



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 13, 2014

Ms. June Harden
Assistant Attorney General
Assistant Public Information Coordinator
General Counsel Division
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2014-14185

Dear Ms. Harden:

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# 532713 (OAG PIR Nos. 14-38997 and 14-39146).

The Office of the Attorney General (the "OAG") received (1) a request for all documents and communications regarding a specified agreement; and (2) a second request from a different requestor for all correspondence for a specified time period "by or to" any staff member of the Office of the Governor regarding a specified payment, excluding information sealed by a court. You state the OAG will release some of the requested information to each of the requestors. Additionally, you state the OAG will redact certain information pursuant to Open Records Decision No. 684 (2009),¹ and Open Records Letter No. 2011-18124 (2011).² You claim the submitted information is excepted from disclosure under sections 552.107

¹Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold specific categories of information without the necessity of requesting an attorney general decision, including an e-mail address of a member of the public under section 552.137 of the Government Code.

²In Open Records Letter No. 2011-18124 this office issued the OAG a previous determination authorizing it to withhold an employee's user ID under section 552.139 of the Government Code without the necessity of requesting a decision from this office.

and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

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 some of the information you have marked consists of communications between OAG attorneys, OAG personnel, and representatives of the OAG's client agencies. You state the remaining information you have marked consists of handwritten notes by OAG attorneys

³This letter ruling assumes the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent the other information is substantially different than that submitted to this office. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

documenting communications and meetings between OAG attorneys and representatives of the OAG's client agencies. You explain these communications were made for the purpose of providing legal services to the OAG and its client agencies. Additionally, you state the communications were not intended to be disclosed and they have remained confidential. Thus, the OAG may generally withhold the information you have marked under section 552.107(1) of the Government Code. We note, however, one of the e-mail strings at issue includes an attachment and e-mail received from parties you have not identified. Furthermore, if the attachment and e-mail received from non-privileged parties are removed from the e-mail string and stand alone, they are responsive to the requests for information. Therefore, if the non-privileged attachment and e-mail, which we have marked, are maintained by the OAG separate and apart from the otherwise privileged e-mail string in which they appear, then the OAG may not withhold the non-privileged attachment or e-mail under section 552.107(1) and they must be released.

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).

You contend the information you have marked consists of the notes of an attorney for the OAG that constitute advice, opinion, and recommendation relating to policy matters of the OAG and its client agencies. Based on your representations and upon our review, we find the information you have marked constitutes policymaking advice, opinion, and recommendation. As such, the OAG may withhold the information you have marked under section 552.111 of the Government Code on the basis of the deliberative process privilege.

In summary, the OAG may generally withhold the information you have marked under section 552.107(1) of the Government Code. However, if the attachment and e-mail we have marked are maintained by the OAG separate and apart from the otherwise privileged e-mail string in which they appear, then, the OAG must release the marked non-privileged attachment and e-mail. The OAG may withhold the information you have marked under section 552.111 of the Government Code.

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# 532713

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)