



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 24, 2016

Ms. Jessica Vu
Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2016-19153

Dear Ms. Vu:

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# 623807 (OOG IDs# 16-173 & 16-178)).

The Office of the Governor (the "OOG") received a request for all information pertaining to multiple named individuals or a specified company during a specified time period. Additionally, the OOG received a second request from a different requestor for all information pertaining to the same named individuals or the same specified company. You state you will release some information. You also state you redacted some information under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).¹ You inform us you will rely on Open Records Letter No. 2015-25580 (2015) and withhold or release some of the requested information in accordance with this ruling. *See* Open Records Decision No. 673 at 6-7 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes information is or is not excepted from disclosure). You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. You state you notified the Office of the Attorney General (the "OAG") of the request

¹Open Records Decision No. 684 serves as a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. *See* ORD 684.

for information pursuant to section 552.304 of the Government Code. *See* Gov't Code § 552.304 (interested third party may submit comments stating why information should or should not be released). We have received comments from the OAG claiming section 552.107 of the Government Code. We have considered the claimed exceptions and reviewed the submitted information.

Initially, we note the first requestor seeks only the communications pertaining to the named individuals and specified company during a specified time period. You have submitted documents that do not pertain to the specified time period. Thus, any additional information the OOG has submitted is not responsive to the first request. The OOG need not release non-responsive information to the first requestor.

Section 552.107(1) of the Government Code protects information coming 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. 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 "to facilitate 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 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: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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 the information you have marked constitutes communications between OOG attorneys and staff in their capacity as clients that were made for the purpose of providing

professional legal services to the OOG. You also state the communications were intended to be confidential and have remained confidential. Based on these representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the OOG may withhold the information you have marked under section 552.107(1) of the Government Code.

The OAG states Exhibit C constitutes communications between OAG attorneys and staff that were made for the purpose of providing professional legal services to the State of Texas. Additionally, the OAG informs us that the information at issue was determined to be privileged in the possession of the OAG in Open Records Letter No. 2016-10415 (2016). The OAG also informs us that, although Exhibit C was previously released by a former OAG employee, the release of the information at issue was unauthorized and against the wishes and policy of the OAG. Section 552.007 of the Government Code provides that if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989). However, we note a governmental body is not precluded from invoking an exception to further public disclosure of information that has been released through no official action and against the wishes and policy of the governmental body. *See* Open Records Decision No. 376 at 2 (1983); *see also* Open Records Decision No. 387 at 3 (1983) (information that is not voluntarily released by a governmental body, but nevertheless comes into another party's possession, is not henceforth automatically available to everyone). Because the OAG states it did not voluntarily release the information at issue, we conclude the OAG did not waive its claim under section 552.107(1) of the Government Code. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). Based on these representations and our review, we find the OAG has demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the OOG may withhold Exhibit C under section 552.107(1) on behalf of the OAG.²

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the OOG must withhold the information we have

²As our ruling is dispositive for this information, we need not consider the OOG's remaining argument against its disclosure.

marked under section 552.101 on the basis of common-law privacy. However, we find you have failed to establish the remaining information is highly intimate or embarrassing and of no legitimate public interest. Therefore, no portion of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy.

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, writ ref’d n.r.e.); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615 (1993), 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 that 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). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5. 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 assert the information at issue consists of advice, opinions, and recommendations relating to the policymaking matters of the OOG. Based on this representation and our review, we find you have demonstrated the information you have marked consists of advice, opinions, or recommendations on the policymaking matters of the OOG. Accordingly, the OOG may withhold the information you have marked under section 552.111 of the Government Code.

Although you state you redacted some personal e-mail addresses subject to section 552.137 of the Government Code pursuant to Open Records Decision No. 684, we note the remaining information includes an unredacted e-mail address of a member of the public that is subject to section 552.137. Section 552.137 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). The e-mail address we have marked is not one of the types specifically excluded by section 552.137(c). *See id.* § 552.137(c). Accordingly, the OOG must withhold the e-mail address we have marked under section 552.137 unless the owner of the address affirmatively consents to its release.

In summary, the OOG may withhold the information you have marked, in addition to Exhibit C, under section 552.107(1) of the Government Code. The OOG must withhold the information we have marked under section 552.101 of the Government Code on the basis of common-law privacy. The OOG may withhold the information you have marked under section 552.111 of the Government Code. The OOG must withhold the e-mail address we have marked under section 552.137 of the Government Code unless the owner of the address affirmatively consents to its release. The OOG 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,



Cole Hutchison
Assistant Attorney General
Open Records Division

CH/bhf

Ref: ID# 623807

Enc. Submitted documents

c: Requestor
(w/o enclosures)