



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 13, 2010

Mr. Reg Hargrove
Public Information Coordinator
Office of the Attorney General
Post Office Box 12548
Austin, Texas 78711-2548

OR2010-05219

Dear Mr. Hargrove:

You ask whether certain information is subject to required public disclosure under the Texas Public Information Act ("PIA" or "Act"), chapter 552 of the Government Code. This request was originally received by the Open Records Division of this office and assigned ID# 376393. Preparation of the ruling has been assigned to the Opinion Committee of this office.

The Office of the Attorney General (the "OAG") received a request for numerous specific items of information concerning personnel of the Open Records Division.¹ You state that the OAG will make most of the responsive information available to the requestor for inspection pursuant to his request. In doing so, you state that you will redact social security numbers from the submitted information pursuant to section 552.147 of the Government Code, which provides that a governmental body may redact social security numbers of living persons without requesting a decision under subchapter G of the PIA. You assert that portions of the remaining information responsive to the request are excepted from required disclosure under the PIA by sections 552.106 (deliberative process privilege related to proposed legislation), 552.107 (attorney-client privilege), and 552.111 (deliberative process privilege) of the Government Code, and you have provided representative samples of this information.²

¹You have attached the request to your letter as Exhibit A. You have also attached an email exchange between yourself and the requestor dated February 5, 2010, which sets out the requestor's agreement to "exclude specific references to ORD working files and attachments obtained directly from ORD working files" from his request.

²We assume the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Tex. Att'y Gen. ORD-499 (1988), ORD-497 (1988). This open records letter does not reach, and therefore does not authorize, the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Government Code section 552.106 excepts from public disclosure “[a] draft or working paper involved in the preparation of proposed legislation.” TEX. GOV’T CODE ANN. § 552.106 (Vernon 2004). This section protects documents concerning the deliberative processes of a governmental body relevant to the enactment of legislation. *See* Tex. Att’y Gen. ORD-429 (1985) at 5–6. Its purpose is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the legislative body. *See* Tex. Att’y Gen. ORD-460 (1987) at 2. Thus, section 552.106(a) applies only to the policy judgments, recommendations, and proposals of persons who are involved in preparing proposed legislation and who have an official responsibility to provide such communications to a legislative body. *See id.* at 1. The representative sample you have marked consists of opinion and advice about proposed amendments to the PIA communicated by the chief of the Open Records Division to a legislative staff member. *See generally* Tex. Att’y Gen. ORD-367 (1983) at 2 (concluding that the predecessor of section 552.106 applies to recommendations on amending the Public Accountancy Act prepared by Texas State Board of Public Accountancy). We agree that the marked portions of the document may be withheld under Government Code section 552.106.

Government Code section 552.107(1) provides that information is excepted from required public disclosure if “it is information that the attorney general . . . is prohibited from disclosing because of a duty to the client under the Texas Rules of Evidence or the Texas Disciplinary Rules of Professional Conduct.” TEX. GOV’T CODE ANN. § 552.107(1) (Vernon Supp. 2009). This section protects information within the attorney-client privilege as set out in Texas Rule of Evidence 503. *See* Tex. Att’y Gen. ORD-676 (2002) at 4; *see also* TEX. R. EVID. 503. The governmental body claiming this exception must demonstrate (1) that the information constitutes or documents a communication; (2) that the communication has been made “for the purpose of facilitating the rendition of professional legal services to the client governmental body”; (3) that the communication was between or among clients, client representatives, lawyers, and lawyer representatives; (4) that the communication 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”; and (5) that the communication has remained confidential. Tex. Att’y Gen. ORD-676 (2002) at 5, 7–8, 10. The attorney-client privilege protects confidential communications between a client and attorney made for the purpose of facilitating the rendition of professional legal services to the client and it ordinarily extends to the entire communication, including facts contained therein. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996).

However, governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. *See* Tex. Att’y Gen. ORD-676 (2002) at 7. The attorney-client privilege does not apply if the attorney is acting in a capacity other than that of attorney. *See In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding), *mand. denied*, 12 S.W.3d 807 (Tex. 2000). The governmental body carries the burden of providing relevant facts to demonstrate the applicability of a claimed exception. *See* Tex. Att’y Gen. ORD-676 (2002) at 6–7.

We have examined the documents you wish to withhold under section 552.107. A two-page email sent by one assistant attorney general to another transmits a communication with an attorney in private practice. You do not provide information necessary to show that the attorney-client privilege applicable to the assistant attorneys general also encompasses the private attorney. Thus, we have no basis for deciding that the content of this communication is privileged. Accordingly, you must release the two-page email to the requestor.

You also claim section 552.107 protection for two emails between an assistant attorney general and a person who was an assistant attorney general at the time the emails were sent. These emails address draft forms prepared by an OAG attorney to comply with a PIA provision.³

The first of these two emails, sent on the earlier date, consists of two paragraphs. The first paragraph evaluates the utility of placing the draft forms and another document on the Internet and thus relates to rendering legal services under the Act. It is a communication between governmental attorneys in their capacity as professional legal counsel and it is made for the purpose of facilitating the rendition of professional legal services to the client governmental body. This paragraph may be withheld under section 552.107. The second paragraph states that the sender may take leave time. In this paragraph, an attorney communicates in the capacity of employee to an attorney acting in the capacity of administrator. The substance of this paragraph is an administrative matter and it does not involve the rendition of professional legal services to the client governmental body. The second paragraph of the first email accordingly may not be withheld pursuant to section 552.107.

The second email of this set addresses the technical aspects of placing on the Internet a document designed to help render legal services under the Act. After viewing it in connection with related documents you have provided, we conclude that the second email may be withheld under section 552.107.

The deliberative process privilege under Government Code section 552.111 protects from disclosure intraagency and interagency communications consisting of advice, opinion, or recommendations on policymaking matters of the governmental body. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 361, 364 (Tex. 2000). “An agency’s policymaking functions do not encompass routine internal administrative and personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues.” Tex. Att’y Gen. ORD-615 (1993) at 5. Even when an internal memorandum does relate to a governmental body’s policy functions, the deliberative process privilege excepts from disclosure only the advice, recommendations, and opinions found in that memorandum. Section 552.111 also protects the drafts of a document that has been released in final form to the public, because the draft necessarily represents advice, opinion,

³The draft forms themselves are addressed under section 552.111.

and recommendations of the drafter as to the form and content of the final document. Tex. Att’y Gen. ORD-559 (1990) at 2–3 (addressing predecessor to Government Code section 552.111). The draft must, of course, consist of advice, opinion, or recommendations on policymaking matters of the governmental body. *See City of Garland*, 22 S.W.3d at 361, 364. The privilege does not except from disclosure purely factual information that is severable from the opinion portions of the memorandum. Tex. Att’y Gen. ORD-615 (1993) at 4–5.

The documents for which you claim section 552.111 protection are preliminary drafts of forms that the PIA directs the attorney general to develop. *See* TEX. GOV’T CODE ANN. §§ 552.024(c-2), .1175(h), .138(e) (Vernon Supp. 2009). The forms are designed to implement certain PIA provisions. *See id.* The drafts comprise advice, opinion, and recommendations about these forms and thus relate to policymaking matters of the governmental body. Accordingly, they may be withheld under section 552.111. *See* Tex. Att’y Gen. ORD-547 (1990) at 1–2 (stating that preliminary documents, including draft form letters, on procedures for monitoring problems in the insurance industry, are excepted by predecessor of section 552.111 because they involve governmental policymaking).

With this letter, we are returning the documents marked as “representative samples.” We have marked these documents to show our determination as to the exception claimed in connection with them.

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,



Susan L. Garrison
Assistant Attorney General
Opinion Committee

SLG/pdr

Ref: ID# 376393

Enc. Submitted documents

c: Requestor
(w/o enclosures)