



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 22, 2019

Ms. Deanne Rienstra
Special Counsel
Texas Lottery Commission
P.O. Box 16630
Austin, Texas 78761-6630

OR2019-13668

Dear Ms. Rienstra:

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# 766693 (TLC File# L-25062).

The Texas Lottery Commission (the "commission") received a request for e-mails sent to and received from a former commission employee during a certain period of time.¹ You claim the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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

¹You state the commission sent the requestor a cost estimate of charges for the responsive information pursuant to section 552.2615 of the Government Code. See Gov't Code § 552.2615.

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). 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 commission claims some of the submitted information, which it marked, is protected under section 552.107(1) of the Government Code. The commission states the information at issue consists of communications involving commission attorneys and commission employees in their capacities as clients. The commission states the communications were made for the purpose of facilitating the rendition of professional legal services to the commission and these communications have remained confidential. Based on these representations and our review, we find the commission has demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the commission may generally withhold the e-mails and attachments you marked under section 552.107(1) of the Government Code.² We note, however, some of these e-mail strings include e-mails received from a non-privileged party. Furthermore, if the e-mails received from the non-privileged party are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, if the non-privileged e-mails, which we marked, are maintained by the commission separate and apart from the otherwise privileged e-mail strings in which they appear, then the commission may not withhold these non-privileged e-mails and attachments under section 552.107(1) of the Government Code.

²As our ruling is dispositive for this information, we need not address your remaining argument against its disclosure.

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 the remaining information under section 552.111 of the Government Code. You state the information at issue consists of advice, opinions, and recommendations of commission employees and third parties with whom the commission shares a privity of interest. You also state the information at issue includes draft documents that will be released to the public in its final form. Based on your representations and our review of the information at issue, we find the commission has demonstrated portions of the information at issue consist of advice, opinions, or recommendations on the policymaking matters of the commission. Thus, the commission may withhold the information we marked under section 552.111 of the Government Code. However, we find the remaining information at issue is general administrative and purely factual information that does not pertain to policymaking or was shared with an individual with whom you have not demonstrated the commission shares a privity of interest or common deliberative process. Thus, you have failed to demonstrate the remaining information at issue reveals advice, opinions, or recommendations that pertain to policymaking. Accordingly, the commission may not withhold the remaining information at issue 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 at issue is not within the scope of section 552.137(c). Accordingly, the commission must withhold the e-mail address we marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its release.

In summary, the commission may generally withhold the e-mails and attachments you marked under section 552.107(1) of the Government Code; however, if the commission maintains the non-privileged e-mails we marked separate and apart from the otherwise privileged e-mail strings in which they appear, then the non-privileged e-mails may not be withheld under section 552.107 of the Government Code. The commission may withhold the information we marked under section 552.111 of the Government Code. The

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).

commission must withhold the e-mail address we marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its release. The commission 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/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, appearing to read "D. Michelle Case", followed by a horizontal flourish.

D. Michelle Case
Assistant Attorney General
Open Records Division

DMC/gw

Ref: ID# 766693

Enc. Submitted documents

c: Requestor
(w/o enclosures)