



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 1, 2012

Ms. Donna L. Johnson
Counsel for Harris County
Olson & Olson, L.L.P.
2727 Allen Parkway, Suite 600
Houston, Texas 77019

OR2012-12016

Dear Ms. Johnson:

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# 460503 (C. A. File No. 12PIA0247).

The Harris County Attorney's Office (the "county attorney's office"), which you represent, received a request for all e-mails to or from a named individual during a specified time period. You state you are releasing some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.103, 552.104, 552.106, 552.107, 552.111, 552.116, 552.117, 552.136, and 552.137 of the Government Code.¹ We have considered the exception you claim and reviewed the submitted representative sample of information.²

¹Although you also raise Texas Rule of Evidence 503, the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107 of the Government Code. *See* Open Records Decision No. 676 at 1-2 (2002). Further, although you also 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.

²We assume the "representative sample" of information 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.

Initially, we must address the county attorney's office's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b) of the Government Code, a governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(b). You state the county attorney's office received the request for information on May 9, 2012. Accordingly, the county attorney's office's ten-business-day deadline was May 23, 2012. While the county attorney's office raised sections 552.103, 552.106, 552.107, 552.111, 552.116, 552.117, 552.136, and 552.137 within the ten-business-day time period as required by subsection 552.301(b), the county attorney's office did not raise section 552.104 until May 31, 2012. Consequently, we find the county attorney's office failed to comply with the requirements of section 552.301 with respect to its claim under section 552.104 of the Government Code.

Generally, a governmental body's failure to comply with section 552.301 results in the waiver of its claims under the exceptions at issue, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). You assert portions of the submitted information are excepted under section 552.104 of the Government Code. This section, however, is discretionary in nature. It serves only to protect a governmental body's interests, and may be waived; as such, it does not constitute a compelling reason to withhold information for purposes of section 552.302. *See also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (waiver of discretionary exceptions). Consequently, the county attorney's office may not withhold any of the information at issue under section 552.104 of the Government Code. However, we will consider your timely raised claims under sections 552.103, 552.106, 552.107, 552.111, 552.116, 552.117, 552.136, and 552.137 of the Government Code.

You claim some of the submitted information is excepted by section 552.107(1) of the Government Code, which 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. ORD 676 at 6-7. 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). 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, 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 the information you have marked consists of communications among attorneys, outside counsel, and employees of the county attorney’s office made in furtherance of the rendition of professional legal services to the county attorney’s office. You also state the communications were made in confidence and that 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. Accordingly, the county attorney’s office may withhold the information you have marked under section 552.107(1) of the Government Code.³

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 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

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

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). Further, 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 contend some of the remaining information consists of advice, opinion, deliberations, and recommendations on policymaking matter concerning the county attorney's office. Based on your representations and our review, we find the information we have marked constitutes policymaking advice, opinion, and recommendation. As such, the county attorney's office may withhold the information we have marked under section 552.111 of the Government Code on the basis of the deliberative process privilege.⁴ However, we find the remaining information consists of either general administrative information that does not relate to policymaking or information that is purely factual in nature. Thus, you have failed to demonstrate how this information is excepted under section 552.111. Accordingly, we find none of the remaining information may be withheld on this basis.

You assert some of the remaining information is excepted by section 552.106 of the Government Code. This section excepts from disclosure "[a] draft or working paper involved in the preparation of proposed legislation." Gov't Code § 552.106(a). Section 552.106 resembles section 552.111 in that both exceptions protect advice, opinion, and recommendation on policy matters, in order to encourage frank discussion during the policymaking process. *See* Open Records Decision No. 460 at 3 (1987). However, section 552.106 applies specifically to the legislative process and thus is narrower than section 552.111. *Id.* The purpose of section 552.106(a) is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body; therefore, this section is applicable only to the policy judgments, recommendations, and proposals of persons who are involved in the preparation of proposed legislation and who have an official responsibility to provide such information to members of the legislative body. *See* Open Records Decision Nos. 460 at 1-2, 367 (1983) (statutory

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

predecessor applied to recommendations of executive committee of State Board of Public Accountancy for possible amendments to Public Accountancy Act); *see also* Open Records Decision No. 429 at 5 (1985) (statutory predecessor to section 552.106 not applicable to information relating to governmental entity's efforts to persuade other governmental entities to enact particular ordinances). Section 552.106 protects only policy judgments, advice, opinions, and recommendations involved in the preparation or evaluation of proposed legislation; it does not except purely factual information from public disclosure. *See* ORD 460 at 2.

In this instance, you generally assert some of the remaining information is excepted from disclosure under section 552.106. However, you have not demonstrated how the remaining information constitutes a draft or working paper involved in the preparation of proposed legislation. Therefore, we conclude the county attorney's office may not withhold any of the remaining information under section 552.106.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former official or employee of a governmental body who timely requests this information be kept confidential under section 552.024. Gov't Code § 552.117(a)(1). Upon review, we find no portion of the remaining information constitutes the home address and telephone number, emergency contact information, social security number, or family member information of a current or former official or employee of the county attorney's office. Accordingly, none of the remaining information may be withheld under section 552.117(a)(1) of the Government Code.

Section 552.136(b) of the Government Code states that "[n]otwithstanding any other provision of [the Act], 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); *see id.* § 552.136(a) (defining "access device"). Therefore, the county attorney's office must withhold the information we have marked pursuant to section 552.136 of the Government Code. However, the county attorney's office has not explained, and we cannot discern, how any of the remaining information consists of a credit card, debit card, or charge card number, or can be used to obtain money, goods, services, or another thing of value or initiate a transfer of funds. Thus, we find none of the remaining information may be withheld under section 552.136 of the Government Code.

Section 552.137 of the Government Code 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). The e-mail address we have marked is not a type specifically excluded by section 552.137(c). Accordingly, the county attorney's office must withhold this e-mail address under

section 552.137 of the Government Code, unless the owner of the e-mail address has affirmatively consent to its release under section 552.137(b).⁵

In summary, the county attorney's office may withhold the information you have marked under section 552.107(1) of the Government Code and the information we have marked under section 552.111 of the Government Code. The county attorney's office must withhold the information we have marked pursuant to section 552.136 of the Government Code and the e-mail address we have marked under section 552.137 of the Government Code, unless the owner of the e-mail address has affirmatively consent to its release under section 552.137(b). The county attorney's office 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.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,



Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/som

Ref: ID# 460503

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁵We 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.