



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 7, 2016

Ms. Jessica Vu
Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2016-15431

Dear Ms. Vu:

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# 617603 (OOG ID No. 16-112).

The Office of the Governor (the "governor's office") received a request for e-mails between named governor's office employees and named Texas Department of Family and Protective Services (the "department") officials during a specified a time period pertaining to specified terms. The governor's office states it is releasing some information. You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. Further, you state release of some of the submitted information may implicate the interests of the department. Accordingly, you state you notified the department of the request for information and of its right to submit arguments to this office as to why the information at issue should not be released.¹ See Gov't Code § 552.304 (providing that interested party may submit comments stating why information

¹As of the date of this letter, we have not received comments from the department explaining why the submitted information should not be released.

should or should not be released). We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Section 552.101 of the Government Code exempts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. This section encompasses information protected by other statutes, such as section 261.201 of the Family Code, which provides, in relevant part, the following:

(a) [T]he following information is confidential, is not subject to public release under [the Act], and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under [chapter 261 of the Family Code] and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under [chapter 261 of the Family Code] or in providing services as a result of an investigation.

Fam. Code § 261.201(a). The governor’s office explains portions of the submitted information consist of files, reports, records, communications, and working papers used and developed in investigations into child abuse or neglect filed with the department. We find the information we marked falls within the scope of section 261.201 of the Family Code. *See id.* §§ 101.003(a) (defining “child” for purposes of this section as person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes), 261.001(1), (4) (defining “abuse” and “neglect” for purposes of chapter 261 of the Family Code). As the governor’s office does not indicate the department has adopted a rule that governs the release of this type of information, we assume no such regulation exists. Given that assumption, we determine the information we marked must be withheld under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code. However, we find the governor’s office has not established any of the remaining information at issue consists of a report of child abuse or neglect nor does the information reveal the identity of an individual who made a report of suspected child abuse or neglect for purposes of section 261.201(a)(1) of the Family Code. Furthermore, we find the governor’s office has failed to demonstrate any portion of the

²We assume 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.

remaining information at issue was used or developed in an investigation of alleged or suspected child abuse or neglect under section 261.201(a)(2) of the Family Code. Therefore, the remaining information at issue may not be withheld under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate or embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. This office has found that common-law privacy generally protects the identifying information of juvenile victims of abuse or neglect. *See* Open Records Decision No. 394 (1983); *cf.* Fam. Code § 261.201. Upon review, we find the information we marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the governor's office must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy.

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).

The governor's office states the information at issue consists of communications between attorneys for the governor's office and governor's office employees. The governor's office states the communications were made for the purpose of facilitating the rendition of professional legal services to the governor and the governor's office. The governor's office further states these communications were intended to be confidential and have remained confidential. Based on your representations and our 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 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 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).

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.

We note section 552.111 can encompass communications between a governmental body and a third party. *See* Open Records Decision Nos. 631 at 2 (Gov't Code § 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) (Gov't Code § 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (Gov't Code § 552.111 applies to memoranda prepared by governmental body's consultants). In order 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.

The governor's office asserts some of the information at issue includes communications between governor's office policy directors, analysts, and employees and department employees communicating in their official policy-making capacities. The governor's office states it shares a privity of interest with the department with respect to these policy issues. The governor's office asserts the information at issue consists of advice, opinions, and recommendations regarding policy-making matters. The governor's office also states the information at issue includes draft documents. The governor's office does not state whether the draft documents will be released to the public in their final forms. Thus, to the extent the governor's office will release the submitted draft documents to the public in their final forms, the governor's office may withhold the submitted draft documents in their entirety under section 552.111 of the Government Code. To the extent the governor's office will not release the draft documents to the public in their final forms, the governor's office may not withhold the submitted draft documents in their entirety under section 552.111. Upon review, we find most of the remaining information at issue consists of advice, opinions, or recommendations on the policymaking matters of the governor's office. However, we find the governor's office failed to establish the information we marked for release constitutes advice, opinions, recommendations, or other material reflecting the policymaking processes

of the governor's office. Accordingly, the governor's office may not withhold the information we marked for release under section 552.111 of the Government Code. Thus, with the exception of the information we marked for release, the governor's office may withhold the remaining information it marked under section 552.111 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).³ See Gov't Code § 552.137(a)-(c). The e-mail address we have marked is not excluded by subsection (c). Upon review, we find the governor's office must withhold the e-mail address we marked under section 552.137 of the Government Code, unless its owner affirmatively consents to its public disclosure.

In summary, the governor's office must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code and the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. The governor's office may withhold the information it marked under section 552.107(1) of the Government Code. To the extent the governor's office will release the submitted draft documents to the public in their final forms, the governor's office may withhold the submitted draft documents in their entirety under section 552.111 of the Government Code. To the extent the governor's office will not release the draft documents to the public in their final forms, the governor's office may not withhold the submitted draft documents in their entirety under section 552.111. With the exception of the information we marked for release, the governor's office may withhold the remaining information it marked under section 552.111 of the Government Code. The governor's office must withhold the e-mail address we marked under section 552.137 of the Government Code, unless its owner affirmatively consents to its public disclosure. The governor's office must release the remaining information.

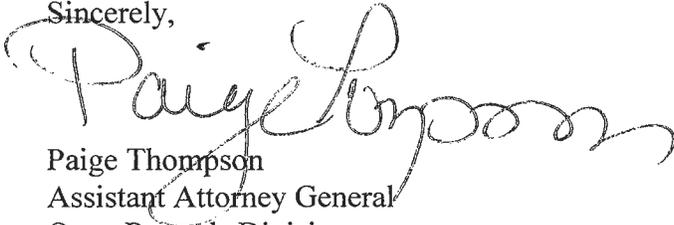
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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/>

³The 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).

[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,



Paige Thompson
Assistant Attorney General
Open Records Division

PT/dls

Ref: ID# 617603

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)