



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 21, 2011

Mr. Vic Ramirez
Associate General Counsel
Lower Colorado River Authority
P.O. Box 220
Austin, Texas 78767-0220

OR2011-01079

Dear Mr. Ramirez:

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# 406575.

The Lower Colorado River Authority (the "authority") received two requests for all records pertaining to the disciplinary actions and termination of the requestor and all records pertaining to the "formal and informal disciplinary actions including documented coaching of" another named individual. You indicate the authority will release some of the requested information. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.102, 552.107, 552.111, and 552.117 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹Although you raise section 552.024 of the Government Code as an exception to disclosure, we note that this section is not an exception to public disclosure under the Act. Rather, this section permits a current or former official or employee of a governmental body to choose whether to allow public access to certain information relating to the current or former official or employee that is held by the employing governmental body. *See* Gov't Code § 552.024. We note section 552.117 of the Government Code is the proper exception to assert.

²This 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)(A)-(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 to only a confidential communication, *id.* 503(b)(1), 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, 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 state Exhibits C-1 through C-4 constitute notes and communications amongst authority attorneys, authority legal staff, outside legal counsel for the authority, and authority employees that were made for the purpose of providing legal services to the authority regarding one of the disciplinary actions at issue. You inform us that Exhibits E-2 and E-3 were provided to an authority attorney and legal staff in order for the attorney to render legal advice and recommendations. You also state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find Exhibits C-1 through C-4, E-2, and E-3 consist of attorney-client privileged communications and the authority may withhold this information under section 552.107 of

the Government Code.³ Although you state some of the remaining information in Exhibits D, E, and F was provided to an authority attorney and legal staff, you have not demonstrated and the remaining information at issue does not reflect which of these remaining documents were provided to these individuals. As such, the authority may not withhold any of the remaining information at issue under section 552.107 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. 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 reexamined 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). Moreover, 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).

You state the remaining information at issue consists of e-mails, notes, and draft documents reflecting “internal [authority] conversations and discussions, consisting of advice, opinion, or recommendations” regarding disciplinary actions against the requestor and the other individual named in the request. As previously stated, the deliberative process privilege only excepts communications pertaining to administrative and personnel matters of a broad scope

³As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

that affect a governmental body's policy mission. *See* ORD 631 at 3. Upon review, the remaining information at issue reflects it pertains to administrative and personnel issues involving two authority employees, and you have not explained how the information pertains to administrative or personnel matters of a broad scope that affect the authority's policy mission. Therefore, you have failed to demonstrate how the deliberative process privilege applies to the remaining information at issue. Accordingly the authority may not withhold the remaining information at issue under section 552.111 of the Government Code on this basis.

Section 552.111 also encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *Dallas Morning News*, 22 S.W.3d at 360; Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as:

(1) [M]aterial prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a). A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *Id.*; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that

a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7.

As discussed above, you state the remaining information at issue consists of e-mails, notes, and draft documents reflecting "internal [authority] conversations and discussions, consisting of advice, opinion, or recommendations" regarding disciplinary actions against the requestor and the other individual named in the request. However, you do not explain that litigation is pending or the authority anticipates litigation on this matter. Thus, we find the authority

may not withhold the remaining information at issue as attorney work product under section 552.111 of the Government Code.

You contend the remaining information at issue is protected under common-law privacy. 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 the common-law right of privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is 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. The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. Whether information is subject to a legitimate public interest and therefore not protected by common-law privacy must be determined on a case-by-case basis. *See* Open Records Decision No. 373 (1983). Upon review, we find that none of the remaining information at issue is highly intimate or embarrassing and not of legitimate public concern. Therefore, the authority may not withhold any of the remaining information at issue under section 552.101 of the Government Code in conjunction with common-law privacy.

You also claim the remaining information at issue is excepted from disclosure under section 552.102 of the Government Code. Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). Upon review, we find none of the remaining information at issue is excepted under section 552.102(a) of the Government Code. Accordingly, none of the remaining information at issue may be withheld on that basis.

You also raise section 552.117 of the Government Code for the remaining information at issue. Section 552.117 excepts from disclosure the home addresses and telephone numbers, 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 pager and cellular telephone numbers, provided the cellular telephone service or pager 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 officials or employees only if these individuals made a request for confidentiality under section 552.024 prior to the date on which the request for this

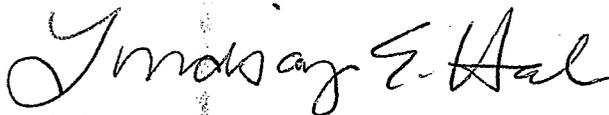
information was made. Upon review, we find the remaining information at issue contains family member information and a cellular telephone number of an employee who is not the requestor. Accordingly, if the employee whose information is at issue timely elected to keep her personal information confidential pursuant to section 552.024, the authority must withhold the employee family member information we have marked in Exhibit D-2 and the cellular telephone number we have marked in Exhibit F-3. However, the authority must withhold the cellular telephone number we have marked only if the employee pays for the cellular telephone service with personal funds. 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.

In summary: (1) the authority may withhold Exhibits C-1 through C-4, E-2, and E-3 under section 552.107 of the Government Code; and (2) to the extent the employee whose information is at issue timely elected confidentiality under section 552.024, the authority must withhold the family member information and cellular telephone number we have marked under section 552.117(a)(1) of the Government Code, if the employee pays for the cellular service with personal funds under section 552.117 of the Government Code. The authority must release the remaining information at issue.⁴

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, 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

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⁴We note some of the information being released contains confidential information to which the requestor has a special right of access. *See* Gov't Code § 552.023(a). Because such information is confidential with respect to the general public, if the authority receives another request for this information from an individual other than this requestor, the authority must again seek a ruling from this office.

Mr. Vic Ramirez - Page 7

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Enc. Submitted documents

c: Requestor
(w/o enclosures)