



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 17, 2015

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

OR2015-16961

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# 575805 (ORR# 15-210).

The Office of the Governor (the "governor's office") received a request for calendars and schedules for a named individual and e-mails between the named individual and specified e-mail addresses during a specified time period. You state the governor's office will withhold information subject to section 552.117 of the Government Code as permitted by section 552.024(c) of the Government Code.¹ You also state the governor's office will withhold e-mail addresses of members of the public under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).² You state the

¹Section 552.117 of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body. *See* Gov't Code § 552.117(a)(1). Section 552.024 of the Government Code authorizes a governmental body to withhold information subject to section 552.117 without requesting a decision from this office if the current or former employee or official chooses not to allow public access to the information. *See id.* § 552.024(c).

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

governor's office will release some of the requested information. You claim the submitted information is excepted from disclosure under section 552.104, 552.106, 552.107, and 552.111 of the Government Code. Additionally, you provide documentation showing you have notified the Texas Department of Public Safety and the United States Immigration and Customs Enforcement of their rights to submit comments to this office why some of the submitted information should not be released.³ See Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted information.

Initially, you indicate some of the submitted information, which you have marked, is not responsive to the instant request for information. This ruling does not address the public availability of any information that is not responsive to the request and the governor's office is not required to release such information in response to this request.

Next, you state some of the requested information was the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2015-09398 (2015) and 2015-06315 (2015). You state there has been no change in the law, facts, or circumstances on which the previous rulings were based. Accordingly, the governor's office may rely on Open Records Letter Nos. 2015-09398 and 2015-06315 as previous determinations and withhold or release the identical information in accordance with those rulings. See Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Section 552.104(a) of the Government Code excepts from 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, 2015 WL 3854264, at *9 (Tex. June 19, 2015). You argue expansion and recruitment of businesses to the State of Texas is a competitive process and you inform us the governor's office "works tirelessly to promote Texas, in part by providing state resources to encourage business growth within the state." You state "Texas devotes substantial resources to programs designed primarily to attract new businesses to the state or assist with the substantial expansion of an existing business as part of competitive recruitment." You explain the governor's office is currently negotiating potential approvals or contracts with the entity at issue, and contracts with this entity have not been executed. You argue release of this information, before contracts are signed or final approval given, would disadvantage Texas by permitting other states to directly approach this entity with

³As of the date of this letter, this office has not received comments from any third party explaining why any of the submitted information should not be released.

competing incentives. Based on your representations and our review, we find you have demonstrated the governor's office has specific marketplace interests and may be considered a "competitor" for purposes of section 552.104. We also find you have demonstrated release of the information you have marked would give advantage to a competitor or bidder. Accordingly, the governor's office may withhold the information you marked under section 552.104 of the Government Code.

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. *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).

You state some of the remaining information at issue consists of communications involving attorneys for the governor's office and governor's office employees and officials in their capacities as clients. You state these communications were made in furtherance of the

rendition of professional legal services to the governor's office. You state these communications were intended to be, and have remained, confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue, which you have marked. Accordingly, the governor's office may withhold the information you 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, 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 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).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (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, 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.

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 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. 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.

You seek to withhold some of the remaining information under section 552.111 of the Government Code. You state some of the information at issue consists of communications between employees and officials of the governor's office and the Texas Health and Human Services Commission (the "commission"). You inform us the governor's office shares a privity of interest and common deliberative process with the commission with respect to the information at issue. Thus, you argue the information at issue consists of internal communications involving the advice, opinions, and recommendations of the governor's office pertaining to its policymaking functions. You also state some of the information at issue consists of draft documents prepared by the governor's office and you state the draft documents will be made available to the public in their final form. Upon review, we find the governor's office has demonstrated the applicability of the deliberative process to the information at issue. Therefore, the governor's office may withhold the information at issue, which you have marked, under section 552.111 of the Government Code.⁴

In summary, the governor's office may rely on Open Records Letter Nos. 2015-09398 and 2015-06315 as previous determinations and withhold or release the identical information in accordance with those rulings. The governor's office may withhold the information you marked under sections 552.104, 552.107, and 552.111 of the Government Code. As no exceptions have been raised against disclosure of the remaining information, the governor's office 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.

⁴As our ruling is dispositive for this information, we need not address your remaining argument against its disclosure.

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 "Claire Morris Sloan". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/som

Ref: ID# 575805

Enc. Submitted documents

c: Requestor
(w/o enclosures)