



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 5, 2016

Ms. Jordan Hale
Public Information Coordinator
Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2016-00272

Dear Ms. Hale:

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# 592867 (OOG ID# 15-408).

The Office of the Governor (the "governor's office") received a request for (1) records that mention communications relating to immigrants between the governor's office and foreign governments during a specified period of time, (2) records that mention e-verify or the hiring of illegal immigrants in Texas during a specified period of time, and (3) records that mention alleged crimes or arrests of immigrants in Texas during a specified period of time.¹ You state you have released some information. You claim portions of the submitted information are excepted from disclosure under sections 552.107 and 552.111 of the Government Code. Additionally, you state you have notified the Texas Department of Public Safety (the "department") of its right to submit comments to this office as to why some of the submitted information should not be released. *See* Gov't Code § 552.304 (interested party may submit

¹We note the governor's office 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).

comments stating why information should or should not be released). We have received comments from the department. We have considered the submitted arguments and reviewed the submitted representative samples of information.²

Initially, we note some of the submitted information may have been the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2015-26463 (2015) and 2015-25580 (2015). In Open Records Letter No.2015-26463 we ruled the governor's office (1) may withhold the information it marked under section 552.107(1) of the Government Code; (2) may withhold the information we marked under sections 552.108(a)(1), and 552.108(b)(1) of the Government Code; (3) with the exception of the information we marked for release, may withhold the information marked under section 552.111 of the Government Code; (4) must withhold the personal e-mail addresses we marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure; and (5) must release the remaining information. In Open Records Letter No.2015-25580 we determined the governor's office (1) must withhold the information marked under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code; (2) may withhold the information we marked under section 552.106 of the Government Code; (3) may withhold the information it marked under section 552.107(1) of the Government Code; (4) may withhold the information we marked under sections 552.108(a)(1) and 552.108(b)(1) of the Government Code; (5) may withhold the information marked under section 552.111 of the Government Code; and (6) must release the remaining information. We have no indication the law, facts, or circumstances on which these prior rulings were based have changed. Accordingly, to the extent the submitted information is identical to the information previously submitted and ruled on by this office, we conclude the governor's office must continue to rely on Open Records Letter Nos. 2015-26463 (2015) and 2015-25580 (2015) as previous determinations and withhold that information in accordance with those rulings. *See* Open Records Decision No. 673 at 6-7 (2001) (discussing criteria for first type of previous determination). To the extent the submitted information is not subject to those prior rulings, we will consider your arguments against disclosure.

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.

²We assume the "representative samples" 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 those records contain substantially different types of information than that submitted to this office.

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 governor’s office states the information it has marked in the submitted information consists of communications involving governor’s office attorneys and governor’s office employees and officials. The governor’s office states the communication was made for the purpose of facilitating the rendition of professional legal services to the governor’s office and the communication has remained confidential. Upon review, we find the governor’s office has demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the governor’s office may withhold the information it has marked under section 552.107(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 exempts 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.

The governor's office states portions of the submitted information consists of advice, opinions, and recommendations relating to the governor's office's policymaking. The governor's office and the department state portions of the information contain draft documents that will be released to the public in final form. Further, the governor's office informs us some of the communications at issue involve the department, with which the governor's office states it shares a privity of interest. Based on these representations and our review, we find the governor's office may withhold the information we have marked under

section 552.111 of the Government Code.³ However, we find the remaining information the governor's office seeks to withhold, which we have marked for release, is general administrative and purely factual information, or does not pertain to policymaking. Therefore, we find the governor's office has failed to demonstrate any of the remaining information at issue consists of advice, opinions, or recommendations regarding policymaking matters. Consequently, the governor's office may not withhold any of the remaining information at issue under section 552.111 of the Government Code.

Section 552.108(b) of the Government Code excepts from disclosure “[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if (1) release of the internal record or notation would interfere with law enforcement or prosecution[.]” Gov’t Code § 552.108(b)(1). This section is intended to protect “information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State.” *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.). This office has concluded this provision protects certain kinds of information, the disclosure of which might compromise the security or operations of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 at 3-4 (1989) (detailed guidelines regarding police department’s use of force policy), 508 at 3-4 (1988) (information relating to future transfers of prisoners), 413 (1984) (sketch showing security measures for forthcoming execution). However, to claim this aspect of section 552.108 protection a governmental body must meet its burden of explaining how and why release of the information at issue would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). Further, commonly known policies and techniques may not be withheld under section 552.108. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (former section 552.108 does not protect Penal Code provisions, common-law rules, and constitutional limitations on use of force), 252 at 3 (1980) (governmental body did not meet burden because it did not indicate why investigative procedures and techniques submitted were any different from those commonly known with law enforcement and crime prevention). To prevail on its claim that section 552.108(b)(1) excepts information from disclosure, a law-enforcement agency must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. The determination of whether the release of particular records would interfere with law enforcement is made on a case-by-case basis. Open Records Decision No. 409 at 2 (1984).

The department explains revealing the records it has marked under section 552.108(b)(1) would provide criminals with invaluable information concerning operational strategies, procedures, and tactics used by department agents in the detection and investigation of criminal activity, and equipment used in the detection and investigation of criminal activity.

³As our ruling is dispositive, we need not address the governor's office's remaining argument against disclosure of this information.

Upon review, we find the department has demonstrated release of a portion of the information we have marked would interfere with law enforcement. However, the department has failed to demonstrate how the remaining information it has marked would interfere with law enforcement. Thus, the governor's office may withhold the information we have marked under section 552.108(b)(1) of the Government Code.⁴

In summary, the governor's office may withhold the information it has marked under section 552.107(1) of the Government Code. The governor's office may withhold the information we have marked under section 552.111 of the Government Code. The governor's office may withhold the information we have marked under section 552.108(b)(1) 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,



Katelyn Blackburn-Rader
Assistant Attorney General
Open Records Division

KB-R/akg

Ref: ID# 592867

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴As our ruling is dispositive, we need not address the department's remaining arguments against disclosure for this information.

Ms. Molly Cost
Assistant General Counsel
Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773
(w/o enclosures)