



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 19, 2011

Ms. Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
P.O. Box 12847
Austin, Texas 78711

OR2011-05424

Dear Ms. Hibbs:

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# 414918 (TDA-PIR-11-278).

The Texas Department of Agriculture (the "department") received a request for eleven categories of information related to egg laying hens in commercial production facilities. You state some information will be released to the requestor. You claim some of the submitted information is excepted from disclosure pursuant to sections 552.103, 552.107, 552.111, and 552.136 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information. We have also received and

¹Although you also raise section 552.101 of the Government Code, you have not submitted arguments explaining how this exception applies to the submitted information. Therefore, we presume you have withdrawn this exception. *See* Gov't Code §§ 552.301, .302. In addition, although you raise Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5 in conjunction with section 552.022 of the Government Code for the submitted information, we note the proper exceptions to raise when asserting the attorney-client privilege and the attorney work product privilege for information not subject to section 552.022 are sections 552.107 and 552.111, respectively. *See* Open Records Decision Nos. 676 at 1-2 (2002), 677 (2002). Furthermore, we note that section 552.022 is not an exception to disclosure. Rather, section 552.022 enumerates categories of information that are not excepted from disclosure unless they are expressly confidential under other law. *See* Gov't Code § 552.022.

considered comments from the requestor.² *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

We note the requestor objects to the department submitting a representative sample in this instance. However, the Act allows a governmental body to submit a representative sample of the information it seeks to withhold if a voluminous amount of information was requested. *Id.* § 552.301(e)(1)(D); *see also* Open Records Decision Nos. 499 at 6 (1988) (if documents requested are numerous and repetitive, governmental body should submit a representative sample), 497 at 4 (1988). Accordingly, we conclude the department has complied with the procedural requirements of the Act in submitting a representative sample of the information it seeks to withhold, and we will consider the department's arguments against the disclosure of the requested information.

Next, we note the requestor also claims the requested information is subject to section 552.022 of the Government Code. Section 552.022 enumerates eighteen categories of information that are not excepted from disclosure unless they are expressly confidential under other law. *See* Gov't Code § 552.022. Upon review, we conclude the submitted information is not encompassed by any of the eighteen categories of information enumerated in section 552.022 of the Government Code. As the department has submitted a representative sample of information the department deems to be responsive to the request, we will consider the department's arguments against disclosure of the submitted information.

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. 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 Texas 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 only to communications between or among clients, client representatives, lawyers, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* TEX. R. EVID. 503(b)(1)(A)-(E). Thus, a governmental body must inform this office of the identities and capacities of the

²Although the requestor generally asserts the information at issue has been released, he provides no argument or explanation of such a release. Thus, we will address the department's arguments.

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 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 assert the information in Exhibit B and the information you have marked in Exhibit C consists of privileged attorney-client communications made to facilitate the rendition of legal advice to the department. You have identified the parties to the communications. You assert these communications were made in confidence and have maintained their confidentiality. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue and may generally withhold this information under section 552.107 of the Government Code. However, we note portions of the privileged e-mail strings you have marked in Exhibit C consist of communications with a non-privileged party. We have marked the non-privileged e-mails. To the extent these non-privileged e-mails exist separate and apart from the privileged e-mail strings, they may not be withheld under section 552.107. With the exception of the marked non-privileged e-mails that exist separate and apart from the otherwise privileged e-mail strings, the department may withhold the e-mails in Exhibit B and the e-mails you have marked in Exhibit C under section 552.107 of the Government Code.³

Section 552.111 of the Government Code excepts from public 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 re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v.*

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

Gilbreath, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that 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. 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).

You contend the information you have marked in Exhibit C consists of advice, recommendations, and opinions between department staff and administration. You explain the information you have marked reflects policy development and deliberations related to implementing a program to enhance the safety of egg production in Texas.⁴ Upon review, we agree the information you have marked in Exhibit C consists of information that reveals advice, opinions, and recommendations relating to policymaking. Thus, the department may withhold the information you have marked under section 552.111 of the Government Code.

You have marked information in Exhibit D which you state is subject to section 552.136 of the Government Code. Section 552.136 states “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov't Code § 552.136(b). Therefore, the department must withhold the bank account and routing numbers you have marked under section 552.136 of the Government Code.⁵

⁴We note the requestor argues the department seeks to withhold information related to the implementation of existing policy. However, the submitted information reflects that the information at issue relates to the adoption of new policies and a new agreement between the department and federal authorities. *See Lett v. Klein Indep. Sch. Dist.*, 917 S.W.2d 455 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (records relating to problems with specific employee do not relate to making of new policy but merely implement existing policy).

⁵In Open Records Decision No. 684 (2009), this office issued a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including bank account and routing numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

In summary, with the exception of the marked non-privileged e-mails that exist separate and apart from the otherwise privileged e-mail strings, the department may withhold the e-mails in Exhibit B and the e-mails you have marked in Exhibit C under section 552.107 of the Government Code. The department may withhold the information you have marked in Exhibit C under section 552.111 of the Government Code and must withhold the information you have marked in Exhibit D under section 552.136 of the Government Code. 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.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,



Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/tf

Ref: ID# 414918

Enc. Submitted documents

c: Requestor
(w/o enclosures)