



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 30, 2019

Ms. Elissa Mazza
Staff Attorney
Texas Board of Professional Engineers
1917 South Interstate 35
Austin, Texas 78741-3702

OR2019-30633

Dear Ms. Mazza:

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# 794363.

The Texas Board of Professional Engineers and Land Surveyors (the "board") received a request for communications sent by a named board official to any of six board officials or employees from a specified time period. You state the board will release some information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. Section 1001.252 of the Occupations Code provides in part:

¹ Although you raise rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure, we note the proper exceptions to raise when asserting the attorney-client privilege or work product privilege for information not subject to section 552.022 of the Government Code, as in this case, are sections 552.107 and 552.111 of the Government Code, respectively. *See* Open Records Decision Nos. 676 at 1-2 (2002), 677 (2002).

(a) The board² shall adopt rules that permit the board to receive and investigate a confidential complaint against a person who may have violated this chapter of Chapter 1071 [of the Occupations Code]. The board shall maintain the confidentiality of the complaint during the investigation.

Occ. Code § 1001.252(a). Act of May 27, 2019, 86th Leg., R.S., H.B. 1523, § 1.27 (to be codified at Occ. Code § 1001.252(a)). Section 139.11 of title 22 of the Texas Administrative Code provides:

(a) The board shall initiate or receive and investigate a complaint against a license holder or other person who may have violated the [Texas Practice Engineering Act] or board rules.

(b) The board shall maintain the confidentiality of the complaint from receipt through the investigation of the complaint. The complaint information will no longer be confidential after formal charges are filed with the State Office of Administrative Hearings or after the investigative file is closed. The following documents in an investigative file are releasable to a respondent or an attorney representing the respondent before the Board during the informal resolution process of a complaint: copies of the original complaint documentation; copies of communications to or from the Board and the complainant, the respondent, witnesses, technical experts used by the Board to advise on the complaint issues, and private or public entities regarding requests for records, documents, or information regarding the complaint; and witness interview reports.

22 T.A.C. § 139.11(a)-(b). Both section 1001.252(a) of the Occupations Code and section 139.11 of title 22 of the Texas Administrative Code require the board to maintain the confidentiality of complaint information during the investigation of the complaint. You state Exhibit 4 relates to a pending investigative matter against a license holder. We have no indication formal charges have been filed with the State Office of Administrative Hearings in this case and the information at issue does not fall within the categories of documents that would be releaseable under section 139.11(b). Based on your representations and our review of the information at issue, we find the board must withhold the Exhibit 4 under section 552.101 of the Government Code in conjunction with section 1001.252(a) of the Occupations Code. We note that complaint information is no longer confidential once formal charges have been filed or once the investigation is closed. *See* Act of May 27, 2019, 86th Leg., R.S., H.B. 1523, § 1.27 (to be codified at Occ. Code §1001.252(a)).

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental

² We note the Eighty-Sixth Legislature passed House Bill 1523, which, as of September 1, 2019, merged the functions of the Texas Board of Professional Engineers and the Texas Board of Professional Land Surveyors into the board.

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 board asserts Exhibit 2 consists of confidential communications between attorneys for board and board employees and officials that were made for the purpose of rendering legal services to the board. The board also asserts communications were intended to be and have remained confidential. Upon review, we find the board has demonstrated the applicability of the attorney-client privilege to information at issue. Therefore, the board may withhold Exhibit 2 under section 552.107(1) of the Government Code.³

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

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

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 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).

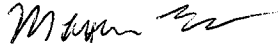
You state Exhibit 5 consists of advice, opinions, and recommendations of board employees regarding policymaking matters. Upon review, we find the board may withhold the information we marked under section 552.111 of the Government Code. However, we find the remaining information at issue consists of information that is administrative or purely factual in nature. Thus, you have failed to demonstrate the remaining information reveals advice, opinions, or recommendations that pertain to policymaking. Accordingly, the board may not withhold any portion of the remaining information at issue under section 552.111 of the Government Code on the basis of the deliberative process privilege.

In summary, the board must withhold Exhibit 4 under section 552.101 of the Government Code in conjunction with section 1001.252(a) of the Occupations Code. The board may withhold Exhibit 2 under section 552.107(1) of the Government Code. The board may withhold the information we marked under section 552.111 of the Government Code. The board 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 <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,



Matthew Taylor
Assistant Attorney General
Open Records Division

MHT/rm

Ref: ID# 794363

Enc. Submitted documents

c: Requestor
(w/o enclosures)