



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 15, 2014

Ms. Lori Fixley Winland  
Attorney For the Alamo Regional Mobile Authority  
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OR2014-22710

Dear Ms. Winland:

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# 546888.

The Alamo Regional Mobile Authority (the "authority") received three requests from two different requestors for information pertaining to a specified Request for Qualifications (the "RFQ"). The first requestor seeks any and all correspondence and communications pertaining to the RFQ. The second requestor seeks a copy of the RFQ, all e-mail communications made during a specified time period related to the RFQ, scoring information for all four respondents to the RFQ, and any staff comments made about the four respondents or their applications during the RFQ process. You state the authority will release some information to the requestors. You claim portions of the submitted information are excepted from disclosure under sections 552.107 and 552.111 of the Government Code.<sup>1</sup> You also state the release of a portion of the submitted information may implicate the proprietary interests of Atkins North America, Inc., CH2M Hill, HNTB Corporation, and AECOMM/Pape-Dawson Munoz, LLC. Accordingly, you state, and provide documentation showing, you notified these third parties of the request for information and of their rights to submit arguments to this office as to why the submitted information should not be released. *See Gov't Code § 552.305(d)* (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision

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<sup>1</sup>Although you raise section 552.101 of the Government Code against disclosure of the submitted information, you provide no arguments explaining how this exception is applicable. Therefore, we assume the authority no longer asserts this exception. *See Gov't Code §§ 552.301, .302.* As well, in your correspondence dated December 2, 2014, you state the authority no longer asserts the submitted information is excepted from disclosure under section 552.104 of the Government Code.

No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exceptions to disclosure under the Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup> We have also received and considered comments from the second requestor's attorney. *See* Gov't Code § 552.304 (interested party may submit written comments to this office stating why information should or should not be released).

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. *See id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from any of the interested third parties explaining why their information should not be released. Therefore, we have no basis to conclude any of the third parties have a protected proprietary interest in the submitted 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. Accordingly, the authority may not withhold any of the submitted information on the basis of any proprietary interest any of the third parties may have in the information.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. Gov't Code § 552.107. 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, lawyer representatives, and a

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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.

lawyer representing another party in a pending action and concerning a matter of common interest therein. 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).

You claim the information in Attachment B is excepted from disclosure under section 552.107(1) of the Government Code. You state the information at issue consists of communications between outside attorneys for the authority, authority staff members, and authority board members. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the authority. You further state these communications were meant to be confidential and have not been disclosed to a third party. 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 Attachment B under section 552.107(1) of the Government Code.<sup>3</sup>

Section 552.111 of the Government Code excepts from disclosure “[a]n 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, writ ref’d n.r.e.); 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). See ORD 615. We determined section 552.111 excepts from disclosure only those internal communications that

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

consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See id.* 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).*

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).*

This office has concluded 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 can also encompass communications between a governmental body and a third party, including a consultant or other party with a privity of interest. *See Open Records Decision Nos. 631 at 2* (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), *561 at 9 (1990)* (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), *462 at 14 (1987)* (section 552.111 applies to memoranda prepared by governmental body's consultants). 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 portions of the information in Attachment C consist of advice, opinions, and recommendations relating to policymaking matters of the authority. You also state portions of the information at issue consist of draft policymaking documents that have been released

to the public in their final forms, and which reflect the advice, opinions, and recommendations of authority staff, authority board members, and outside consultants acting on behalf of the authority at its request and performing a task within the authority's purview. Based on your representations and our review of the information at issue, we find the information we have marked in Attachment C consists of advice, opinions, and recommendations related to policymaking matters of the authority. Thus, the authority may withhold the information we have marked in Attachment C under section 552.111 of the Government Code. Upon review, however, we find the remaining information at issue in Attachment C is general administrative and purely factual information or does not pertain to policymaking. Thus, we find you have failed to demonstrate how any of the remaining information at issue in Attachment C consists of advice, opinions, or recommendations on policymaking matters. Accordingly, the remaining information in Attachment C may not be withheld under section 552.111 of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official 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), .024. Section 552.117 also encompasses a personal cellular telephone number, provided a governmental body does not pay for the cellular telephone service. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers 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 be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official 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, to the extent the employee whose information we have marked timely elected confidentiality under section 552.024 and the cellular telephone service was not paid for by a governmental body, the authority must withhold the information we have marked under section 552.117(a)(1) of the Government Code. To the extent the employee at issue did not make a timely election under section 552.024 or the cellular telephone service is paid for by a governmental body, this information may not be withheld under section 552.117(a)(1) of the Government Code.

We note portions of the remaining information are e-mail addresses that may be subject to section 552.137 of the Government Code. 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). We note section 552.137(c) provides section 552.137(a) does not apply to an e-mail address provided to a governmental body by a person who has or seeks a contractual relationship with the governmental body or by the contractor's agent. *Id.* § 552.137(c)(1)-(2). Because we are unable to discern whether

the e-mail addresses we have marked fall within the scope of section 552.137(c), we must rule conditionally. To the extent the e-mail addresses at issue belong to members of the public, the authority must withhold the e-mail addresses we have marked under section 552.137, unless the individuals to whom the e-mail addresses belong affirmatively consent to their public disclosure. However, to the extent the e-mail addresses at issue are excluded by section 552.137(c), the authority may not withhold the e-mail addresses we have marked under section 552.137 of the Government Code.

In summary, the authority may withhold Attachment B under section 552.107(1) of the Government Code. The authority may also withhold the information we have marked in Attachment C under section 552.111 of the Government Code. To the extent the employee whose information we have marked timely elected confidentiality under section 552.024 of the Government Code and the cellular telephone service was not paid for by a governmental body, the authority must withhold the information we have marked under section 552.117(a)(1) of the Government Code. To the extent the e-mail addresses we have marked belong to members of the public and are not excluded by subsection 552.137(c) of the Government Code, the authority must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the individuals to whom the e-mail addresses belong affirmatively consent to their public disclosure. 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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Alley Latham", with a long, sweeping horizontal line extending to the right.

Alley Latham  
Assistant Attorney General  
Open Records Division

AKL/dls

Ref: ID# 546888

Enc. Submitted documents

c: 2 Requestors  
(w/o enclosures)

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