



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 6, 2012

Mr. Christopher Sterner
Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2012-03351

Dear Mr. Sterner:

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# 447109 (ORR# 707-11).

The Office of the Governor (the "governor's office") received a request for information related to the Texas Enterprise Fund contracts with Nationwide Insurance ("Nationwide") and KLN Steel Products ("KLN"), the termination of Nationwide's Texas Enterprise Fund contract, and KLN's compliance under its Texas Enterprise Fund contract.¹ You state the governor's office is withholding or releasing some of the requested information in accordance with Open Records Letter Nos. 2011-14353 (2011), 2010-07377A (2010), and 2009-06144 (2009). You also state the governor's office is releasing other requested information, but is redacting account numbers in accordance with section 552.136 of the Government Code. *See* Gov't Code § 552.136(d)-(e). You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. In addition, you inform us the governor's office has notified KLN and Nationwide of the receipt of the request for information by the governor's office and of the

¹The governor's office sought and received clarification of the information requested. *See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (if governmental entity, acting in good faith, requests clarification of unclear or over-broad request, ten-day period to request attorney general ruling is measured from date request is clarified).

right of each to submit arguments to this office as to why the requested information should not be released to the requestor. *See id.* § 552.305(d); *see also* Open Records Decision No. 542 at 3 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received correspondence from the Texas Workforce Commission (the “commission”) objecting to the release of some of the requested information. *See* Gov’t Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted information.

Section 552.101 of the Government Code exempts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. This section encompasses information protected by other statutes. The governor’s office asserts some of the submitted information in Exhibit D is confidential under section 301.081 of the Government Code. Section 301.081 governs the release of employment information held by the commission and provides in pertinent part as follows:

- (a) Each employing unit shall keep employment records containing information as prescribed by the commission and as necessary for the proper administration of this title. The records are open to inspection and may be copied by the commission or an authorized representative of the commission at any reasonable time and as often as necessary.
- (b) The commission may require from an employing unit sworn or unsworn reports regarding persons employed by the employing unit as necessary for the effective administration of this title.
- (c) Employment information thus obtained or otherwise secured may not be published and is not open to public inspection, other than to a public employee in the performance of public duties, except as the commission considers necessary for the proper administration of this title or as provided by commission rule and consistent with federal law.

Id. § 301.081(a)-(c). The governor’s office asserts the information it has marked in Exhibit D consists of employment information provided to the governor’s office by the commission pursuant to the interagency transfer doctrine, as well as information derived from the records received from the commission. Section 301.081(c) states employment information maintained by the commission may be released to a public employee in the performance of public duties. *Id.* § 301.081(c). Pursuant to the interagency transfer doctrine, records that are confidential in the hands of the originating governmental body remain confidential when transferred to another governmental body. *See* Open Records Decision Nos. 674 at 4 (2001), 667 at 4 (2000); *see also* Attorney General Opinion H-836 (1976) (governmental bodies have need to maintain unrestricted flow of information, to effectuate state policy that

governmental bodies cooperate in the efficient and economical administration of statutory duties). The commission states that the information at issue was released to the governor's office to assist that office in the execution of its official duties. Furthermore, we note that a portion of the information at issue states on its face it is subject to the confidentiality requirement of section 301.081. Accordingly, we find that the information we have marked is confidential under section 301.081 of the Labor Code in conjunction with section 552.101 of the Government Code. *See* Open Records Decision No. 599 at 4 (1992) (concluding predecessor statute to section 301.081 made confidential total number of employees of employing unit provided to commission in quarterly unemployment tax reports). We find that the governor's office has not established that the remaining information it seeks to withhold under section 301.081 is confidential under that statute.

Next, we note that the commission seeks to withhold the remaining information in Exhibit D pursuant to section 603 of title 20 of the Code of Federal Regulations, as well as under section 301.085 of the Labor Code. Pursuant to section 603.4 of title 20 of the Code of Federal Regulations, state unemployment compensation agencies, such as the commission, must protect the confidentiality of information that "reveals the name or any identifying particular about any individual or any past or present employer or employing unit, or [that] could foreseeably be combined with other publicly available information to reveal any such particulars, and must include provision for barring the disclosure of any such information[.]" 20 C.F.R. § 603.4(b). Section 301.085 of the Labor Code provides in relevant part the following:

(a) In this section:

...

(2) "Unemployment compensation information" means information in the records of the commission that pertains to the administration of Subtitle A, including any information collected, received, developed, or maintained in the administration of unemployment compensation benefits or the unemployment compensation tax system.

(b) Consistent with federal law, the commission shall adopt and enforce reasonable rules governing the confidentiality, custody, use, preservation, and disclosure of unemployment compensation information. The rules must include safeguards to protect the confidentiality of identifying information regarding any individual or any past or present employer or employing unit contained in unemployment compensation information, including any information that foreseeably could be combined with other publicly available information to reveal identifying information regarding the individual, employer, or employing unit, as applicable.

...

(c) Unemployment compensation information and job matching services information are not public information for purposes of Chapter 552, Government Code.

Lab. Code § 301.085(a)(2), (b), (c). The commission asserts the documents in Exhibit D either consist of unemployment compensation information maintained by the commission that it provided to the governor's office in accordance with sections 603.5(e) and 603.9 of title 20 of the Code of Federal Regulations or are documents that contain or discuss such information. The commission also asserts this information must be withheld in its entirety pursuant to section 301.085(c) and sections 603.5(e) and 603.9 because "the requestor asked for information regarding two named companies and so it is not possible to effectively redact identifying information." Upon review of the remaining information in Exhibit D, we note this information was not obtained by the governor's office from the commission, but instead was provided by the company involved directly to the governor's office. Thus, upon review, we find the commission has not established the remaining information in Exhibit D is subject to section 301.085 of the Labor Code or section 603.4 of title 20 of the Code of Federal Regulations, and the governor's office may not withhold it from release on any of those grounds.

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 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 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, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain 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 explain Exhibit B constitutes confidential communications between attorneys and staff of the governor’s office that were made in furtherance of the rendition of professional legal services. You also assert the communications were intended to be confidential and their confidentiality has been maintained. After reviewing your arguments and the submitted information, we agree Exhibit B constitutes privileged attorney-client communications that the governor’s office may withhold under section 552.107.²

You assert portions of Exhibit C are excepted from disclosure under section 552.111 of the Government Code, which 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.” 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*, 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. *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

²As our ruling is dispositive, we do not address the commission’s argument to withhold this information.

functions 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).

Further, 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. 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).

Having considered your arguments and representations and having reviewed the submitted information, we conclude the governor's office has established the information you have marked in Exhibit C is encompassed by the deliberative process privilege. Therefore, the governor's office may withhold the information you have marked under section 552.111 of the Government Code.

Finally, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, neither Nationwide nor KLN has submitted to this office any reasons explaining why the requested information should not be released. We thus have no basis for concluding any portion of the submitted information constitutes proprietary information of these companies, and the governor's office may not withhold any portion of the submitted information on that basis. *See* Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3.

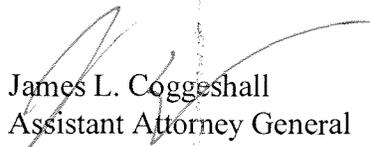
We conclude the following: the governor's office (1) must withhold the information we have marked in Exhibit D under section 552.101 of the Government Code in conjunction with section 301.081 of the Labor Code; (2) may withhold Exhibit B under section 552.107 of the Government Code and the information you have marked under section 552.111 of the Government Code; and (3) must release the remaining information.³

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.

³We note the submitted information contains social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

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 L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/ag

Ref: ID# 447109

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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(w/o enclosures)