



ATTORNEY GENERAL OF TEXAS
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May 11, 2011

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OR2011-06553

Dear Ms. McGowan:

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# 417058.

The Dallas Independent School District (the "district") received a request for 1) e-mails, correspondence, reports, memos, and documents related to eleven requests for proposals during a specified time period; 2) copies of the eleven requests for proposals; 3) the qualifying bids for the eleven requests for proposals; 4) notes, memos, agendas, minutes, and a list of members from the committee that reviewed the bids at issue; and 5) e-mails, correspondence, reports, memos, and documents regarding the e-rate fund during a specified time period. The district received a second request for information related to AT&T and the e-rate procurement process. You claim the requested information is excepted from disclosure under sections 552.104, 552.107, 555.111, and 552.116 of the Government Code.¹ You also explain this information may contain third parties' proprietary information subject to exception under the Act. Accordingly, you have notified the interested third parties of these requests for information and of their right to submit arguments to this office as to why

¹Although you raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure, we note section 552.101 does not encompass discovery privileges. *See* Open Records Decision No. 676 at 1-2 (2002), 575 at 2 (1990). Furthermore, although you raise the attorney-client privilege under rule 503 of the Texas Rules of Evidence and the attorney work product privilege under rule 192.5 of the Texas Rules of Civil Procedure, we note sections 552.107 and 552.111 are the proper exceptions for your attorney-client privilege and work product privilege claims in this instance.

the submitted information should not be released.² *See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments received from Windstream, UPN, Verizon Wireless, TMC, and AT&T.

You claim most of the submitted information is excepted from disclosure under section 552.104 of the Government Code. Section 552.104 of the Government Code excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The purpose of section 552.104 is to protect the purchasing interests of a governmental body in competitive bidding situations where the governmental body wishes to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 (1991). Section 552.104 protects information from disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* Open Records Decision No. 463 (1987). Generally, section 552.104 does not except bids from disclosure after bidding is completed and the contract has been executed. *See* Open Records Decision No. 541 (1990).

You state the information you have marked relates to various requests for proposals of IT services. You further state that prior to receiving the present requests all of the requests for proposals had been removed from consideration by the district's board in order to reevaluate the services needed. You also assert release of the information at issue at this time would jeopardize the district's bargaining position when entering into future negotiations related to these bids. Based on your representations and our review, we determine the district has demonstrated release of the information at issue would harm its interests in a competitive situation. Accordingly, the district may withhold the information you have marked under section 552.104 of the Government Code.³

Section 552.116 of the Government Code provides the following:

²The notified third parties are: T Mobile USA, Inc.; Verizon Wireless; AT&T; Sprint Nextel; IBM Corp.; Dell Marketing, LP; Insight Networking; Netsync Network Solutions; Texas Moving Company, Inc. ("TMC"); Electro Information Systems; Prime Systems; Audio Visual Networking Plus; Move Solutions, Ltd.; Smartgroup Systems; McCollister's Transportation Systems, Inc.; Lazo Technologies, Inc.; Delcom Group; Sequel Data Systems, Inc.; General Datatech, LP; Layer 3 Communications, LLC; XO Communications; Tel West Network Services Corp.; Time Warner Cable; FiberLight, LLC; Windstream Communications Inc. ("Windstream"); Unite Private Networks ("UPN"); Relational Technology Solutions; Abacus Computers, Inc.; Altura Communication Solutions, LLC; CDW Government, LLC; CBS Network Services, Inc.; Computerland Texas; Sigma Solutions, Inc.; Solid IT Networks, Inc; and Verizon.

³As our ruling is dispositive, we do not address the remaining arguments, including those submitted by Windstream, UPN, Verizon Wireless, TMC, and AT&T, to withhold this information.

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from the requirements of Section 552.021. If information in an audit working paper is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You inform this office the submitted documents include "information compiled to allow the [district] to audit and investigate the circumstances surrounding the administration of the referenced procurements." You also inform us, and provide documentation showing, the audit is authorized by an action of the district's board of trustees in its adoption of a compliance agreement with the Federal Communications Commission. Based on your representations and our review, we agree the information you have marked consists of audit working papers for purposes of section 552.116 of the Government Code. Accordingly, the district may withhold the remaining information you have marked under section 552.116 of the Government Code.⁴

⁴As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

Next, we will address your argument under section 552.107 of the Government Code. Section 552.107(1) protects information coming within the attorney-client privilege. *Id.* § 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 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). 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 to only communications between or among clients, client representatives, lawyers, and lawyer representatives. 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 to only 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 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 submitted in response to the second request constitutes e-mail communications amongst district attorneys and employees that were made for the purpose of providing legal services to the district. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the district may generally withhold the information responsive to only the second request under section 552.107(1) of the Government Code. However, we note the attachments to two of the e-mails at issue consist of communications relating to contract negotiations between the district and AT&T. Because AT&T and the district were negotiating a contract, their interests in these communications were adverse. Thus, these parties do not share a common interest that would allow the attorney-client privilege to apply to the information at issue. *See In re Monsanto*, 998 S.W.2d 917, 922 (Tex.

App.—Waco 1999, no pet.) (discussing the “joint-defense” privilege incorporated by rule 503(b)(1)(C)). Therefore, you have failed to demonstrate that this information, which we have marked, consists of communications between privileged parties. Thus, to the extent these non-privileged attachments exist separate and apart from the submitted e-mail strings, they may not be withheld under section 552.107. However, we will address your argument under section 552.111 for these attachments to the extent they exist separate and apart.

You claim the information you have marked and the remaining attachments responsive only to the second request to the extent they exist separate and apart are excepted under section 552.111 of the Government Code, which 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. Section 552.111 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 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. 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, opinions, or recommendations 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 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.

Further, section 552.111 can encompass communications between a governmental body and a third-party consultant. *See* Open Records Decision Nos. 631 at 2 (1995) (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body's consultants). 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* ORD 561 at 9. We note a governmental body does not have a privity of interest or common deliberative process with a private party with which the governmental body is engaged in contract negotiations. *See id.* (section 552.111 not applicable to communication with entity with which governmental body has no privity of interest or common deliberative process).

You contend the e-mails, draft attachments, and attachments regarding negotiations with a third party you have marked contain advice, opinion, and recommendations relating to the district's "proposed technology guidelines and the discussion on the proposed guidelines." Upon review, we agree most of the draft attachments, which we have marked, constitute drafts of policymaking documents. In addition, you state draft attachments have been released to the public in their final form. Therefore, the district may withhold the marked draft attachments in their entirety under section 552.111. However, we find the remaining e-mails you have marked do not contain advice, opinion, or recommendations. In addition, one of the attachments you have marked as a draft is an annual report for the Universal Service Administrative Company. You have failed to demonstrate, and this report does not reflect on its face, how it is excepted under section 552.111 of the Government Code. We also note the attachments to the e-mails submitted as responsive to only the second request are drafts pertaining to contract negotiations between the district and AT&T. Because the district and AT&T were negotiating a contract, their interests were adverse. Thus, we conclude the district and AT&T did not share a privity of interest or common deliberative process, and these attachments are not subject to section 552.111. Thus, the remaining information you have marked may not be withheld under section 552.111 of the Government Code.

We note the remaining information includes a district employee's cellular telephone number that may be protected under section 552.117 of the Government Code.⁵ Section 552.117(a)(1) excepts from disclosure the current and former 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 this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Additionally, section 552.117 encompasses personal cellular telephone numbers, provided the cellular telephone service is paid for by the employee with the employee's funds. *See* Open Records Decision No. 670 at 6 (2001) (extending section 552.117 exception to personal cellular telephone number and personal pager number of employee who elects to withhold home telephone number in accordance with section 552.024). Whether information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The district may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made.

We have marked a district employee's cellular telephone number in the remaining information. You have not informed us whether the employee timely chose to restrict public access to his personal information. Furthermore, you have not informed us whether the employee paid for his cellular telephone service. Therefore, if the employee timely requested confidentiality for his personal information and the cellular telephone number we have marked is not paid for by the district, the district must withhold the marked information pursuant to section 552.117(a)(1) of the Government Code. If the employee did not timely request confidentiality or the marked cellular telephone number is paid for by the district, the marked information may not be withheld under section 552.117(a)(1) of the Government Code.

We note the remaining information includes e-mail addresses subject to section 552.137 of the Government Code. Section 552.137 provides that "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). We have marked e-mail addresses that are not of the types specifically excluded by section 552.137(c) of the Government Code.

⁵The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Accordingly, the district must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners consent to disclosure.⁶

In summary, the district may withhold the information you have marked under section 552.104 of the Government Code. The district may withhold the remaining information you have marked under section 552.116 of the Government Code. The district may generally withhold the information responsive to only the second request under section 552.107(1) of the Government Code. However, the district may only withhold the non-privileged attachments we have marked if they do not exist separate and apart from the submitted e-mail strings. The district may withhold the draft attachments we have marked under section 552.111 of the Government Code. To the extent the employee at issue timely requested confidentiality for his personal information and the cellular telephone number we have marked is not paid for by the district, the district must withhold the information we have marked pursuant to section 552.117(a)(1) of the Government Code. The district must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners consent to disclosure. As no additional exceptions to disclosure have been raised for the remaining information, it 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, 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,



Tamara Wilcox
Assistant Attorney General
Open Records Division

TW/dls

⁶We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

Ref: ID# 417058

Enc. Submitted documents

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