



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 5, 2014

Ms. Evelyn W. Kimeu
Staff Attorney
Houston Police Department
1200 Travis
Houston, Texas 77002-6000

OR2014-13605

Dear Ms. Kimeu:

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# 531633 (Houston PD ORU No. 14-3162).

The Houston Police Department (the "department") received a request for information for a specified time period pertaining to department research involving eyewitness identification and eyewitness identification policies, including changes to those policies through legislation. You state the department will release some of the requested information. You claim 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. We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing interested party may submit written comments regarding why information should or should not be released).

Initially, we address the requestor's assertion the information the department submitted as a representative sample of information is not representative of the whole of the information requested. Additionally, the requestor objects to the department's submission of a representative sample of the requested information because the requestor does not seek repetitive documents. We note, in requesting a decision from this office, a governmental body may submit to this office a representative sample of information rather than submitting all the requested records. *See id.* § 552.301(e)(1)(D). In doing so, it is the governmental

body's burden to assure that the 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). Whether the department has additional information it seeks to withhold that it has not provided is a question of fact. This office is unable to resolve disputes of fact in the open records ruling process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where fact issues are not resolvable as a matter of law, we must rely upon the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernable from the documents submitted for our inspection. *See* Open Records Decision No. 522 at 4 (1990). Accordingly, we must accept the department's representation the information submitted to this office is truly representative of the information for which the department seeks a ruling as a whole. *See* ORDs 499, 497. 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 that submitted to our office. *See* Gov't Code §§ 552.301(e)(1)(D), .302; ORDs 499 at 6, 497 at 4.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). 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 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). 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 to only 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 to only 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 Exhibit 2 consists of communications between department attorneys, department personnel, and outside consultants hired by the department, and the communications were made for the purpose of providing legal services to the department. The requestor asserts the department has waived the attorney-client privilege because department officials and consultants hired by the department have publicly discussed certain issues related to the information at issue. Whether or not the department waived the attorney-client privilege is a question of fact. As noted above, this office is unable to resolve disputes of fact in the open records ruling process. *See* ORDs 592 at 2, 552 at 4, 435 at 4. Additionally, as previously discussed, we must rely upon the facts alleged to us by the governmental body, or upon those facts that are discernable from the documents submitted for our inspection. *See* ORD 522 at 4. In this instance, the department states the communications between department attorneys, department personnel, and outside consultants hired by the department were not intended to be disclosed and they have remained confidential. Based on these representations and our review, we conclude the department may generally withhold Exhibit 2 under section 552.107(1) of the Government Code. We note, however, some of the e-mail strings at issue include e-mails and attachments sent to or received by parties you have not explained are privileged for the purposes of the communications in Exhibit 2. Furthermore, if the e-mails and attachments received from or sent to the non-privileged parties are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, if the non-privileged e-mails and attachments, which we have marked, are maintained by the department separate and apart from the otherwise privileged e-mail strings in which they appear, then the department may not withhold the non-privileged e-mails or attachments under section 552.107(1).

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. 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, writ ref’d n.r.e.); 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. 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). When determining if an interagency memorandum is excepted from disclosure under section 552.111, we must consider whether the agencies between which the memorandum is passed share a privity of interest or common deliberative process with regard to the policy matter at issue. *See* Open Records Decision No. 561 at 9 (1990).

Section 552.111 can also encompass communications between a governmental body and a third party, including a consultant or other party with a privity of interest. *See id.* (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See id.* We note a governmental body does not have a privity of interest or common deliberative process with a private party with which the governmental body is engaged in contract negotiations. *See id.* (section 552.111 not applicable to communication with entity with which governmental body has no privity of interest or common deliberative process).

This office also has concluded a preliminary draft of a document that has been or 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 raise the deliberative process privilege for the information in Exhibits 3 through 6 and explain the information at issue consists of communications and notes of communications between department personnel and outside consultants hired by the department. Additionally, you explain some of the communications in Exhibit 6 involve other law enforcement agencies, the Texas Police Chiefs Association, and the Law Enforcement Management Institute of Texas, with whom you assert the department shares a common deliberative process in relation to the collaboration regarding certain legislation affecting Texas law enforcement agencies. You also contend some of the information at issue consists of drafts of policymaking documents pertaining to a certain study conducted by the department and its consultants. You state the department will release some of the drafts at issue to the public in their final form. Upon review, we find the information we have marked constitutes drafts of policymaking documents. Accordingly, to the extent they will be released in their final form, the department may withhold the draft policymaking documents we have marked in their entireties under section 552.111. However, to the extent these draft policymaking documents will not be released in their final form, the department may not withhold them on that basis. We agree portions of the remaining information, which we have marked, constitute policymaking advice, opinion, and recommendation. As such, the department may withhold the information we have marked under section 552.111 on the basis of the deliberative process privilege. However, we find some of the remaining communications either involve individuals with whom you have not demonstrated the department shares a privity of interest or common deliberative process or involve an individual discussing contract negotiations between the department and third parties. As such, there is no privity of interest or common deliberative process between these individuals and the department. Additionally, 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.

We note some of the remaining information may be subject to sections 552.117 and 552.1175 of the Government Code.¹ Section 552.117(a)(2) applies to records a governmental body holds in an employment capacity and excepts from public disclosure the current and former home addresses and telephone numbers, emergency contact information, social security number, and family member information of a peace officer, regardless of whether the peace officer made an election under section 552.024 or section 552.1175 of the Government Code to keep such information confidential. Gov't Code § 552.117(a)(2).

¹The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Section 552.117(a)(2) protects a peace officer's personal cellular telephone number if the cellular telephone service is not paid for by a governmental body. Open Records Decision No. 670 at 6 (2001); *cf.* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to section 552.117 of the Government Code not applicable to numbers for cellular mobile phones installed in county officials' and employees' private vehicles and intended for official business). Accordingly, if the individuals whose information we have marked are still licensed peace officers and the cellular telephone service is not paid for by a governmental body, the department must withhold the cellular telephone numbers we have marked under section 552.117(a)(2).

Section 552.1175 of the Government Code protects the home address, home telephone number, emergency contact information, date of birth, social security number, and family member information of certain individuals when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information confidential. Gov't Code § 552.1175. Section 552.1175 applies, in part, to "peace officers as defined by Article 2.12, Code of Criminal Procedure[.]" *Id.* § 552.1175(a)(1). Section 552.1175 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* ORD 506 at 5-6. Some of the remaining information pertains to peace officers not employed by the department. Thus, to the extent the cellular telephone numbers we have marked are not paid for by a governmental body and they belong to currently licensed peace officers who elect to restrict access to their information in accordance with section 552.1175(b), the department must withhold the information we have marked under section 552.1175.

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). Gov't Code § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, or an e-mail address maintained by a governmental entity for one of its officials or employees. The e-mail addresses we have marked are not of the types specifically excluded by section 552.137(c). Accordingly, the department must withhold the e-mail addresses we have marked under section 552.137 unless the owners of the addresses affirmatively consent to their release.

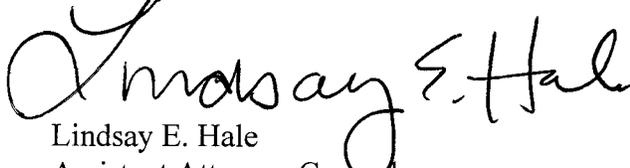
In summary, the department may withhold Exhibit 2 under section 552.107(1) of the Government Code. However, if the e-mails and attachments we have marked are maintained by the department separate and apart from the otherwise privileged e-mail strings in which they appear, then the department may not withhold the non-privileged e-mails or attachments under section 552.107(1). To the extent they will be released in their final form, the department may withhold the draft policymaking documents we have marked in their

entireties under section 552.111 of the Government Code. The department may also withhold the additional information we have marked under section 552.111 of the Government Code. If the individuals whose information we have marked are still licensed peace officers and the cellular telephone service is not paid for by a governmental body, the department must withhold the cellular telephone numbers we have marked under section 552.117(a)(2) of the Government Code. To the extent the cellular telephone numbers we have marked are not paid for by a governmental body and they belong to currently licensed peace officers who elect to restrict access to their information in accordance with section 552.1175(b) of the Government Code, the department must withhold the information we have marked under section 552.1175 of the Government Code. The department must withhold the e-mail addresses we have marked under section 552.137 of the Government Code unless the owners of the addresses affirmatively consent to their release. 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.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/akg

Ref: ID# 531633

Enc. Submitted documents

c: Requestor
(w/o enclosures)