



January 12, 2015

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

OR2015-00557

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# 549679 (OOG ID# 333-14).

The Office of the Governor (the "governor's office") received a request for all e-mails containing the terms "Ebola", "Centers for Disease Control", or "CDC" sent during a specified time period to or from any e-mail account associated with a named governor's office employee. You indicate the governor's office is withholding e-mail addresses of members of the public under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).<sup>1</sup> You state the governor's office will provide some of the requested information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. You also state you have notified the Texas Department of State Health Services (the "department") and the United States Department of Homeland Security of the request and of their rights to submit arguments to this office as to why the requested information should not be released.<sup>2</sup> See Gov't Code § 552.304 (interested party may submit written

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<sup>1</sup>Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

<sup>2</sup>As of the date of this letter, we have not received comments from either entity.

comments regarding availability of requested information). We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>3</sup>

Initially, we note some of the requested information may have been the subject of a previous request for a ruling, in response to which this office issued Open Records Letter No. 2014-23493 (2014). We have no indication the law, facts, or circumstances on which the prior ruling was based have changed. Thus, the governor's office must continue to rely on Open Records Letter No. 2014-23493 as a previous determination, and withhold or release the requested information that is identical to the information that was at issue in that ruling in accordance with that ruling.<sup>4</sup> *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the requested information is not encompassed by the previous ruling, we will consider whether it is excepted under the Act.

Section 552.107(1) of the Government Code protects information that comes 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. *See* 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. *See* 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. *See 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 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* TEX. R. EVID.

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<sup>3</sup>We 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 those records contain substantially different types of information than that submitted to this office.

<sup>4</sup>As our ruling for this information is dispositive, we need not address your arguments against disclosure for this information.

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. *See 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 state some of the submitted information consists of communications involving attorneys for the governor’s office and governor’s office staff and officials in their capacities as clients. You also state the communications involve staff and officials from the Texas Health and Human Services Commission (the “commission”) and attorneys with the Office of the Attorney General, which you inform us are privileged parties with respect to these communications. *See In re XL Speciality Ins. Co.*, 373 S.W.3d 46, 51 (Tex. 2012) (discussing common interest rule under attorney-client privilege). You state these communications were made in furtherance of the rendition of professional legal services to the governor’s office. You state these communications were intended to be, and have remained, confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue, which you have marked. Accordingly, the governor’s office may withhold the information you marked under section 552.107(1) of the Government Code.<sup>5</sup>

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, writ ref’d n.r.e.); *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.*

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<sup>5</sup>As our ruling for this information is dispositive, we need not address your remaining argument against disclosure for this information.

*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).

This office has also concluded a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

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.

The governor's office states some of the remaining information consists of advice, opinions, and recommendations relating to policymaking of the governor's office. The governor's office also states the information at issue contains draft documents that will be released to

the public in final form. You inform us some of the information at issue was communicated with several third parties, including the commission, the department, and the Texas A&M Health Science Center, as well as consultants for the governor's office. You explain the governor's office shares a common deliberative process with these third parties. Upon review, we find the governor's office may withhold the information at issue, which you have marked, under section 552.111 of the Government Code.<sup>6</sup>

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that other statutes make confidential. You raise section 552.101 in conjunction with section 81.046 of the Health and Safety Code, which is part of the Communicable Disease Prevention and Control Act, chapter 81 of the Health and Safety Code. *See* Health & Safety Code § 81.001. Section 81.046 provides, in part:

(b) Reports, records, and information relating to cases or suspected cases of diseases or health conditions are not public information under [the Act], and may not be released or made public on subpoena or otherwise except as provided by Subsections (c), (d), and (f).

*Id.* § 81.046(b). You argue the remaining information pertains to cases of Ebola. Upon review, we agree section 81.046(b) governs the release of some of the information, which we have marked. We have no indication any of the release provisions of section 81.046 are applicable to the submitted information. Accordingly, the governor's office must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 81.046(b) of the Health and Safety Code.<sup>7</sup> However, we find you have not demonstrated how the remaining information at issue pertains to any case or suspected case of a disease or health condition for purposes of section 81.046. Thus, we find you have failed to demonstrate section 81.046(b) is applicable to any portion of the remaining information, and the governor's office may not withhold the remaining information under section 552.101 on that basis.

In summary, to the extent the requested information was previously upon, the governor's office must continue to rely on Open Records Letter No. 2014-23493 as a previous determination, and withhold or release the requested information that is identical to the information that was at issue in that ruling in accordance with that ruling. The governor's office may withhold the information you marked under sections 552.107(1) and 552.111 of

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<sup>6</sup>As our ruling for this information is dispositive, we need not address your remaining argument against disclosure for this information.

<sup>7</sup>As our ruling for this information is dispositive, we need not address your remaining argument against disclosure for a portion of this information.

the Government Code. The governor's office must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 81.046(b) of the Health and Safety Code. The governor's office must release the remaining information.

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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](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,



Leah B. Wingerson  
Assistant Attorney General  
Open Records Division

LBW/bhf

Ref: ID# 549679

Enc. Submitted documents

c: Requestor  
(w/o enclosures)