



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 15, 2011

Ms. Cynthia Villarreal-Reyna
Section Chief - Agency Counsel
Legal & Regulatory Affairs MC 110-1A
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2011-08475

Dear Ms. Villarreal-Reyna:

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# 420710 (TDI# 114034).

The Texas Department of Insurance (the "department") received a request for information pertaining to policies, internal inquiries, and communications with certain law enforcement entities regarding investigations of possible employee misconduct pertaining to outside employment by department employees. You state the department has provided some of the requested information to the requestor with certain information withheld pursuant to the previous determination issued to all governmental bodies in Open Records Decision No. 684 (2009).¹ You claim the submitted e-mails, attachments, and notes are excepted from disclosure under sections 552.107 and 552.111 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

¹Open Records Decision No. 684 authorizes all governmental bodies to withhold ten categories of information, including specified information under sections 552.130, 552.136, and 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

²In addition to the deliberative process privilege under section 552.111 of the Government Code, you claim the attorney work product privilege under section 552.111 of the Government Code. You have not, however, submitted any arguments explaining how the attorney work product privilege applies to the submitted information. Therefore, we presume you have withdrawn your claim under this privilege. *See* Gov't Code §§ 552.301, .302.

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, no pet.). 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 submitted e-mails, attachments, and notes you have marked consist of communications between department staff and attorneys made in furtherance of the rendition of professional legal services. You also state the communications were made in confidence and the confidentiality has been maintained. 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 department may withhold the submitted e-mails, attachments, and notes you have marked under section 552.107(1) of the Government Code.³

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

You assert the remaining information is excepted from disclosure under the deliberative process privilege encompassed by section 552.111 of the Government Code. *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. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications consisting 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). Additionally, section 552.111 does not generally except from disclosure purely factual information severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5.

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.

You contend the remaining e-mails, attachments, and notes, including communications between city employees regarding draft or preliminary responses to various e-mail communications, are excepted under section 552.111. The remaining information, however, pertains to internal investigations of violations of the department's employment policies and disciplinary actions regarding certain employees. Thus, the information pertains to administrative and personnel matters. As previously stated, the deliberative process privilege excepts communications pertaining to administrative and personnel matters of broad scope

that affect a governmental body's policy mission. *See* ORD 631 at 3. In this instance, however, the information reflects it pertains to administrative and personnel issues involving specific department employees, and you have not explained how the information pertains to administrative or personnel matters of broad scope that affect the department's policy mission. Therefore, you have failed to demonstrate how the deliberative process privilege applies to the remaining e-mails, attachments, and notes. Consequently, the department may not withhold the remaining information under section 552.111 of the Government Code.

We note some of the remaining information may be subject to section 552.117(a)(1) of the Government Code, which excepts from disclosure the current and former 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 this information be kept confidential under section 552.024 of the Government Code.⁴ Gov't Code § 552.117(a)(1). Whether 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). The department may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made.

The remaining information contains department employees' home telephone numbers, which we have marked. You have not informed us whether or not the employees timely chose to not allow public access to their personal information. Therefore, if the employees timely requested confidentiality for their personal information, the department must withhold the marked telephone numbers pursuant to section 552.117(a)(1) of the Government Code. If the employees did not timely request confidentiality, the department may not withhold the marked telephone numbers under section 552.117(a)(1) of the Government Code.

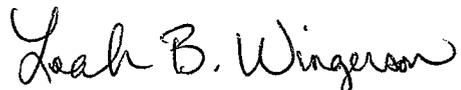
In summary, the department may withhold the submitted e-mails, attachments, and notes you have marked under section 552.107(1) of the Government Code. If the employees whose telephone numbers we have marked timely requested confidentiality for their personal information, the department must withhold the marked telephone numbers pursuant to section 552.117(a)(1) of the Government Code. The department 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.

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

Ref: ID# 420710

Enc. Submitted documents

c: Requestor
(w/o enclosures)