



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 24, 2015

Ms. Stefanie Albright
For the North Texas Municipal Water District
Lloyd Gosselink Rochelle & Townsend, P.C.
816 Congress Avenue, Suite 1900
Austin, Texas 78701

OR2015-05593

Dear Ms. Albright:

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# 559612.

The North Texas Municipal Water District (the "district"), which you represent, received a request for a specified compliance agreement and all documents related to a specified disclosure of violation, including the district's reports from its self-evaluation under the Texas Environmental, Health, and Safety Audit Privilege Act (the "TEHSAP").¹ You claim the requested information is excepted from disclosure under sections 552.107, 552.111, and 552.125 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. *See* Gov't Code § 552.107(1). When asserting the attorney-client

¹You state, and provide documentation showing, the district sent a cost estimate of charges pursuant to section 552.2615 of the Government Code. *See* Gov't Code § 552.2615.

²We assume that 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.

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. 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. Finally, 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. *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. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state Exhibits P, Q, and R consist of communications involving the district’s attorneys, district representatives, and other district employees and officials. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the district and these communications have remained confidential. Upon review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the district may generally withhold Exhibits P, Q, and R under section 552.107(1) of the Government Code.³ However, we note Exhibit R includes an e-mail received from or sent to a party you have not demonstrated is privileged. Furthermore, if this e-mail is removed from the e-mail string and stands alone, it is

³ As our ruling is dispositive, we do not address your other argument to withhold this information.

responsive to the request for information. Therefore, if the district maintains this non-privileged e-mail, which we have marked, separate and apart from the otherwise privileged e-mail string in which it appears, then the district may not withhold this non-privileged e-mail under section 552.107 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, writ ref’d n.r.e.); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, 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, 364 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body’s policymaking 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 severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152, 157 (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, section 552.111 protects the factual information. *See* Open Records Decision No. 313 at 3 (1982).

This office has also concluded section 552.111 exempts from disclosure a preliminary draft of a document intended for public release in its final form because the draft necessarily represents the drafter’s advice, opinion, and recommendation with regard to the form and content of the final document. *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 of a preliminary draft of a policymaking document, including comments, underlining, deletions, and proofreading marks, 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 which the governmental body establishes it has a privity of interest or common deliberative process. *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.

You state Exhibits S, T, and U, as well as the non-privileged e-mail we have marked in Exhibit R contain advice, opinions, and recommendations relating to the district's policymaking. Further, you inform us some of the communications at issue involve third parties, with which the district shares a privity of interest. You also state the information at issue contains draft documents. For one of the draft documents, which we have marked, you state the draft document will be released to the public in final form. Thus, the district may withhold this draft document in its entirety under section 552.111 of the Government Code. However, you do not state whether the other draft documents, which we have marked, will be released to the public in final form. Thus, to the extent the district will release these draft documents to the public in their final form, the district may withhold them in their entireties under section 552.111. To the extent the district will not release these draft documents to the public in their final form, the district may not withhold them in their entireties under section 552.111. Nevertheless, upon review, we find some of the information, which we have marked, consists of advice, opinions, and recommendations pertaining to a policymaking matter. Accordingly, the district may withhold the information we have marked under section 552.111 of the Government Code. However, we find the remaining information at issue consists of either general administrative information that does not relate to policymaking or information that is purely factual in nature. Thus, we find you have failed to demonstrate how the remaining information at issue is excepted under section 552.111. Accordingly, the district may not withhold the remaining information at issue under section 552.111 of the Government Code.

Section 552.125 of the Government Code excepts from disclosure any documents or information privileged under the TEHSAP. Gov't Code § 552.125. Section 3(a) of article 4447cc of the Texas Civil Statutes, the TEHSAP, provides:

(4) "Environmental or health and safety audit" or "audit" means a systematic voluntary evaluation, review, or assessment of compliance with environmental or health and safety laws or with any permit issued under an environmental or health and safety law conducted by an owner or operator, an employee of an owner or operator, . . . or an independent contractor of:

(A) a regulated facility or operation; or

(B) an activity at a regulated facility or operation.

V.T.C.S. art. 4447cc, § 3(a)(4). An audit report, which consists of all the documents produced from an environmental or health and safety audit, including findings, recommendations, exhibits, and communications associated with an audit, is privileged under section 5(a) of the TEHSAP. *See id.* §§ 4(a), (b), 5(a). However, section 8 of the TEHSAP provides the privilege does not apply to:

- (1) a document, communication, datum, or report or other information required by a regulatory agency to be collected, developed, maintained, or reported under a federal or state environmental or health and safety law;
- (2) information obtained by observation, sampling, or monitoring by a regulatory agency; or
- (3) information obtained from a source not involved in the preparation of the environmental or health and safety audit report.

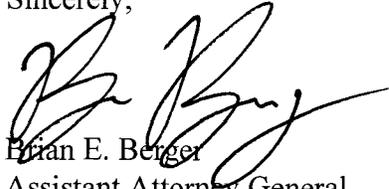
Id. § 8(a)(1)-(3). You assert Exhibits H, I, J, K, L, M, N, and O are privileged under the TEHSAP, and thus, excepted from disclosure under section 552.125 of the Government Code. You inform us the information at issue pertains to an audit conducted under the TEHSAP. You further state the privilege has not been waived and none of the exceptions in section 8 of the TEHSAP apply. Based on your representations and our review of the information at issue, we conclude the information is privileged under section 5 of the TEHSAP. Therefore, the district must withhold Exhibits H, I, J, K, L, M, N, and O under section 552.125 of the Government Code.

In summary, the district may generally withhold Exhibits P, Q, and R under section 552.107(1) of the Government Code; however, if the district maintains the non-privileged e-mail, which we have marked, separate and apart from the otherwise privileged e-mail string in which it appears, then the district may not withhold this non-privileged e-mail under section 552.107(1) of the Government Code. The district may withhold the draft document we have marked in its entirety under section 552.111 of the Government Code. To the extent the district will release the other draft documents we have marked to the public in their final form, the district may withhold them in their entireties under section 552.111 of the Government Code. The district may withhold the additional information we have marked under section 552.111 of the Government Code. The district must withhold Exhibits H, I, J, K, L, M, N, and O under section 552.125 of the Government Code. The remaining 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.

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,



Brian E. Berger
Assistant Attorney General
Open Records Division

BB/akg

Ref: ID# 559612

Enc. Submitted documents

c: Requestor
(w/o enclosures)