



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 5, 2011

Ms. Lauren Kalisek  
For the City of Sweetwater  
Lloyd, Gosselink, Rochelle & Townsend, P.C.  
816 Congress Avenue, Suite 1900  
Austin, Texas 78701

OR2011-14408

Dear Ms. Kalisek:

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# 432041.

The City of Sweetwater (the "city"), which you represent, received a request for all records during a specified time period pertaining to Tenaska, Inc.'s ("Tenaska") proposed Trailblazer Energy Center, receipt of local water resources, and involvement with the proposed Williams Pipeline. You state the city has provided some of the requested information to the requestor. You claim some of the remaining requested information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code.<sup>1</sup> You also state release of the remaining requested information may implicate the proprietary interests of Tenaska. Accordingly, you state, and provide documentation showing, the city notified Tenaska of the request and of the company's right to submit arguments to this office as to why the information at issue should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain the applicability of exception to disclose under Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted representative sample of

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<sup>1</sup>Although you initially also raised sections 552.101 and 552.105 of the Government Code as exceptions to disclosure of the information at issue, you have provided no arguments regarding the applicability of these sections. Therefore, we assume you no longer assert section 552.101 or section 552.105. *See* Gov't Code §§ 552.301(b), (e), .302.

information.<sup>2</sup> We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information).

Initially, we note the information submitted as Exhibits D through G was created after the city received the request for information. Thus, this information is not responsive to the request. This decision does not address the public availability of the non-responsive information, and that information need not be released.

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 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). 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. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain 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

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<sup>2</sup>We assume 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 those records contain substantially different types of information than that submitted to this office.

governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You seek to withhold the information you have marked in Exhibits K through M under section 552.107(1). You state the information consists of communications between attorneys for the city and a city official made in furtherance of the rendition of professional legal services. You also indicate the communications were made in confidence and the confidentiality has been maintained. 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 city may withhold the information you have marked in Exhibits K through M under section 552.107(1) of the Government Code.

You claim some of the remaining information is excepted from disclosure under the deliberative process privilege 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 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 consisting 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 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*.

We note section 552.111 can encompass a governmental body's communications with a third-party, including a consultant or other party with which the governmental body shares a common deliberative process or privity of interest. *See Open Records Decision No. 561 at 9* (1990) (section 552.111 of the Government Code encompasses communications with party with which governmental body has privity of interest or common deliberative process).

In order 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.

You contend the information you seek to withhold in Exhibits H through J, which consists of e-mails and handwritten notes, falls within the scope of section 552.111. You state the information relates to communications involving a city official, attorneys for the city, and a consultant hired by the city regarding ongoing contract negotiations with Tenaska. You explain the communications pertain to policymaking matters related to whether or not the city will supply certain water resources to Tenaska. Based on your representations and our review of the information at issue, we conclude the city may withhold the information we have marked in Exhibits H through J under section 552.111 of the Government Code. We find, however, you have not established the remaining information at issue reveals advice, opinion, or recommendations that implicate the city's policymaking processes. Consequently, the city may not withhold any of the remaining information at issue in under section 552.111 of the Government Code.

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Tenaska explaining why the remaining information at issue should not be released. Therefore, we have no basis to conclude Tenaska has protected proprietary interests in the information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Consequently, the city may not withhold any of the remaining information at issue on the basis of any proprietary interest Tenaska may have in the information.

In summary, the city may withhold the information you have marked in Exhibits K through M under section 552.107(1) of the Government Code. The city may withhold the information we have marked in Exhibits H through J under section 552.111 of the Government Code. The city must release the remaining responsive information.

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) 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 that reads "Leah B. Wingerson".

Leah B. Wingerson  
Assistant Attorney General  
Open Records Division

LBW/dls

Ref: ID# 432041

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Tenaska, Inc.  
c/o Ms. Elizabeth Drews  
Brown McCarroll, L.L.P.  
111 Congress Avenue, Suite 1400  
Austin, Texas 78701  
(w/o enclosures)