



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 3, 2017

Ms. Lori Fixley Winland
Counsel for the North Texas Tollway Authority
Locke Lord, L.L.P.
600 Congress Avenue, Suite 2200
Austin, Texas 78701

OR2017-20396A

Dear Ms. Winland

This office issued Open Records Letter No. 2017-20396 (2017) on September 7, 2017. We have examined this ruling and determined that we will correct the previously issued ruling. Consequently, this decision serves as the corrected ruling and is a substitute for the decision issued on September 7, 2017. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act ("Act")). This ruling was assigned ID# 685014.

The North Texas Tollway Authority (the "authority"), which you represent, received a request for communications sent or received by a named individual.¹ You state the authority will redact information subject to section 552.117(a)(1) of the Government Code as permitted by section 552.024(c) of the Government Code.² You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.111,

¹You state the authority sent the requestor a cost estimate of charges pursuant to section 552.2615 of the Government Code. *See* Gov't Code § 552.2615.

²Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. *See* Gov't Code § 552.024(c)(2). If a governmental body redacts such information, it must notify the requestor in accordance with subsections 552.024(c-1) and (c-2). *See id.* § 552.024(c-1)-(c-2).

and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

Section 552.107(1) of the Government Code 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. *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 “to facilitate 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 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. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). 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.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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 state the information submitted as Attachments C and D consists of communications among authority attorneys, officials, and employees that were made for the purpose of providing legal services to the authority. You state the communications were intended to be

³We 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.

confidential and have remained confidential. Based on your representations and our review, we find Attachment D and portions of Attachment C, which we marked, consist of privileged attorney-client communications. Therefore, the authority may withhold Attachment D and the information we marked in Attachment C under section 552.107(1) of the Government Code.⁴ However, we note the remaining information in Attachment C consists of communications with individuals you have not demonstrated are privileged parties. Thus, we find you have not demonstrated the remaining information in Attachment C constitutes privileged attorney-client communications for the purposes of section 552.107(1). Accordingly, the authority may not withhold any of the remaining information in Attachment C under section 552.107(1) of the Government Code.

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). 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 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 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

⁴As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

This office has also concluded a preliminary draft of a document 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 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.

You state some of the remaining information consists of advice, opinions, and recommendations of authority board members, employees, and consultants regarding policymaking matters of the authority. You also state some of the information at issue was shared with the Texas Department of Transportation and the Texas Department of Public Safety, which share a privity of interest and common deliberative process with the authority regarding certain projects. Based on your representations and our review of the information at issue, we find you have established the deliberative process privilege is applicable to some of the remaining information, which we marked. Accordingly, we find the authority may withhold the information we marked under section 552.111 of the Government Code. However, the remaining information is either factual in nature, consists of internal administrative matters that do not rise to the level of policymaking, or was shared with third parties with whom you have not demonstrated a privity of interest. Therefore, we find the authority has failed to demonstrate the remaining information constitutes internal communications containing advice, recommendations, or opinions reflecting the policymaking processes of the department. Accordingly, the authority may not withhold any of the remaining information under section 552.111 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information other statutes make confidential.

The authority is governed by the Texas Regional Tollway Authority Act, chapter 366 of the Transportation Code. Section 366.179 of the Transportation Code provides in relevant part the following:

(a) For purposes of this section, a transponder is a device placed on or within a motor vehicle that is capable of transmitting or receiving information used to assess or collect tolls or provide toll exemptions. A transponder is insufficiently funded if there is no money in the account for which the transponder was issued.

...

(d) Transponder account information, including contact and payment information and trip data, is confidential and not subject to disclosure under [the Act].

Transp. Code § 366.179(a), (d). We understand the authority issues transponders or “TollTags” to its customers in connection with the operation of its toll projects for purposes of toll collection and enforcement. You state Attachment B contains TollTag account information, contact and payment information, and trip data pertaining to the authority’s customers. Therefore, we find to the extent the information in Attachment B consists of TollTag account information, contact and payment information, and trip data, it must be withheld under section 552.101 of the Government Code in conjunction with section 366.179(d) of the Transportation Code.⁵ Conversely, to the extent the information in Attachment B does not consist of TollTag account information, contact and payment information, and trip data, it is not confidential under section 366.179(d) of the Transportation Code and it may not be withheld under section 552.101 of the Government Code on that basis. In that event, we will address your remaining arguments against disclosure of the information at issue.

Section 552.101 of the Government Code also encompasses section 366.178 of the Transportation Code, which provides in relevant part the following:

(b-1) As an alternative to requiring payment of a toll at the time a vehicle is driven or towed through a toll assessment facility, the [regional tollway authority] shall use video recordings, photography, electronic data, transponders, or other tolling methods to permit the registered owner of the nonpaying vehicle to pay the toll at a later date or provide toll exemptions. Information collected under this subsection, including contact, payment, and

⁵In that event, our ruling is dispositive and we need not address your remaining argument against disclosure of this information.

other account information and trip data, is confidential and not subject to disclosure under [the Act].

Id. § 366.178(b-1). You inform us that, as an alternative to payment of a toll through a TollTag account, the authority permits individuals to pay a toll by mail at a later date through the ZipCash invoicing system. You state Attachment B contains information including contact, payment, and other account information and trip data pertaining to the authority's customers who pay tolls using the ZipCash system. Therefore, we find to the extent the information in Attachment B was collected by the authority pursuant to this subsection, the authority must withhold such information under section 552.101 of the Government Code in conjunction with section 366.178(b-1) of the Transportation Code.⁶ Conversely, to the extent the information in Attachment B does not consist of contact, payment, and other account information and trip data collected by the authority pursuant to this subsection, it is not confidential under section 366.178(b-1) of the Transportation Code, and it may not be withheld under section 552.101 of the Government Code on that basis. In that event, we will address your remaining arguments against disclosure of the information at issue.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. This office has also found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate or embarrassing. See Open Records Decision Nos. 600 (1992) (personal financial information includes choice of particular insurance carrier), 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). Upon review, we find some of the remaining information, which we marked, satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the authority must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release. See Gov't Code § 552.130. Accordingly, the authority must

⁶In that event, our ruling is dispositive and we need not address your remaining argument against disclosure of this information.

withhold the motor vehicle record information we marked under section 552.130 of the Government Code.

You state the authority will redact some e-mail addresses under section 552.137 of the Government Code pursuant to Open Records Decision No. 684.⁷ Section 552.137 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). *Id.* § 552.137(a)-(c). Section 552.137 does not apply to an institutional e-mail 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, an e-mail address of a vendor who seeks to contract with a governmental body, an e-mail address maintained by a governmental entity for one of its officials or employees, or an e-mail address provided to a governmental body on a letterhead. *See id.* § 552.137(c). Upon review, however, we find the remaining information includes the personal e-mail addresses of authority officials or employees who used their private e-mail addresses to conduct official government business. In *Austin Bulldog v. Leffingwell*, 490 S.W.3d 240 (Tex. App.— Austin 2016, no pet.), the court concluded section 552.137 does not except from disclosure the private e-mail addresses of government officials who use their private e-mail addresses to conduct official government business. *See Austin Bulldog*, 490 S.W.2d at 491. Thus, the personal e-mail addresses of the authority officials and employees in the remaining information are not subject to section 552.137, and the authority may not withhold them on that basis. However, to the extent the remaining e-mail addresses at issue are not the personal e-mail addresses of authority officials or employees and subsection (c) does not apply, this information is subject to section 552.137 and the authority must withhold it under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release.

In summary, the authority may withhold Attachment D and the information we marked in Attachment C under section 552.107(1) of the Government Code. The authority may withhold the information we marked under section 552.111 of the Government Code. To the extent the information in Attachment B consists of TollTag account information, contact and payment information, and trip data, the authority must withhold it under section 552.101 of the Government Code in conjunction with section 366.179(d) of the Transportation Code. To the extent the information in Attachment B consists of information collected by the authority pursuant to subsection 366.178(b-1), the authority must withhold it under section 552.101 of the Government Code in conjunction with section 366.178(b-1) of the Transportation Code. The authority must withhold the information we marked under

⁷Open Records Decision No. 684 serves as a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including personal e-mail addresses subject to section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. *See* ORD 684.

section 552.101 of the Government Code in conjunction with common-law privacy. The authority must withhold the motor vehicle record information we marked under section 552.130 of the Government Code. To the extent the e-mail addresses within the remaining information are not the personal e-mail addresses of authority officials or employees and subsection (c) does not apply, the authority must withhold such e-mail addresses under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their 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.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,



Kieran Hillis
Assistant Attorney General
Open Records Division

KH/sb

Ref: ID# 685014

Enc. Submitted documents

c: Requestor
(w/o enclosures)