



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 16, 2009

Ms. Susan K. Bohn
General Counsel
Lake Travis Independent School District
3322 Ranch Road 620 South
Austin, Texas 78738

OR2009-16218

Dear Ms. Bohn:

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# 361519 (Lake Travis Request No. 082509-R581/DL 4039).

The Lake Travis Independent School District (the "district") received a request for information pertaining to a named individual's electronic communications during a specified time period. You state that some of the information will be released to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.105, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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 must provide 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). 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, 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 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). The district asserts that the documents at Tabs 4 and 5 are confidential communications between an attorney and employees of the district that were made for the purpose of rendering professional legal advice. You state that the confidentiality of these communications has been maintained. Based on these representations and our review, we agree that the information at Tabs 4 and 5 consists of privileged attorney-client communications that the district may withhold under section 552.107.

Section 552.111 of the Government Code excepts from disclosure “an 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); 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, and opinions that reflect 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. 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). Moreover, 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. However, 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). This office has also concluded that section 552.111 does not apply unless the entities between which the information is passed are shown to share a privity of interest or common deliberative process with regard to the policy matter at issue. Open Records Decision No. 561 at 9 (1990).

You state the submitted information at Tab 1 consists of an internal draft policy for the creation of an employee sick leave bank. You also state this information contains the opinions and recommendations of senior district staff and is related to broader policy issues concerning a significant employee issue. You assert that the information at issue has only been shared among the district's senior administrators, all of whom share a privity of interest in the information at issue. Based on your representations and our review, we find you have established that the deliberative process privilege is applicable to the information at Tab 1. Therefore, the district may withhold this information under section 552.111 of the Government Code.

You state the submitted information at Tab 2 is a planning document pertaining to the H1N1 virus. Although you generally state this information relates to "broader policy issues and high-level decision-making[,]" we note this document appears to consist of a schedule of tasks and events. You have failed to establish how any portion of this factual information constitutes advice, recommendations, or opinions that relate to policymaking. Accordingly, the district may not withhold any of the information in Tab 2 under the deliberative process privilege of section 552.111.

You state the submitted information at Tab 3 is a conceptual plan for the potential use of district property. However, you also state that this information was shared with "senior officials at a municipality located within the [d]istrict's boundaries." In mentioning these third parties, you do not identify the municipality or the specific officials who reviewed the conceptual plan. Further, you do not explain how the district shares a privity of interest or common deliberative process with these third parties. Therefore, you have failed to establish that the information at Tab 3 is subject to the deliberative process privilege under section 552.111 of the Government Code, and it may not be withheld on that basis.

In summary, the district may withhold the submitted information at Tabs 4 and 5 under section 552.107 of the Government Code.¹ The district may withhold the submitted

¹As our ruling is dispositive regarding the submitted information at Tab 5B, we do not address your remaining argument for that information.

information at Tab 1 under section 552.111 of the Government Code. As you raise no further exceptions, the remaining information must be released to the requestor.

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,



James McGuire
Assistant Attorney General
Open Records Division

JM/eb

Ref: ID# 361519

Enc. Submitted documents

c: Requestor
(w/o enclosures)