



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 16, 2019

Ms. Heather K. Trachtenberg
Counsel for the Southwest Management District
Allen Boone Humphries Robinson, L.L.P.
3200 Southwest Freeway, Suite 2600
Houston, Texas 77027

OR2019-29073

Dear Ms. Trachtenberg:

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# 790382.

The Southwest Management District (the "district"), which you represent, received a request for all documents related to a specified petition during a specified time period. The district states it is releasing some of the requested information. The district claims the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. We have considered the exceptions the district claims and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

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

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.

The district claims the information submitted as Exhibit D is protected by section 552.111 of the Government Code. The district explains the information at issue consists of communications between board members of the district and employees of the district's general manager, with which the district shares a privity of interest or common deliberative process. The district states the information consists of internal deliberations related to a policymaking matter. Thus, the district states the information at issue consists of advice, opinions, and recommendations of the district pertaining to its policymaking functions. Based on these representations and our review of the information at issue, we find the district has demonstrated portions of Exhibit D, which we marked, consist of advice, opinions, or recommendations on the policymaking matters of the district. Thus, the district may withhold the information we marked under section 552.111 of the Government Code. Upon review, however, we find some of the remaining information at issue is general

administrative and purely factual information or does not pertain to policymaking. Further, some of the remaining information was received from or sent to individuals with whom the district has failed to demonstrate it shares a privity of interest or common deliberative process. Thus, we find the district has not shown the remaining information at issue consists of internal communications containing advice, opinions, or recommendations on the policymaking matters of the district. Accordingly, the district may not withhold any of the remaining information under section 552.111 of the Government Code.

We note the remaining information, including the marked non-privileged e-mails, contains e-mail addresses that may be subject to section 552.137 of the Government Code.¹ Section 552.137 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). *See id.* § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, an e-mail address that a governmental entity maintains for one of its officials or employees, or a personal e-mail address belonging to a district employee or official used to conduct official government business. *See Austin Bulldog v. Leffingwell*, 490 S.W.3d 240 (Tex. App.—Austin 2016, no pet.) (holding personal e-mail addresses of government officials used to conduct official government business are not e-mail addresses of “members of the public” for purposes of Gov’t Code § 552.137(a)). Accordingly, to the extent the e-mail addresses in the remaining information belong to members of the public, the district must withhold such e-mail addresses under section 552.137, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release. *See id.* § 552.137(b). However, to the extent the e-mail addresses in the remaining information are excluded by subsection 552.137(c) or belong to a district employee or official, the district may not withhold such e-mail addresses under section 552.137 of the Government Code.

In summary, the district may generally withhold Exhibit C under section 552.107(1) of the Government Code; however, to the extent the non-privileged e-mails and attachments we marked are maintained by the district separate and apart from the otherwise privileged e-mail strings in which they appear, the district may not withhold such non-privileged e-mails and attachments under section 552.107(1) of the Government Code. The district may withhold the information we marked in Exhibit D under section 552.111 of the Government Code. To the extent the e-mail addresses in the remaining information belong to members of the public, the district must withhold such e-mail addresses under section 552.137, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release. The district must release the remaining information.

¹ The 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).

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Claire V. Morris Sloan". The signature is fluid and cursive, with a large initial "C" and "M".

Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/eb

Ref: ID# 790382

Enc. Submitted documents

c: Requestor
(w/o enclosures)