



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 26, 2012

Ms. Sharon Alexander  
Associate General Counsel  
Texas Department of Transportation  
125 East 11th Street  
Austin, Texas 78701-2483

OR2012-11622

Dear Ms. Alexander:

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# 460250.

The Texas Department of Transportation (the "department") received a request for the complete file related to a named company. You state the department is releasing some of the requested information. You claim Exhibits C and D are excepted from disclosure under sections 552.107 and 552.111 of the Government Code.<sup>1</sup> Although you take no position as to whether Exhibits B and E are excepted under the Act, you state release of this information may implicate the proprietary interests of Inland Environmental and Remediation, L.P., and U.S. Liquids of Louisiana (collectively, the "third parties"). Accordingly, you notified the third parties of the request for information and of their right to submit arguments to this office as to why Exhibits B and E should not be released. *See Gov't Code § 552.305(d); see also Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability*

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<sup>1</sup>Although you also claim the attorney client privilege under section 552.101, this office has concluded section 552.101 does not encompass discovery privileges. *See Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).*

of exception in Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted information, some of which is a representative sample.<sup>2</sup>

Initially, we note 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. Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from the third parties explaining why their information should not be released. Therefore, we have no basis to conclude the third parties have a protected proprietary interest in Exhibits B or E. *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. Accordingly, the department may not withhold any portion of this information based upon the proprietary interests of the third parties.

You raise section 552.107 of the Government Code for Exhibit C. Section 552.107(1) 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. 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). Third, the privilege applies only to 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 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

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<sup>2</sup>We assume the "representative sample" of records submitted to this office in Exhibit C 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.

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 inform us that the draft documents and e-mails submitted as Exhibit C consist of communications between department attorneys and employees that were made for the purpose of providing legal advice to the department. You inform us these communications were intended to be, and have remained, confidential. Based on your representations and our review, we conclude you have established the information at issue is protected by the attorney-client privilege. Therefore, the department may withhold Exhibit C under section 552.107(1) of the Government Code.<sup>3</sup>

You assert Exhibit D is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 excepts from disclosure “an interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. This exception 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. 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

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<sup>3</sup>As our ruling for this information is dispositive, we need not address your remaining argument against its release.

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. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *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).

You assert Exhibit D consists of internal pre-decisional deliberations regarding agency policy. You inform us that this information consists of advice, recommendations, and opinions of department personnel. Based on your representations and our review, we find that you have established that the deliberative process privilege is applicable to the information at issue. Therefore, the department may withhold Exhibit D under section 552.111 of the Government Code.

We note portions of Exhibit E may be subject to section 552.117(a)(1) of the Government Code.<sup>4</sup> Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, emergency contact information, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See* 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 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Therefore, if the individual whose cellular telephone number we have marked in Exhibit E timely requested confidentiality under section 552.024 and pays for the cellular telephone service with his own funds, the department must withhold this information under section 552.117(a)(1) of the Government Code. If the individual whose information is at issue did not make a timely election under section 552.024 or does not pay for the cellular telephone service with his own funds, the department may not withhold the information at issue under section 552.117(a)(1).

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<sup>4</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

We also note portions of Exhibit E are subject to section 552.137 of the Government Code, which 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). The e-mail addresses we have marked in Exhibit E are not specifically excluded by section 552.137(c). As such, these e-mail addresses must be withheld under section 552.137, unless the owners of the e-mail addresses have affirmatively consented to their release.<sup>5</sup> *See id.* § 552.137(b).

Finally, some of the remaining information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the department may withhold Exhibit C under section 552.107(1) of the Government Code and Exhibit D under section 552.111 of the Government Code. If the individual whose cellular telephone number we have marked in Exhibit E timely requested confidentiality under section 552.024 of the Government Code and pays for the cellular telephone service with his own funds, the department must withhold this information under section 552.117(a)(1) of the Government Code. If the individual whose information is at issue did not make a timely election under section 552.024 of the Government Code or does not pay for the cellular telephone service with his own funds, the department may not withhold the information at issue under section 552.117(a)(1) of the Government Code. The department must withhold the e-mail addresses we have marked in Exhibit E under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their release. The department must release the remaining information, but any information that is protected by copyright may only be released in accordance with copyright law.

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.

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<sup>5</sup>Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an email address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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,



**Kenneth Leland Conyer**  
Assistant Attorney General  
Open Records Division

KLC/dls

Ref: ID# 460250

Enc. Submitted documents

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