



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 23, 2014

Mr. Michael VanderBurg
General Counsel
Legislative Budget Board
1501 North Congress Avenue
Austin, Texas 78701

OR2014-06673

Dear Mr. VanderBurg:

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# 520452.

The Legislative Budget Board (the "board") received a request for "[a]ll documents, correspondence, emails, text messages, memoranda or other writings . . . regarding the receipt, the processing, production or review of documents in response to" a specified Open Records Request served on the board on a specified date. You state you have provided some requested information to the requestor. You claim the remaining requested information is excepted from disclosure under sections 552.107, 552.111, and 552.146 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹Although you also raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision No. 676 at 1-2 (2002). Further, although you raise Texas Rule of Evidence 503, we note the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107(1) of the Government Code. *See id.*

²We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 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.

Initially, we note that some of the information you have submitted is not responsive to the request at issue. The requestor seeks information relating to a specified prior open records request. Some of the information you have submitted consists of information pertaining to other unrelated open records requests, as well as information created after the date of the instant request.³ Thus, this information, which we have marked, is not responsive to the request. This ruling does not address the public availability of that information, and the board need not release any non-responsive 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 has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. ORD 676 at 6-7. 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, this office must be informed 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, 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).

³The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990).

The board argues the information it has marked consists of confidential communications between counsel for the board and its employees. We understand the communications were made in furtherance of the rendition of professional legal services. We also understand the communications were intended to be confidential and their confidentiality has been maintained. Upon review, we find the attorney-client privilege is applicable to some of the information at issue. However, some of the communications at issue were sent to or received from parties you have not demonstrated are privileged. Therefore, we find that these communications, which we have marked, do not constitute privileged attorney-client communications and may not be withheld under section 552.107 of the Government Code. We further note some of the privileged e-mail strings include e-mails received from or sent to non-privileged parties. Furthermore, if the e-mails received from or sent to non-privileged parties are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, if these non-privileged e-mails, which we have marked, are maintained by the board separate and apart from the otherwise privileged e-mail strings in which they appear, then the board may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code.

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, 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 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).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *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).

Section 552.111 can also encompass communications between a governmental body and a third party, including a consultant or other party with a privity of interest. *See* Open Records Decision No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See* ORD 561.

You argue the remaining information at issue should be excepted from disclosure under section 552.111 of the Government Code. Upon review, we find the information at issue has been shared with parties with whom you have not demonstrated a privity of interest or common deliberative process. Accordingly, the board may not withhold any portion of the remaining information under section 552.111 of the Government Code.

Section 552.146 of the Government Code provides in relevant part:

(a) All written or otherwise recorded communications, including conversations, correspondence, and electronic communications, between a member of the legislature or the lieutenant governor and an assistant or employee of the [board] are excepted from [required public disclosure].

...

(c) This section does not except from required disclosure a record or memoranda of a communication that occurs in public during an open meeting or public hearing conducted by the [board].

Gov't Code § 552.146. You state the information you have marked under section 552.146 of the Government Code consists of communications between employees of the board and assistants to members of the legislature and the lieutenant governor. We understand the information at issue is held in confidence and does not pertain to communications that occurred in open meetings or public hearings. Upon review, we conclude the board may withhold the information you have marked under section 552.146 of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, emergency contact information, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government

Code.⁴ *Id.*; Open Records Decision No. 622 (1994). We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information.

We note the remaining information contains family member information and a cellular telephone number for a current employee of the board. Accordingly, if the individual whose information is at issue timely requested confidentiality pursuant to section 552.024, the board must withhold the information we marked under section 552.117(a)(1), including the cellular telephone number if the cellular telephone service is not paid for by a governmental body. The board may not withhold this information under section 552.117(a)(1) if the individual whose information is at issue did not make a timely election to keep the information confidential. Further, the board may not withhold the marked cellular telephone number if the cellular telephone service is paid for by a governmental body.

In summary, with the exception of the information we marked for release, the board may generally withhold the information you marked under section 552.107(1) of the Government Code. However, if the non-privileged e-mails we have marked are maintained by the board separate and apart from the otherwise privileged e-mail strings in which they appear, this information may not be withheld under section 552.107 of the Government Code. The board must withhold the information you have marked under section 552.146 of the Government Code. If the individual whose information is at issue timely requested confidentiality pursuant to section 552.024, the board must withhold the information we marked under section 552.117(a)(1) of the Government Code. However, the board may not withhold the marked cellular telephone number if the cellular telephone service is paid for by a governmental body. The remaining responsive information must be released.

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.

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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,

A handwritten signature in black ink, appearing to read "J. Behnke", with a long horizontal stroke extending to the right.

Joseph Behnke
Assistant Attorney General
Open Records Division

JB/som

Ref: ID# 520452

Enc. Submitted documents

c: Requestor
(w/o enclosures)