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ATTORNEY GENERAL OF TEXAS

March 9, 2015

Ms. June Harden  
Assistant Attorney General  
Public Information Coordinator's Office  
General Counsel Division  
Office of the Attorney General  
Post Office Box 12548  
Austin, Texas 78711-2548

OR2015-04417

Dear Ms. Harden:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. This request was originally received by the Open Records Division of this office and assigned ID# 560987 (PIR# 14-40799). Preparation of the ruling has been assigned to the Opinion Committee.

The Office of the Attorney General (the "OAG") received a public information request for "a copy of the case file including all briefs, letters, etc. in the Open Records Decision No. 669." You indicate that you have released some of the requested information but claim the requested information submitted in Exhibit B is excepted from disclosure under Government Code sections 552.107 and 552.111. We have considered the exceptions you claim and reviewed the information you have submitted in Exhibit B.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. *See* TEX. GOV'T CODE ANN. § 552.107(1) (West 2012). 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* Tex. Att'y Gen. ORD-676 (2002) 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. See *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding), *mand. denied*, 12 S.W. 3d 807 (Tex. 2000) (stating that the attorney-client “privilege does not apply if the attorney is acting in a capacity other than that of an 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.” 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, *see 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 [mand. denied]) (stating that “the issue of confidentiality focuses on the intent of the parties at the time the communications are made”). 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) (orig. proceeding) (recognizing that the privilege extends to the “entire communication, including facts contained therein”).

You state that the submitted information in Exhibit B includes notes and emails between the OAG’s Open Records Division attorneys and executive administration staff, samples of drafts of the open records decision, internal tracking sheets, and samples of attorney research. You state that because the tracking sheets are circulated with the draft and are used by Open Records Division attorneys to communicate their legal advice and opinions, they are part of the communications between OAG attorneys. You also state that the drafter circulated research with the draft to assist the attorney reviewers in understanding the topic and his legal determination. You further state that all of the documents within Exhibit B constitute or reveal communications between privileged parties that were made for the purpose of providing professional legal services. And you state that these communications were not intended to be disclosed and that they have not been disclosed to non-privileged parties. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information you have solely marked as

excepted by section 552.107(1). Accordingly, you may withhold this information in Exhibit B under section 552.107(1) of the Government Code.

You also assert that the samples of drafts of the open records decision are excepted from disclosure under the deliberative process aspect of section 552.111 of the Government Code. Section 552.111 excepts from public disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” TEX. GOV’T CODE ANN. § 552.111 (West 2012). Section 552.111 encompasses the deliberative process privilege. *See* Tex. Att’y Gen. ORD-615 (1993) at 2. 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.); Tex. Att’y Gen. ORD-538 (1990) at 1–2.

In Open Records Decision No. 615, this office reexamined 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, opinions, and other material reflecting the policy-making processes of the governmental body. *See* Tex. Att’y Gen. ORD-615 (1993) at 5. A governmental body’s policy-making 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, 363-64 (Tex. 2000) (section 552.111 is not applicable to personnel-related communications that did not involve policy-making). A governmental body’s policy-making function does not include “information that pertains solely to internal administrative or personnel matters.” Tex. Att’y Gen. ORD-631 (1995) at 3. Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* Tex. Att’y Gen. ORD-615 (1993) at 5. But if factual information is so “inextricably intertwined” with material involving advice, opinions, or recommendations as to make severance of the factual data impractical, it may also be withheld under section 552.111. Tex. Att’y Gen. ORD-313 (1982) at 3.

This office has also concluded that 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* Tex. Att’y Gen. ORD-559 (1990) at 2 (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 policy-making document that will be released to the public in its final form. *See id.* at 2.

You explain that the documents in Exhibit B marked under section 552.111 are samples of draft Open Records Decision No. 669 which was released to the public in its final form. You state that these documents were made in furtherance of the OAG's policy of issuing formal open records decisions and maintaining uniformity in the application, operation, and interpretation of the Public Information Act. We have reviewed the draft documents at issue and conclude that they relate to the policy-making processes of the Open Records Division of the OAG. The records also indicate that a final version of the document has been released to the public in the form of Open Records Decision 669. Based on your representations and our review, you may withhold the draft documents from disclosure under section 552.111.

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,



Charlotte M. Harper  
Assistant Attorney General  
Opinion Committee

CMH/sdk

Ref: ID# 560987

Enc. Submitted documents

c: Requestor  
(w/o enclosures)