



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 24, 2015

Ms. Ann-Marie Sheely
Assistant County Attorney
Travis County Attorney's Office
P. O. Box 1748
Austin, Texas 78767

OR2015-12552

Dear Ms. Sheely:

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# 568408.

The Travis County District Clerk's Office (the "district clerk's office") received a request for all e-mails the district clerk personally sent regarding administrative matters to anyone except judges during her term.¹ You state you will release some information but claim the submitted information is excepted from disclosure under sections 552.104, 552.107, and 552.111 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

¹The present request also asked for any public information requests the district clerk's office has received during the clerk's term. You state the district clerk's office will release information responsive to that part of the request upon the requestor's response to a cost estimate.

²Although you also raise section 552.101 of the Government Code in conjunction with section 552.107 of the Government Code and Texas Rule of Evidence 503, this office has concluded section 552.101 encompasses neither the other exceptions found in the Act nor discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Further, although you raise Texas Rule of Evidence 503, we note the proper exception to raise when asserting the attorney-client privilege in this instance is section 552.107 of the Government Code. *See* ORD 676 at 1-2.

Initially, we note you have marked portions of e-mail strings as not responsive to the present request. Upon review, however, we find this information is located within responsive e-mail strings and, thus, is responsive to the request for information. Accordingly, we will address your arguments for this and the remaining information.

Section 552.104 of the Government Code exempts from required public disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). The “test under section 552.104 is whether knowing another bidder’s [or competitor’s information] would be an advantage, not whether it would be a decisive advantage.” *Boeing Co. v. Paxton*, No. 12-1007, slip op. at 17 (Tex. June 19, 2015). You state a portion of the submitted information, which you have marked, relates to vendor proposals to provide the district clerk’s office with software and technology services. We note the vendors at issue are competitors. You state negotiations for these services are still ongoing and a final contract for the services has not been executed. You argue release of this information would jeopardize the bargaining position of the district clerk’s office during negotiations. After review of the information at issue and consideration of the arguments, we find the district clerk’s office has established the release of the information at issue would give advantage to a competitor or bidder. Accordingly, the district clerk’s office may withhold the information you have marked under section 552.104 of the Government Code.³

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

³As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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).

You assert some of the remaining information, which you have marked, consists of communications between the district clerk’s office personnel and their attorneys. You state the communications were made for the rendition of professional legal services to the district clerk’s office and these communications have remained confidential. Upon review, we find the district clerk’s office has demonstrated the applicability of the attorney-client privilege to the information you have marked. Thus, the district clerk’s office 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*, 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, no writ). 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 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body’s policymaking

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

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 that are severable from advice, opinions, and recommendations. *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, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

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 assert the remaining information is excepted from release under section 552.111 and the deliberative process privilege because it consists of e-mail communications that involve recommendations, drafts, summaries, and other written information between the district clerk's office and other departments of Travis County about policy decisions. You argue these communications involve the district clerk's office seeking advice and recommendations. You contend the information at issue also involves discussions of new policies and procedures for the district clerk's office to implement. Upon review, we find the district clerk's office has established the deliberative process privilege is applicable to the information we have marked. Thus, the district clerk's office may withhold the information we have marked under section 552.111 of the Government Code and the deliberative process privilege. However, we find the remaining information at issue is factual in nature or relates to routine internal administrative or employment matters that do not rise to the level of policymaking for purposes of section 552.111. Therefore, none of the remaining information at issue may be withheld under section 552.111 of the Government Code.

In summary, the district clerk's office may withhold the information you have marked under sections 552.104 and 552.107 of the Government Code. The district clerk's office may withhold the information we have marked under section 552.111 of the Government Code. The remaining submitted 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,

A handwritten signature in cursive script that reads "Ramsey Abarca".

Ramsey A. Abarca
Assistant Attorney General
Open Records Division

RAA/eb

Ref: ID# 568408

Enc. Submitted documents

c: Requestor
(w/o enclosures)