



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 19, 2012

Mr. Christopher Sterner  
Assistant General Counsel  
Office of the Governor  
P.O. Box 12428  
Austin, Texas 78711

OR2012-04013

Dear Mr. Sterner:

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# 449312 (OOG ID# 007-12).

The Office of the Governor (the "governor's office") received a request for documents, communications, and other records related to the consideration, development, drafting, and adoption of the definition of "unitary business" enacted in section 171.0001(17) of the Tax Code and the combined reporting requirement enacted in section 171.1014 of the Tax Code. You state you have released a portion of the requested information to the requestor. You further state you will redact e-mail addresses under Open Records Decision No. 684.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.106, 552.107, and 552.111 of the Government Code. You also state release of exhibit H may implicate the proprietary interests of Time Warner Cable, Inc. ("Time Warner"). Accordingly, you state you notified Time Warner of the request for information and of its right 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). We have

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<sup>1</sup>We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

received comments from a representative of Time Warner. We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>2</sup>

We note the requestor amended his request on February 10, 2012 to specifically exclude Time Warner's tax payments, tax rates and other proprietary or confidential information from the request for information and you subsequently withdrew your request for an opinion regarding that portion of the submitted information. Thus, the information we have marked is not responsive to the present request for information. This decision does not address the public availability of non-responsive information and such information need not be released in response to the present request.<sup>3</sup>

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). 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 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).

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<sup>2</sup>We assume that 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 that those records contain substantially different types of information than that submitted to this office.

<sup>3</sup>As we are able to make this determination, we need not address Time Warner's arguments under sections 552.101 and 552.110(b) of the Government Code.

You state exhibit D consists of communications between governor's office attorneys, attorney representatives, governor's office staff members, and employees of the Texas Tax Reform Commission ("TTRC"). You state TTRC was created by the governor's office pursuant to an executive order, the governor's office pays for the services that a certain person renders to TTRC, TTRC staff aided governor's office staff in the review of the legislation at issue, and these TTRC employees served as client representatives with respect to the issue that is the subject of the communications. You state these communications were made for facilitating the rendition of professional legal services to the governor's office. You state the communications were not intended to be disclosed to third persons and have not been disclosed to third persons. Based on your representations and our review, we conclude you have established the applicability of the attorney-client privilege to the information in exhibit D. Therefore, the governor's office may withhold exhibit D under section 552.107(1) of the Government Code.<sup>4</sup>

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. 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 recommendations 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); *see also* 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 only those internal communications that consist of advice, opinions, recommendations 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. *See 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

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<sup>4</sup>As our ruling with regard to this information is dispositive, we do not address your remaining arguments against its disclosure.

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 also concluded a preliminary draft of a document intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendations 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 state the information you have marked in exhibit E consists of communications between governor's office staff and TTRC staff and these communications pertain to recommended policy actions, potential policy statements, and advice and opinion on policy issues including legislation under review by the governor's office. You state the staff members involved in the communications are tasked with the responsibility of formulating policy recommendations on behalf of the governor's office with respect to the pending legislation. You state exhibit F consists of internal bill analyses or working papers prepared by the governor's office or TTRC to evaluate proposed legislation that contain opinions, advice, and recommendations on critical areas of the bill at issue. You state exhibit G consists of preliminary drafts of policymaking documents, the final version of which has been released to the public. Based on your representations and our review, we find you have established the deliberative process privilege is applicable to the marked information in exhibit E and all of exhibits F and G. Accordingly, the governor's office may withhold the information you have marked in exhibit E and may withhold exhibits F and G in their entirety under section 552.111.<sup>5</sup>

Time Warner raises section 552.111 for its responsive information in exhibit H and argues it shares a privity of interest with TTRC and the governor's office with regard to the pending legislation. We note section 552.111 protects the interests of a governmental body, as distinguished from exceptions intended to protect the interests of third parties. *See* Open Records Decision No. 522 (1989) (discretionary exceptions generally). Therefore, because the governor's office did not submit any argument in support of withholding exhibit H pursuant to section 552.111, the governor's office may not withhold any portion of exhibit H under section 552.111 of the Government Code.

In summary, you may withhold exhibit D under section 552.107(1) of the Government Code. You may withhold the information you have marked in exhibit E and the entirety of exhibits

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<sup>5</sup>As our ruling is dispositive, we do not address your remaining argument to withhold exhibit F under section 552.106 of the Government Code.

F and G under section 552.111 of the Government Code. The remaining responsive 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](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,



Jessica Marsh  
Assistant Attorney General  
Open Records Division

JM/em

Ref: ID# 449312

Enc. Submitted documents

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