



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

December 17, 2015

Mr. Michael VanderBurg  
General Counsel  
Legislative Budget Board  
P.O. Box 12666  
Austin, Texas 78711-2666

OR2015-26591

Dear Mr. VanderBurg:

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# 590983.

The Legislative Budget Board (the "board") received a request for information related to the Texas Racing Commission (the "commission") during a specified time period. You claim the submitted information is excepted from disclosure under sections 552.106, 552.107, 552.111, 552.116, and 552.146 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note you have indicated some of the submitted information is not responsive to the instant request because it either does not pertain to the commission or it does not pertain to the specified time period. This ruling does not address the public availability of

---

<sup>1</sup>Although you raise section 552.101 of the Government Code in conjunction with section 552.107 of the Government Code, this office has concluded section 552.101 does not encompass other exceptions found in the Act. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

non-responsive information, and the board is not required to release non-responsive information in response to this request.<sup>2</sup>

Section 552.106(a) of the Government Code excepts from required public disclosure “[a] draft or working paper involved in the preparation of proposed legislation[.]” Gov’t Code § 552.106(a). Section 552.106(a) ordinarily applies only to persons with a responsibility to prepare information and proposals for a legislative body. *See* Open Records Decision No. 460 at 1 (1987). The purpose of this exception is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body. Therefore, section 552.106 encompasses only policy judgments, recommendations, and proposals involved in the preparation of proposed legislation and does not except purely factual information from public disclosure. *Id.* at 2. However, a comparison or analysis of factual information prepared to support proposed legislation is within the ambit of section 552.106. *Id.*

The board states the responsive information in Exhibits 6A through 6E consists of working papers of board staff regarding the development, analysis, and evaluation in the preparation of legislation to be introduced in the 85th Legislature related to the commission, or related to work projects that may be introduced as part of the state’s biennial budget bill in the 85th Legislature. We understand the information at issue has not been made public and all parties to them have a privity of interest with regard to enactment of the legislation. Upon review, we find the board has established the responsive information in Exhibits 6A through 6E constitutes advice, opinion, analysis, and recommendation regarding proposed legislation. Therefore, the board may withhold the responsive information in Exhibits 6A through 6E under section 552.106 of the Government Code.<sup>3</sup>

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. ORD 676 at 6-7. 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

---

<sup>2</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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

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 board claims the information it has marked is excepted from disclosure under section 552.107(1) of the Government Code. The board states the information at issue consists of communications between attorneys and staff of the board and attorneys and staff of the Texas Legislative Council (the “council”). You explain the board and the council have an agreement that the council will provide legal advice to the board upon request. The board states the communications at issue were made for the purpose of facilitating the rendition of professional legal services, the confidentiality of the communications has been maintained, and the communications were not intended to be shared with any third parties. Based on these representations and our review, we find the board has demonstrated the applicability of the attorney-client privilege to the information you have marked. Thus, the board may withhold the information you have marked under section 552.107(1) of the Government Code.<sup>4</sup>

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*

---

<sup>4</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

*of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, orig. proceeding); 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 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. ORD 615 at 5; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). 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). However, 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. ORD 615 at 5-6; *see also Dallas Morning News*, 22 S.W.3d at 364 (section 552.111 not applicable to personnel-related communications that did not involve policymaking).

Further, section 552.111 does not generally except from disclosure facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 157; 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, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

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 Nos. 631 at 2 (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body's consultants). 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.

This office has also concluded 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.

You state Exhibit 9 consists of advice, opinions, and recommendations of the board relating to the board's policy. We note the information at issue contains draft documents. We understand the draft documents will be released to the public in final form. Based on your representations and our review, we find the board may withhold the information we have marked under section 552.111. However, we find the remaining information at issue consists of 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 remaining information may not be withheld under section 552.111 of the Government Code.

Section 552.146 of the Government Code provides, in relevant part, the following:

(a) All written or otherwise recorded communications, including conversations, correspondence, and electronic communications, between a member of the legislature or the lieutenant governor and an assistant or employee of the Legislative Budget Board [the "board"] are excepted [required public disclosure].

...

(c) This section does not except from required disclosure a record or memoranda of a communication that occurs in public during an open meeting or public hearing conducted by the [board].

Gov't Code § 552.146. You state the information you have marked under section 552.146 consists of communications between members of the legislature or their staffs and the board related to the drafting of the General Appropriations Act (H.B. 1) in the 84th Legislature. The board further states this information was not disclosed in open meetings or public hearings conducted by the board. Upon review, we conclude the board may withhold the information you have marked under section 552.146 of the Government Code.

In summary, the board may withhold the responsive information in Exhibits 6A through 6E under section 552.106 of the Government Code. The board may withhold the information you have marked 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 may withhold the information you have marked under section 552.146 of the Government Code. The board must release the remaining responsive 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 black ink that reads "Britni Ramirez". The signature is written in a cursive, flowing style.

Britni Ramirez  
Assistant Attorney General  
Open Records Division

BR/bhf

Ref: ID# 590983

Enc. Submitted documents

c: Requestor  
(w/o enclosures)