in final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document. *See* Open Records Decision No. 559 at 2 (1990). 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 the information submitted as Attachment E consists of "various e-mails containing draft responses, suggestions, proposals, and/or suggestions regarding response, investigation and/or remediation of the Kelly Blvd. wall failure." You further state that these documents are pre-decisional policies of the authority and disclosure would "hamper" the authority's ability to carry out its functions and mission. Having considered your arguments and representations and reviewed the information at issue, we agree that the authority may withhold the information we have marked in Attachment E under section 552.111 of the Government Code. Additionally, to the extent the draft documents we have marked will be released to the public in their final form, they may also be withheld under section 552.111 of the Government Code. However, we note the remaining information in Attachment E consists of general administrative information that does not relate to policymaking or information that is purely factual in nature. You have failed to demonstrate, and the information does not reflect on its face, that this information consists of advice, recommendations, or opinions that pertain to policymaking. Accordingly, the authority may not withhold any of the remaining information at issue under section 552.111 of the Government Code.

The remaining responsive information contains a Texas motor vehicle identification number. Section 552.130 of the Government Code excepts from public disclosure information that relates to a Texas motor vehicle operator's or driver's license or permit or Texas motor

vehicle title or registration.<sup>1</sup> Gov't Code § 552.130(a)(1), (2). Thus, the authority must withhold the Texas motor vehicle record information we have marked under section 552.130 of the Government Code.

The remaining responsive information also contains insurance policy numbers and account numbers. Section 552.136 of the Government Code 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.”<sup>2</sup> Gov't Code § 552.136; *see id.* § 552.136(a) (defining “access device”). Accordingly, you must withhold the insurance policy numbers and account numbers we have marked under section 552.136 of the Government Code.<sup>3</sup>

In summary, with the exception of the information we have marked for release, the authority may withhold the responsive information you have marked under section 552.107 of the Government Code. The authority may withhold the information we have marked under section 552.111 of the Government Code. The Texas motor vehicle record information and insurance and account numbers we have marked must be withheld under sections 552.130 and 552.136 of the Government Code. The remaining responsive information must be released.<sup>4</sup>

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](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)

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<sup>1</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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

<sup>3</sup>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 insurance policy numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

<sup>4</sup>We note that the remaining information contains social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

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,

A handwritten signature in cursive script, appearing to read "Andrea L. Caldwell".

Andrea L. Caldwell  
Assistant Attorney General  
Open Records Division

ALC/eeg

Ref: ID# 381146

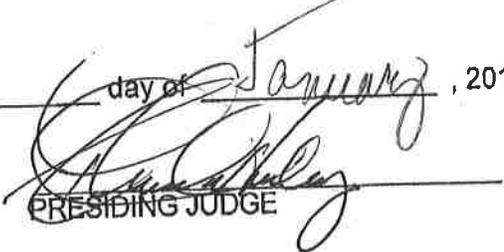
Enc. Submitted documents

c: Requestor  
(w/o enclosures)



- a. Withhold bates-numbered documents NTTA 0001-941 (all documents hereafter referred to by bates number) pursuant to PIA § 552.103, except:
- i. Release to Mr. Jerry Read, Mr. Brian Cooper, and Mr. Mike S. Litherland documents NTTA 110, 119, 186, 466-467, 699, 704, and 715-717;
  - ii. Release to Mr. Brian Cooper and Mr. Mike S. Litherland, documents NTTA 84-95, 235-262, 703, 710-711, 736-748, and 753;
  - iii. Release to Mr. Jerry Read documents NTTA 108-109, 122, 124-131, 154, 166, 414, 701-702, and 706-709; and
  - iv. Release to Mr. Hauck document NTTA 705.
- b. Release to all requesting parties NTTA 0942-2944 and NTTA 2953-2993.
- c. Withhold NTTA 2994-4939, binder 001-392, and MK2 001-072 under PIA § 552.103.
- d. Release to all requesting parties documents MK1 001-052 except the portions marked under PIA §§ 552.136 and .147 (credit card, access device, and social security numbers).
2. All costs of court are taxed against the parties incurring the same;
3. All relief not expressly granted is denied; and
4. This Agreed Final Judgment finally disposes of all claims between Plaintiff and Defendant and is a final judgment.

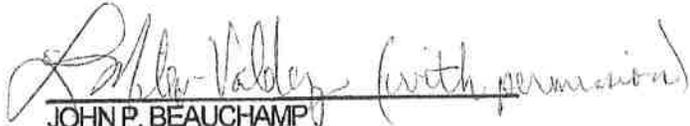
SIGNED this the 5 day of January, 2011.

  
PRESIDING JUDGE

APPROVED:



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