



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 3, 2011

Mr. Earl S. Nesbitt
Mr. James M. McCown
Nesbitt, Vassar, McCown & Roden, L.L.P.
15851 Dallas Parkway, Suite 800
Addison, Texas 75001

OR2011-07856

Dear Mr. Nesbitt and Mr. McCown:

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# 418164.

The North Texas Tollway Authority (the "authority"), which you represent, received a request for documents related to the authority's relationship with a specified law firm or named individual from August 1, 2010 to the date of the request, e-mails sent by or to any authority board member or two named individuals from August 1, 2010 to the date of the request, and any summary or analyses made by the authority of its payments to a named individual, specified law firm, or any other "legacy firms" from January 1, 2008 to the date of the request.¹ You state you have released some responsive information to the requestor. You claim the submitted information is excepted from disclosure pursuant to

¹You state the authority sought and received clarification of the information requested. *See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

sections 552.107 and 552.111 of the Government Code.² We have considered the exception you claim and reviewed the submitted representative sample of information.³

Initially, we note the authority sought to withdraw its present request for an open records decision because the requestor's public information request was withdrawn by operation of law for failure to timely respond to a cost estimate for providing requested records.⁴ Upon review of a copy of the cost estimate provided to the requestor, we note it does not comply with the requirements of section 552.2615 of the Government Code. *See* Gov't Code § 552.2615. Accordingly, we conclude the requestor's public information request has not been withdrawn by operation of law. We will, therefore, address your arguments against disclosure of the submitted information.

The Act is applicable to "public information." *See id.* § 552.021. Section 552.002 of the Act provides that "public information" 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." *Id.* § 552.002(a). The characterization of information as "public information" under the Act is not dependent on whether the requested records are in the possession of an official or employee of a governmental body or whether a governmental body has a particular policy or procedure that establishes a governmental body's access to the information. *See* Open Records Decision No. 635 at 3-4 (1995) (finding that information does not fall outside definition of "public information" in Act merely because individual official or employee of governmental body possesses information rather than governmental body as whole); *see also* Open Records Decision No. 425 (1985) (concluding, among other things, that information sent to individual school trustees' homes was public information because it related to official business of governmental body) (overruled on other grounds by Open Records Decision No. 439 (1986)). Thus, the mere fact that a governmental body does not possess the information at issue does not take the information outside the scope of the Act. *See* ORD 635 at 6-8. Furthermore, this office has found information in a public official's personal e-mail account and home

²Although you also raise rule 503 of the Texas Rules of Evidence, we note section 552.107 is the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code. *See* Open Records Decision No. 676 at 1-2 (2002).

³We assume that the "representative sample" of information 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.

⁴In correspondence dated March 22, 2011, you also inform this office you withdraw your request for an opinion regarding the Royal Bank of Canada spreadsheet in Exhibit D-5 because it will be released to the requestor.

telephone records may be subject to the Act where the public official uses the personal e-mail account and home telephone to conduct public business. *See* ORD 635 at 6-8 (stating information maintained on a privately-owned medium and actually used in connection with the transaction of official business would be subject to the Act). We note that the Act's definition of "public information" does not require that a public employee or official create the information at the direction of the governmental body. *See* Gov't Code § 552.002. Accordingly, the mere fact that a public employee generates business-related information using personal resources does not take the information outside the scope of the Act.

You state the authority does not collect, assemble, maintain, or have a right of access to e-mails that are not sent to or from the authority's exchange server. We reiterate that information is within the scope of the Act if it relates to the official business of a governmental body and is maintained by a public official or employee of the governmental body. *See id.* § 552.002(a). Thus, to the extent any of the requested e-mails that are not sent to or from the authority's exchange server relate to the official business of the authority, they are subject to the Act, and we will address your arguments against disclosure for this information. However, to the extent the requested e-mails do not relate to the official business of the authority, they are not subject to the Act and need not be released.

You assert the information in Exhibits D-1 through D-5 are subject to section 552.107(1) of the Government Code, which protects information coming 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. 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *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. *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 the information in Exhibits D-1 through D-5 consists of privileged attorney-client communications between authority officials and authority attorneys made to facilitate the rendition of legal advice to the authority. You assert these communications were made in confidence and have maintained their confidentiality. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the authority may withhold the information in Exhibits D-1 through D-5 under section 552.107 of the Government Code.

Section 552.111 of the Government Code excepts from public 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 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) (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)*. 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).

This office has also 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 state the information in Exhibit D-6 constitutes advice, opinions, and recommendations of authority officials related to the authority's Legal Services Delivery Plan. You also assert this information includes draft versions of a document that has been released in its final form. Upon review, we find some of the information in Exhibit D-6, which we have marked, pertains to routine internal administrative matters. Thus, we find you have failed to demonstrate how this information consists of advice, opinions or recommendations on the policymaking functions of the authority. Accordingly, the information we have marked in Exhibit D-6 may not be withheld under section 552.111 of the Government Code. However, we find the authority has established the applicability of section 552.111 of the Government Code to the remaining information in Exhibit D-6. Thus, the authority may withhold the remaining information in Exhibit D-6 under section 552.111.

In summary, the authority may withhold the information in Exhibits D-1 through D-5 under section 552.107 of the Government Code. With the exception of the information we have marked for release, the authority may withhold the information in Exhibit D-6 under section 552.111 of the Government Code. The remaining 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, 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,

A handwritten signature in cursive script, appearing to read "Jennifer Burnett", with a horizontal line extending to the right from the end of the signature.

Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/dls

Ref: ID# 418164

Enc. Submitted documents

c: Requestor
(w/o enclosures)