



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 13, 2012

Mr. Robert Martinez  
Director  
Environmental Law Division  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

OR2012-14599

Dear Mr. Martinez:

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# 464886 (TCEQ PIR No. 12.06.22.03).

The Texas Commission on Environmental Quality (the "commission") received a request for information pertaining to the consideration of the need for a watermaster to manage water rights in the Brazos River Basin.<sup>1</sup> You state you will make some information available to the requestor. You claim some of the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

Initially, we note the commission has redacted portions of the submitted information. You assert this information is unrelated to the Brazos River Basin, and is therefore not responsive to the request. This ruling does not address the public availability of any information that

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<sup>1</sup>We note the commission sought and received clarification of the information requested. See Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request).

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

is not responsive to the request and the commission is not required to release such information in response to this request.

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). 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, orig. proceeding). 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 inform us the information you seek to withhold under section 552.107(1) of the Government Code consists of communications between a commission attorney and commission employees that were made for the purpose of rendering professional legal services to the commission. You state the communications have not been released to third parties, and the privilege has not been waived. Based on your representations and our review, we find the commission has demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the commission may withhold the information you have marked under section 552.107(1) of the Government Code.<sup>3</sup>

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

Section 552.111 of the Government Code excepts from disclosure “[a]n 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 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 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).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *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).

This office has also concluded a preliminary draft of a document that is 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 state portions of the remaining information include deliberative drafts as well as communications to commission management regarding developing policies pertaining to the need for or appointment of a watermaster for the Brazos River Basin. However, you do not inform us whether the draft policymaking documents, which you have marked, will be

released to the public in their final form. Thus, to the extent the marked draft documents will be released to the public in their final form, the commission may withhold the marked draft documents in their entirety under section 552.111 of the Government Code. If the submitted draft documents will not be released to the public in their final form, then the commission may not withhold them in their entirety under section 552.111 of the Government Code. To the extent the draft documents will not be released in final form, we note portions of the draft documents consist of advice, opinions, or recommendations relating to policymaking. Further, portions of the remaining information consists of advice, opinions, and recommendations related to policymaking. Thus, the information we have marked may be withheld under section 552.111 of the Government Code. However, we find the remaining information at issue consists of either administrative matters or information that is purely factual in nature. Therefore, you have failed to demonstrate how the deliberative process privilege applies to the information at issue. Consequently, the commission may not withhold any of the remaining information at issue 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.<sup>4</sup> Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, emergency contact information, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). Section 552.117 is also applicable to cellular telephone numbers, provided the cellular telephone 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 item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Therefore, if the individual whose cellular telephone number we have marked timely requested confidentiality under section 552.024 and pays for the cellular telephone service with his own funds, the commission must withhold the marked information under section 552.117(a)(1) of the Government Code. If the individual whose information is at issue did not make a timely election under section 552.024 or does not pay for the cellular telephone service with his own funds, the commission may not withhold the information at issue under section 552.117(a)(1) of the Government Code.

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

In summary, the commission may withhold the information it has marked under section 552.107(1) of the Government Code. To the extent the draft documents will be released in final form, the commission may withhold them in their entireties under section 552.111 of the Government Code. If the draft documents will not be released in their final form, the commission may withhold the information we marked within the drafts under section 552.111. Additionally, the commission may withhold the remaining information we have marked under section 552.111 of the Government Code. To the extent the individual whose cellular telephone number we have marked timely requested confidentiality under section 552.024 and pays for the cellular telephone service with his own funds, the commission must withhold the marked information under section 552.117(a)(1) of the Government Code. The commission 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](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,



Cynthia G. Tynan  
Assistant Attorney General  
Open Records Division

CGT/akg

Ref: ID# 464886

Enc. Submitted documents

c: Requestor  
(w/o enclosures)