



KEN PAXTON  
ATTORNEY GENERAL OF TEXAS

April 2, 2015

Ms. Maureen Franz  
Deputy Chief Counsel  
Texas Health and Human Services Commission  
P.O. Box 13247  
Austin, Texas 78711

OR2015-06338

Dear Ms. Franz:

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# 558574.

The Texas Health and Human Services Commission (the "commission") received a request for e-mails or memoranda sent or received by six named individuals during a specified time period referencing eight specified terms. You state the commission is releasing most of the requested information. You claim the requested information is excepted from disclosure under sections 552.107, 552.108, and 552.111 of the Government Code.<sup>1</sup> We have considered the exception you claim and reviewed the submitted representative sample of information.<sup>2</sup>

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<sup>1</sup>We note the commission did not provide the requestor with a copy of its argument under section 552.108 of the Government Code and thus, failed to comply with section 552.301 with respect to that argument. *See Gov't Code* § 552.301(e-1). Nevertheless, the law enforcement interests of a governmental body other than the one that failed to comply with section 552.301 can provide a compelling reason for non-disclosure under section 552.302 of the Government Code. *See Open Records Decision No. 586 at 2-3 (1991)*. Accordingly, we will consider whether the commission may withhold the information at issue on behalf of the Special Prosecutions Division of the Travis County District Attorney's Office. *See Gov't Code* §§ 552.007, .302, .352.

<sup>2</sup>We 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.

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

The commission states the information in Exhibit B consists of communications involving commission attorneys and commission employees. The commission states the communications were made for the purpose of facilitating the rendition of professional legal services to the commission and these communications have remained confidential. Upon review, we find the commission has demonstrated the applicability of the attorney-client privilege to the information at issue. Therefore, the commission may generally withhold the information in Exhibit B under section 552.107(1) of the Government Code. However, we note some of these e-mail strings include e-mails received from or sent to non-privileged parties. Furthermore, if these e-mails are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, if the commission maintains these non-privileged e-mails, which we have marked, separate and apart from the otherwise

privileged e-mail strings in which they appear, then the commission may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code.

Section 552.108(a) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]” *Id.* § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must reasonably explain how and why the release of the information at issue would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706, 710 (Tex. 1977). Section 552.108 may be invoked by the proper custodian of information relating to an investigation or prosecution of criminal conduct. Open Records Decision No. 474 at 4-5 (1987). Where a non-law enforcement agency possesses information relating to a pending case of a law enforcement agency, the non-law enforcement agency may withhold the information under section 552.108(a)(1) if it demonstrates the information relates to the pending case and provides this office with a representation from the law enforcement agency that it wishes to have the information withheld. The commission has submitted correspondence from the Special Prosecutions Division of the Travis County District Attorney’s Office (the “district attorney’s office”) in which the district attorney’s office objects to the release of specified categories of information because that information pertains to a pending criminal investigation. We understand the information in Exhibit D falls within the categories of information the district attorney’s office seeks to withhold. Based on these representations, we conclude the release of the information in Exhibit D would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177, 186-87 (Tex. Civ. App.—Houston [14th Dist.] 1975) (delineating law enforcement interests present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Therefore, the commission may withhold the information in Exhibit D on behalf of the district attorney’s office under section 552.108(a)(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, *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).

The commission states the information you have highlighted in Exhibit C consists of advice, opinions, and recommendations relating to the commission's policymaking. Upon review, we find the commission may withhold the information you have highlighted in Exhibit C under section 552.111 of the Government Code.

To the extent the commission maintains the non-privileged e-mails separate and apart, we note these e-mails contains e-mail addresses that are subject to section 552.137 of the Government Code.<sup>3</sup> 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). See Gov't Code § 552.137(a)-(c). We note the requestor has a right to his own e-mail address under section 552.137(b). *Id.* § 552.137(b). The e-mail addresses at issue are not excluded by subsection (c). Therefore, the commission must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

In summary, the commission may generally withhold the information in Exhibit B under section 552.107(1) of the Government Code. However, if the commission maintains the marked non-privileged e-mails separate and apart from the otherwise privileged e-mail strings in which they appear, then the commission may not withhold the non-privileged e-mails under section 552.107(1) of the Government Code. The commission may withhold the information in Exhibit D under section 552.108(a)(1) of the Government Code on behalf of the district attorney's office. The commission may withhold the information you have highlighted in Exhibit C under section 552.111 of the Government Code. The commission must withhold the personal e-mail addresses we have marked under section 552.137 of the

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<sup>3</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).

Government Code, unless the owners affirmatively consent to their public disclosure. The commission 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,



Kristi L. Godden  
Assistant Attorney General  
Open Records Division

KLG/cz

Ref: ID# 558574

Enc. Submitted documents

c: Requestor  
(w/o enclosures)