



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 17, 2015

Ms. Lauren Downey
Assistant Attorney General
Public Information Coordinator
General Counsel Division
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2015-19481

Dear Ms. Downey:

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# 579679 (OAG PIR Nos. 15-41804, 15-41830, 15-41856, 15-41809).

The Office of the Attorney General (the "OAG") received four requests from different requestors for certain information regarding United States Supreme Court decisions and specified key words during specified time periods.¹ You state the OAG will release some of the requested information to the respective requestors. Additionally, you state the OAG has redacted certain information pursuant to Open Records Decision No. 684 (2009).² You

¹You inform us the fourth requestor was required to make a deposit for payment of anticipated costs under section 552.263 of the Government Code, which the OAG received on July 14, 2015. *See* Gov't Code § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date that governmental body receives deposit or bond).

²Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold specific categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

claim the remaining requested information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. Additionally, you state the OAG has notified the Office of the Governor (the “OOG”) of one of the requests for information and of its right to submit written comments to this office stating why certain information responsive to that request should or should not be released. *See* Gov’t Code § 552.304. We have considered the exceptions you claim and reviewed the submitted representative sample of information.³ We have also received and considered comments submitted by the OOG.

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. *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 “to facilitate 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, and lawyer representatives. *See* 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. Finally, 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. *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

³This letter ruling assumes the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent the other information is substantially different than that submitted to this office. *See* Gov’t Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

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 the information you have marked under section 552.107(1) of the Government Code consists of communications between OAG attorneys and other privileged parties, including OAG employees and officials and a client agency of the OAG. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the OAG, the client agency, and the State. Further, you state these communications were not intended to be disclosed and have not been disclosed to non-privileged parties. Upon review, we find the OAG has demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the OAG may withhold the information you have marked under section 552.107(1) of the Government Code.⁴

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)*.

⁴As our ruling is dispositive, we need not address your remaining argument or the OOG’s arguments against disclosure of this information.

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 the remaining information you have marked under section 552.111 of the Government Code consists of advice, opinions, and recommendations relating to the OAG's policymaking. You also state the information at issue contains draft documents that have been released to the public in final form. Further, you inform us some of the communications at issue involve an OAG consultant, and you state the OAG shares a privity of interest with this individual. Upon review, we find the OAG has demonstrated the applicability of the deliberative process privilege to the information at issue. Accordingly, the OAG may withhold the information you have marked under section 552.111 of the Government Code.

In summary, the OAG may withhold the information you have marked under section 552.107(1) of the Government Code. The OAG may withhold the information you have marked under section 552.111 of the Government Code. The OAG 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, 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 black ink, appearing to read "Kristi L. Godden". The signature is fluid and cursive, with the first name "Kristi" being the most prominent.

Kristi L. Godden
Assistant Attorney General
Open Records Division

KLK/cz

Ref: ID# 579679

Enc. Submitted documents

c: 4 Requestors
(w/o enclosures)