



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 10, 2012

Ms. Jacqueline E. Hojem  
Public Information Coordinator  
Metropolitan Transit Authority of Harris County  
P.O. Box 61429  
Houston, Texas 77208-1429

OR2012-12576

Dear Ms. Hojem:

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# 461585 (MTA No. 2012-0264).

The Metropolitan Transit Authority of Harris County (the "authority") received a request for all internal or external letters or e-mails for specified time periods between the following: (1) five named authority board members and three named individuals regarding the general mobility referendum and the upcoming 2012 referendum issues; (2) two of the named board members and one of the named individuals regarding authority media events; and (3) one of the named board members and one of the named individuals regarding the general mobility agreement. You state the authority does not have any internal or external letters or e-mails responsive to item two of the instant request.<sup>1</sup> You state the authority has released some information to the requestor. You claim the submitted 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 information. We have also

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<sup>1</sup>The Act does not require a governmental body to release information that did not exist when a request for information was received, obtain information that is not held by the governmental body or on its behalf, or prepare new information in response to a request. See *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed).

received and considered comments submitted by the requestor.<sup>2</sup> *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should 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 governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

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<sup>2</sup>The requestor asserts the authority has violated the Open Meetings Act. However, this office lacks the statutory authority to investigate an alleged violation of or to enforce any provision of the Open Meetings Act. *See* Gov't Code § 552.301(a) (open records division's authority is limited to determining, upon a governmental body's request, whether requested information falls within an exception to disclosure). Thus, this ruling does not address the issues raised by the requestor that are beyond the scope of our authority.

You claim the submitted information in Exhibit 3 is protected by section 552.107(1) of the Government Code. You state these documents consist of communications between the authority's board members, officers, general counsel, and outside counsel. You state these communications were made for the purpose of rendering professional legal services to the district. You state these communications were intended to be and remain confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the submitted information in Exhibit 3. Accordingly, the authority may withhold the submitted information in Exhibit 3 under section 552.107(1) of the Government Code.

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. 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); *see also* 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 only those internal communications that consist of advice, opinions, recommendations 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. *See 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 also has 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.

Section 552.111 also can encompass communications between a governmental body and a third-party, including a consultant or other party with a privity of interest. *See* Open Record Decision No. 561 at 9 (1990) (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* ORD 561 at 9.

You state the submitted information in Exhibit 5 consists of communications containing the advice, recommendations, and opinions of authority employees regarding the ballot language to be used in an upcoming referendum. You further state some of the information at issue consists of draft documents intended for public release in their final form. Based on your representations and our review, we find the authority may withhold the information we have marked under section 552.111 of the Government Code. However, we note the remaining information consists of general administrative or purely factual information. Thus, we find you have not demonstrated how this information consists of advice, opinions, or recommendations pertaining to policymaking matters of the authority. Accordingly, we conclude the authority may not withhold any of the remaining information in Exhibit 5 under section 552.111 of the Government Code.

Section 552.137 of the Government Code 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). Upon review, we find the e-mail addresses we have marked in the remaining information in Exhibit 5 are not of the types specifically excluded by section 552.137(c) of the Government Code. Accordingly, the authority must withhold these e-mail addresses under section 552.137 of the Government Code, unless the owners affirmatively consent to disclosure.<sup>3</sup>

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<sup>3</sup>We note Open Records Decision No. 684 (2009) is a previous determination authorizing all governmental bodies to withhold certain categories of information, including e-mail addresses of members 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 submitted information in Exhibit 3 under section 552.107(1) of the Government Code. The authority may withhold the information we have marked in Exhibit 5 under section 552.111 of the Government Code. The authority must withhold the e-mail addresses we have marked in the remaining information in Exhibit 5 under section 552.137 of the Government Code, unless the owners affirmatively consent to disclosure. 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,



Sean Nottingham  
Assistant Attorney General  
Open Records Division

SN/bhf

Ref: ID# 461585

Enc. Submitted documents

c: Requestor  
(w/o enclosures)