



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 17, 2012

Mr. Milton B. Lee II
Vice-Chair
Texas Low-Level Radioactive Waste Disposal Compact Commission
3616 Far West Boulevard, Suite 117, #294
Austin, Texas 78731

OR2012-16596

Dear Mr. Lee:

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# 468093.

The Texas Low Level Radioactive Waste Disposal Compact Commission (the "commission") received two requests from different requestors for information pertaining to (1) certain commission hearings and meetings; (2) any issues addressed by the commission since its last meeting; (3) documents discussed or altered related to the commission and a specified facility during a specified period of time; and (4) the issues discussed at a specified meeting. You state the commission is releasing some of the requested information to the requestors. You claim the submitted information is excepted from disclosure under sections 552.106, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note portions of the submitted information, which we have marked, are not responsive to the instant requests because they were created after the requests were received by the commission. This ruling does not address the public availability of the information

¹We 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 those submitted to this office.

that is not responsive to the request, and the commission is not required to release this information in response to these requests.

You assert Attachment D is protected under section 552.106 of the Government Code, which excepts from disclosure “[a] draft or working paper involved in the preparation of proposed legislation[.]” Gov’t Code § 552.106(a). Section 552.106 protects advice, opinion, and recommendation on policy matters in order to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body. *See* Open Records Decision No. 460 at 3 (1987). Therefore, section 552.106 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. *Id.* at 1. Section 552.106 does not protect purely factual information from public disclosure. *See id.* at 2; *see also* Open Records Decision No. 344 at 3-4 (1982) (for purposes of statutory predecessor, factual information prepared by State Property Tax Board did not reflect policy judgments, recommendations, or proposals concerning drafting of legislation). However, a comparison or analysis of factual information prepared to support proposed legislation is within the scope of section 552.106. ORD 460 at 2. Having considered your arguments and reviewed the information at issue, we conclude the commission may withhold the information we have marked under section 552.106. However, we find you have failed to demonstrate the remaining information at issue constitutes advice, opinion, recommendation, and analysis regarding proposed legislation. Therefore, the commission may not withhold any of the remaining information at issue under section 552.106 of the Government Code.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* Gov’t Code § 552.107. 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 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. 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. *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 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 Attachment E consists of confidential communications between or among clients, client representatives, lawyers, and lawyer representatives. You inform us the communications at issue were made for the purpose of facilitating the rendition of professional legal services to the commission. Further, you state these communications were not intended to be, and have not been, disclosed to third persons other than those to whom disclosure was made in furtherance of the rendition of legal services. Based on your representations and our review, we find Attachment E consists of privileged attorney-client communications and the commission may withhold this information under section 552.107(1) of the Government Code.

You assert Attachment F is excepted from disclosure under section 552.111 of the Government Code, which 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); *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 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 state Attachment F contains advice, opinions, or recommendations on policymaking matters of the commission. Based on this representation and our review of the information at issue, we find the commission has demonstrated portions of the responsive information at issue, which we have marked, consist of advice, opinions, or recommendations on policymaking matters. Thus, the commission may withhold the information we have marked in Attachment F under section 552.111 of the Government Code. However, we find the remaining responsive information is general administrative or purely factual information, or does not relate to the policymaking functions of the commission. Thus, we find you have failed to show how the remaining responsive information consists of advice, opinions, or recommendations on the policymaking matters of the commission and it may not be withheld under section 552.111 of the Government Code.

The remaining responsive information contains e-mail addresses that are subject to section 552.137 of the Government Code.² Section 552.137 provides, "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). Accordingly, the commission must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their release.

In summary, the commission may withhold the information we have marked in Attachment D under section 552.106 of the Government Code. The commission may withhold Attachment E under section 552.107(1) of the Government Code and the responsive information we have marked in Attachment F under section 552.111 of the Government Code. The commission must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their release. The commission must release the remaining responsive information.

²The 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 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,

A handwritten signature in black ink, appearing to read "Michelle R. Garza". The signature is fluid and cursive, with a large initial "M" and "G".

Michelle R. Garza
Assistant Attorney General
Open Records Division

MRG/som

Ref: ID# 468093

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)