



KEN PAXTON  
ATTORNEY GENERAL OF TEXAS

April 1, 2015

Mr. Richard Gober  
Staff Attorney  
State Board of Dental Examiners  
333 Guadalupe, Tower 3, Suite 800  
Austin, Texas 78701-3942

OR2015-06150

Dear Mr. Gober:

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# 558174.

The State Board of Dental Examiners (the "board") received a request for information pertaining to specified terms regarding sedation during a specified period of time, including information pertaining to a specified meeting.<sup>1</sup> You state the board released some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note you have redacted portions of the submitted information. We understand you have redacted some information pursuant to Open Records Decision No. 684 (2009).<sup>2</sup>

---

<sup>1</sup>We note the board sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing 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) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

<sup>2</sup>Open Records Decision No. 684 serves as a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of seeking a decision from the attorney general. *See* ORD 684.

However, you have also redacted the name of a dentist in a complaint. You do not assert, nor does our review of the records indicate, you have been authorized to withhold this information without seeking a ruling from this office. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 (2001). Therefore, information must be submitted in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure. In this instance, we can discern the nature of the redacted information; thus, being deprived of this information does not inhibit our ability to make a ruling. In the future, however, the board should refrain from redacting any information that it is not authorized to withhold in seeking an open records ruling. Failure to do so may result in the presumption the redacted information is public. *See* Gov't Code § 552.302.

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 that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “to facilitate 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)(A), (B), (C), (D), (E). 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.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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 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) (privilege extends to entire communication, including facts contained therein).

---

You claim portions of the submitted information are protected by section 552.107(1) of the Government Code. You state the information at issue consists of communications involving board employees, board attorneys, and board members. You state the communications were made in confidence for the purpose of facilitating the rendition of professional legal services to the board and that these communications 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. Thus, the board may generally withhold the information you have indicated under section 552.107(1) of the Government Code.<sup>3</sup> We note, however, one of the e-mail strings at issue includes e-mails sent to and received from a non-privileged party. Furthermore, if these e-mails are removed from the e-mail string and stand alone, they are responsive to the request for information. Therefore, if the non-privileged e-mails, which we have marked, are maintained by the board separate and apart from the otherwise privileged e-mail string in which they appear, then the board may not withhold these non-privileged communications under section 552.107(1) of the Government Code.

Section 552.111 of the Government Code exempts 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. Section 552.111 encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of this exception 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. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, orig. proceeding). We determined section 552.111 exempts from disclosure only those internal communications that consist of advice, opinions, recommendations, 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

---

<sup>3</sup>As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

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 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* 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 at 9.

You state portions of the remaining information relate to the board's "future rule and policy making decisions regarding anesthesia and sedation." You explain these documents reflect the deliberations of board employees, board attorneys, board members, and a consultant for the board regarding future policy and consist of their opinions and recommendations. Based on these representations and our review, we agree the information we have marked constitutes advice, opinion, or recommendations on a policymaking matter. Accordingly, the board may withhold the information we have marked under section 552.111 of the Government Code. We find the remaining information at issue is general administrative and factual information or has been shared with individuals with whom you have not demonstrated the board shares a privity of interest. Therefore, we find you have failed to demonstrate how this information is excepted under section 552.111. Accordingly, none of the remaining information may be withheld under section 552.111 of the Government Code.

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. Section 552.101 encompasses information made confidential by other statutes, including section 254.006 of the Occupations Code, which states:

(a) Except as provided by this section, the investigation files and other records of the board are public records and open to public inspection at reasonable times.

(b) Investigation files and other records are confidential, except the board shall inform the license holder of the specific allegations against the license holder. The board may share investigation files and other records with another state regulatory agency or a local, state, or federal law enforcement agency.

(c) The exception from public disclosure of investigation files and records provided by this section does not apply to the disclosure of a disciplinary action of the board, including:

- (1) the revocation or suspension of a license;
- (2) the imposition of a fine on a license holder;
- (3) the placement on probation with conditions of a license holder whose license has been suspended;
- (4) the reprimand of a license holder; or
- (5) the issuance of a warning letter to a license holder.

Occ. Code § 254.006. You state portions of the remaining information consist of investigation files and records of the board compiled in response to complaints filed against a dentist licensed by the board. You do not indicate, and the information at issue itself does not reflect, that subsection 254.006(c) is applicable to any of the information at issue. Therefore, based on your representations and our review of the information at issue, we conclude the information you have indicated is confidential under section 254.006(b) of the Occupations Code and must be withheld under section 552.101 of the Government Code.

Section 552.117(a)(1) of the Government Code exempts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code.<sup>4</sup> *See* Gov't Code § 552.117(a)(1). 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

---

<sup>4</sup>The 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).

applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See Open Records Decision No. 530 at 5 (1989)*. Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official 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 the cellular telephone number of a board member. Therefore, if the individual at issue timely requested confidentiality under section 552.024 of the Government Code and a governmental body does not pay for the cellular telephone service, the board must withhold the marked cellular telephone number under section 552.117(a)(1) of the Government Code. Conversely, if the individual at issue did not timely request confidentiality under section 552.024 or if a governmental body pays for the cellular telephone service, the board may not withhold the marked cellular telephone number under section 552.117(a)(1) of the Government Code.

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). The e-mail addresses at issue are not within the scope of section 552.137(c). Accordingly, the board must withhold the e-mail addresses we have marked, in addition to the e-mail addresses the board has redacted, under section 552.137 of the Government Code, unless the owners affirmatively consent to their release.

In summary, the board may generally withhold the information you have indicated under section 552.107(1) of the Government Code. However, if the non-privileged e-mails, which we have marked, are maintained by the board separate and apart from the otherwise privileged e-mail string in which they appear, then the board may not withhold these non-privileged communications under section 552.107(1) of the Government Code. The board may withhold the information we have marked under section 552.111 of the Government Code. The board must withhold the information you have indicated under section 552.101 of the Government Code in conjunction with 254.006(b) of the Occupations Code. If the individual at issue timely requested confidentiality under section 552.024 of the Government Code and a governmental body does not pay for the cellular telephone service, the board must withhold the cellular telephone number we have marked under section 552.117(a)(1) of the Government Code. The board must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their release. The board 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,

A handwritten signature in blue ink that reads "Megan G. Holloway". The signature is written in a cursive style with a large, looping flourish at the end.

Megan G. Holloway  
Assistant Attorney General  
Open Records Division

MGH/cbz

Ref: ID# 558174

Enc. Submitted documents

c: Requestor  
(w/o enclosures)