



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

August 22, 2006

Ms. Peggy D. Rudd
Director and Librarian
Texas State Library and Archives Commission
P. O. Box 12927
Austin, Texas 78711-2927

OR2006-09668

Dear Ms. Rudd:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Public Information Act (the "Act"). Your request was assigned ID# 256009.

The State Library and Archives Commission (the "commission") received a request to review specific documents from former Texas Governor George W. Bush's records that are held by the commission. You state that the requestor has agreed to the redaction of some of the responsive information. You further inform us that this office has previously addressed the public availability of some of the responsive information in Open Records Letter Nos. 2004-06882 (2004), 2004-09502 (2004), 2004-10799 (2004), 2005-08230 (2005), and 2005-10147 (2005), and that, because the circumstances surrounding the issuance of those rulings have not changed, the commission is withholding or releasing that information in accordance with the previous letter rulings.¹ You state that staff for the governor's office reviewed the responsive documents and seeks to withhold a portion of the requested

¹The four criteria for this type of "previous determination" are 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code; 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the attorney general's prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and 4) the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling. *See* Open Records Decision No. 673 (2001).

information under sections 552.106, 552.107, and 552.111 of the Government Code. You state that the Department of Criminal Justice (the “department”) has also reviewed the responsive documents and seeks to withhold a portion of the requested information under sections 552.101, 552.111, and 552.134 of the Government Code. We have considered the exceptions claimed and reviewed the submitted information.

We will begin by addressing the documents reviewed by the governor’s office. 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 “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 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.² TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). 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.* 503(b)(1), 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, no writ). 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

²Specifically, the privilege applies only to confidential communications between the client or a representative of the client and the client’s lawyer or a representative of the lawyer; between the lawyer and the lawyer’s representative; by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein; between representatives of the client or between the client and a representative of the client; or among lawyers and their representatives representing the same client. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E); *see also id.* 503(a)(2), (a)(4) (defining “representative of the client,” “representative of the lawyer”).

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).

We understand the governor's office to assert that some of the submitted documents are communications between and among its staff and staff representatives, its attorneys, and representatives of other state agencies that were made in furtherance of the rendition of legal services to the former governor.³ These documents were not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of legal services. Based on this representation and our review of the submitted documents, we find that the commission may withhold some of the submitted information that was reviewed by the governor's office, which we have marked, as attorney-client privileged information that is excepted under section 552.107 of the Government Code. However, we find that the governor's office has neither asserted nor demonstrated that any of the remaining records are attorney-client privileged communications and, as such, the remaining information may not be withheld on this basis.

Section 552.106 of the Government Code excepts from disclosure "[a] draft or working paper involved in the preparation of proposed legislation" and "[a]n internal bill analysis or working paper prepared by the governor's office for the purpose of evaluating proposed legislation." Section 552.106 ordinarily applies only to persons with a responsibility to prepare information and proposals for a legislative body. Open Records Decision No. 460 (1987). The purpose of section 552.106 is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body, and therefore, it does not except from disclosure purely factual information. *Id.* at 2. Upon review, we find that the governor's office has not established that any of the submitted information is excepted from disclosure under section 552.106. Accordingly, none of the submitted information may be withheld on this basis.

Section 552.111 of the Government Code, which excepts from public disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." The purpose of this exception 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 (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 only those internal communications that consist of

³See Tex. R. Evid. 503(a)(2) (defining "representative of the client" as person having authority to obtain legal services or to act on legal advice on behalf of client, or person who for purpose of effectuating legal representation makes or receives a confidential communication while acting in scope of employment for client).

advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* Open Records Decision No. 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. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (Gov't Code § 552.111 not applicable to personnel-related communications that did not involve policymaking). Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* Open Records Decision No. 615 at 5. If, however, the 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 may also 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 applies not only to a governmental body's internal memoranda, but also to memoranda prepared for a governmental body by its outside consultant. *Open Records Decision Nos. 462 at 14 (1987), 298 at 2 (1981).*

Some of the submitted information consists of advice, opinions, and recommendations that reflect the policymaking processes of the governor's office and other governmental bodies with whom the governor's office shared a privity of interest. We have marked the information that is excepted from disclosure under section 552.111. However, the remaining information submitted by the governor's office consists of facts and written observations of facts and events that are severable from advice, opinions, and recommendations. Accordingly, this information may not be withheld under section 552.111.

Regarding the department's arguments under section 552.111, the submitted information includes a document that reflects the department's deliberations on policymaking issues such as pending legislation that would effect the department directly. The department states that it shared a privity of interest with the governor's office with regard to the policy matters addressed in this document. For these reasons, we conclude that the information we have marked may be withheld from disclosure under section 552.111. We find that the remaining information marked by the department as excepted under this provision does not consist of advice, opinion, and recommendations excepted from disclosure under section 552.111 and, as such, it may not be withheld on this basis.

We next address the public availability of the remainder of the documents reviewed by the department. The department contends that section 552.134 of the Government Code excepts

some of the submitted information from disclosure. Section 552.134 provides in relevant part:

(a) Except as provided by Subsection (b) or by Section 552.029, information obtained or maintained by the Texas Department of Criminal Justice is excepted from the requirements of Section 552.021 if it is information about an inmate who is confined in a facility operated by or under a contract with the department.

Gov't Code § 552.134(a). We agree that one of the submitted documents is excepted from disclosure under section 552.134. We have marked the information that may be withheld under this provision. The remainder of the information the department seeks to withhold under section 552.134 is not information maintained by the department. These are communications from the department to the governor's office that were maintained by the governor's office; they are not department documents that have been transferred to the governor's office. *See* Open Records Decision No. 667 (2000) (the department has discretion to transfer inmate's social security number made confidential by statutory predecessor to section 552.134 to voter registrar for purpose of maintaining accurate voter registration lists and transferred social security number remains confidential in possession of voter registrar). Thus, we find that the remainder of the information marked by the department as excepted under section 552.134 may not be withheld on this basis.

The department also contends that some of the submitted information is excepted from disclosure under section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section also encompasses the common law right of privacy. For information to be protected by common law privacy it must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The *Industrial Foundation* court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685.

Some of the submitted information pertains to a sexual harassment investigation. In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of the common law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual

witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released.” *Id.*

Because there is no adequate summary of the sexual harassment investigation at issue, you must release the requested information that pertains to this investigation. However, based on *Ellen*, the department must withhold the identity of the victim. We have marked the information that must be withheld on this basis.

The submitted documents also contain personal medical information that is protected under common law privacy as well. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. This office has since concluded that other types of information also are private under section 552.101. *See* Open Records Decision Nos. 659 at 4-5 (1999) (summarizing information attorney general has held to be private), 470 at 4 (1987) (illness from severe emotional job-related stress), 455 at 9 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 343 at 1-2 (1982) (references in emergency medical records to drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress). The submitted documents contain information that is considered highly intimate or embarrassing and is not of legitimate concern to the public. We have marked the personal medical information that must be withheld on this basis.

In summary, the commission may withhold the memoranda we have marked under section 552.107(1) of the Government Code. The commission may withhold the information we have marked under section 552.111 of the Government Code. The commission must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common law privacy, as well as the information we have marked under section 552.134 of the Government Code. As no other exceptions are raised for the remaining information, it must be released to the requestor.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the

governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

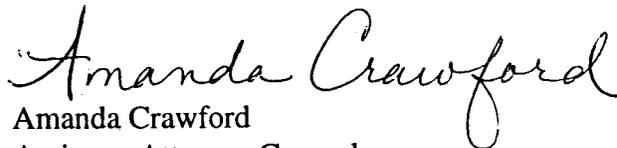
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Amanda Crawford
Assistant Attorney General
Open Records Division

AEC/krl

Ref: ID# 256009

Enc. Submitted documents

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