



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 9, 2012

Mr. Robert Schell  
North Texas Tollway Authority  
5900 West Plano Parkway, Suite 100  
Plano, Texas 75093

OR2012-00413

Dear Mr. Schell:

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# 441772.

The North Texas Tollway Authority (the "authority") received a request for three categories of information: (1) copies of the materials provided to a named firm from the authority's board of directors or from a named former executive director; (2) copies of all written communications between the authority and a named firm or the judges or judges' offices for four named counties for a specified time period; and (3) copies of all disclosure forms pertaining to "actual or potential conflicts of interests filled out by or on the behalf of any board member" of the authority for a specified time period, as well as any other communications from the board members to the authority notifying the authority of a "real or potential conflict[.]" You state the authority has released some of the requested information. You claim that the remaining requested information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

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<sup>1</sup>This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

Section 552.107(1) of the Government Code 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 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). 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.*, 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, orig. proceeding). 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 in Attachment B constitutes communications among outside legal counsel, consultants hired to conduct a review and evaluation of the authority, and authority general counsel, staff, and board members that were made for the purpose of providing legal services to the authority. You explain the consultants are “authorized to obtain and act upon confidential legal advice” provided by the authority and outside legal counsel. You identify each of the e-mail recipients and explain the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the authority may withhold the information you have marked in Attachment B under section 552.107(1) of the Government Code.<sup>2</sup>

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<sup>2</sup>As our ruling is dispositive, we need not address your remaining argument for this information.

Section 552.111 of the Government Code 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. ORD 615 at 5; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). 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). However, 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. ORD 615 at 5-6; *see also Dallas Morning News*, 22 S.W.3d at 364 (section 552.111 not applicable to personnel-related communications that did not involve policymaking).

Further, section 552.111 does not generally except from disclosure facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 157; 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).

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* ORD 561 at 9 (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.* 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).

This office also has concluded a preliminary draft of a document that has been or 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 contend the remaining information in Attachment B and the information in Attachment C reflects the advice, recommendations, and opinions of the authority, its consultants, and county judges of the authority's four member counties. You also explain the remaining information in Attachment B constitutes e-mail communications between the authority and its consultants hired to conduct a review and evaluation of the authority's financial, operating, and administrative functions. Thus, we agree the authority and its consultants share a privity of interest with regard to the policy matters addressed in the information at issue, and the authority may withhold the information we have marked in Attachment B under section 552.111 of the Government Code on the basis of the deliberative process privilege. You explain the information in Attachment C constitutes e-mail communications between the authority and county judges of the authority's four member counties, who selected the consultant hired to conduct the review and evaluation. Additionally, you state the information at issue pertains to advice, opinion, and recommendation of the judges and authority regarding the agreement between the authority and its consultant. Furthermore, you state the draft agreement in Exhibit C has been or will be released to the public in its final form. As such, we find the information we have marked in Attachment C, including the draft agreement, constitutes policymaking advice, opinion, and recommendation, and the authority may withhold this information under section 552.111 of the Government Code on the basis of the deliberative process privilege. However, we find the remaining information in Attachments B and C consists of information that is purely factual in nature or pertains to contract negotiations between the authority and a third party; thus, their interests were adverse as to the negotiations and there is no privity of interest between the two parties. Consequently, you have failed to demonstrate how this information is excepted under section 552.111. Accordingly, we find none of the remaining information may be withheld on this basis.

We note a portion of the remaining information in Attachment C is subject to section 552.117 of the Government Code.<sup>3</sup> Section 552.117 excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to section 552.117 of the Government Code not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Whether a particular piece of 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). Therefore, a governmental body must withhold information under section 552.117 on behalf of current or former employees only if these individuals made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the employee whose cellular telephone number is at issue timely elected to keep this information confidential pursuant to section 552.024 and the cellular telephone service is not paid for by a governmental body, the authority must withhold the cellular telephone number we have marked under section 552.117(a)(1). The authority may not withhold this information under section 552.117 if the employee did not make a timely election to keep the information confidential or if the cellular telephone service is paid for by a governmental body.

We note the remaining information in Attachment C contains the e-mail address of a member of the public. Section 552.137 of the Government Code 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). Gov't Code § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, or an e-mail address maintained by a governmental entity for one of its officials or employees. The e-mail address we have marked is not of a type specifically excluded by section 552.137(c). Accordingly, the authority must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless its owner has affirmatively consented to its release.<sup>4</sup>

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<sup>3</sup>The 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).

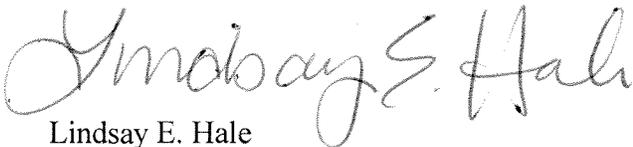
<sup>4</sup>We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

In summary, the authority may withhold the information you have marked in Attachment B under section 552.107(1) of the Government Code. The authority may withhold the information we have marked in Attachment C under section 552.111 of the Government Code on the basis of the deliberative process privilege. The authority must withhold the cellular telephone number we have marked in Attachment C under section 552.117(a)(1) if the employee timely elected to keep this information confidential and the cellular telephone service is not paid for by a governmental body. The authority must withhold the e-mail address we have marked in Attachment C under section 552.137 of the Government Code, unless its owner has affirmatively consented to its release. The authority must release the remaining 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,



Lindsay E. Hale  
Assistant Attorney General  
Open Records Division

LEH/ag

Ref: ID# 441772

Enc. Submitted documents

c: Requestor  
(w/o enclosures)