



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 15, 2019

Mr. Nicholas Lealos
Assistant General Counsel
Texas Workforce Commission
101 East 15th Street
Austin, Texas 78778-0001

OR2019-19015

Dear Mr. Lealos:

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# 775199 (TWC Tracking No. 190328-006).

The Texas Workforce Commission (the "commission") received a request for all communications among two named commission officials and commission staff related to a specified commission rule change during a specified time period.¹ The commission claims 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 representative sample of information.²

¹You state the commission sought and received clarification of the information requested. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *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). You also state the commission sent the requestor an estimate of charges pursuant to section 552.2615 of the Government Code, and the requestor accepted the charges. *See* Gov't Code § 552.2615.

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 those records contain substantially different types of information than that submitted to this office.

Initially, we note some of the submitted information, which we marked, is not responsive to the request for information because it was created outside of the time period specified by the requestor. This ruling does not address the public availability of any information that is not responsive to the request, and the commission is not required to release this information in response to this request.

Next, we note 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. 2019-10719 (2019) and 2019-18349 (2019). We have no indication there has been a change in the law, facts, or circumstances on which the previous rulings were based. Accordingly, we conclude the commission may continue to rely on Open Records Letter Nos. 2019-10719 and 2019-18349 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). To the extent the submitted, responsive information is not subject to the prior rulings, we will address your arguments against its disclosure.

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, 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 the information you marked consists of communications between attorneys for the commission and commission staff that were made for the purpose of providing legal services to the commission. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to most of the information at issue. Accordingly, with the exception of the information we marked for release, the commission may generally withhold the responsive information you marked under section 552.107(1) of the Government Code.³ However, we note some of these privileged e-mail strings include e-mails sent to or received from non-privileged parties. Furthermore, if these e-mails are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, to the extent the commission maintains these non-privileged e-mails, which we marked, separate and apart from the otherwise privileged e-mail strings in which they appear, the commission may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code. Further, upon review, we find you have failed to demonstrate the information we marked for release consists of privileged attorney-client communications. Accordingly, the commission may not withhold the information we marked for release under section 552.107. However, we will address your remaining argument against disclosure of this information.

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

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

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 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 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 at issue under section 552.111 of the Government Code. You state the information at issue consists of advice, opinions, and recommendations of employees of the commission regarding policymaking matters of the commission. You further state that portions of the information at issue consist of draft documents that were intended to be released in their final forms. Upon review, we find the commission may withhold the information we marked under section 552.111 of the Government Code. However, the remaining information is either purely factual in nature, consists of internal administrative matters that do not rise to the level of policymaking, or was shared with third parties with whom you have not demonstrated a privity of interest. 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 any portion of the remaining responsive information under section 552.111 of the Government Code on the basis of the deliberative process privilege.

In summary, the commission may continue to rely on Open Records Letter Nos. 2019-10719 and 2019-18349 as previous determinations and withhold or release the identical information in accordance with those rulings. With the exception of the information we marked for release, the commission may generally withhold the responsive information you marked under section 552.107(1) of the Government Code; however, if the non-privileged e-mails 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 under section 552.107(1) of the Government Code. The commission may withhold the information we marked under section 552.111 of the Government Code. The commission 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.

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,



Kieran Hillis
Assistant Attorney General
Open Records Division

KH/jxd

Ref: ID# 775199

Enc. Submitted documents

c: Requestor
(w/o enclosures)