



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 18, 2020

Ms. Courtney L. Ebeier
Attorney
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711-3247

OR2020-13966

Dear Ms. Ebeier:

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# 825812 (Ref. No. 21162).

The Texas Health and Human Services Commission (the "commission") received a request for eight categories of information pertaining to specified communications and a specified request for proposals. You claim the submitted information is excepted from disclosure under sections 552.104, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹ 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).

Initially, we must address the requestor's assertion the commission failed to comply with section 552.301 of the Government Code in requesting this decision. Section 552.301 of the Government Code describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(b), the governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See id.* § 552.301(a), (b). Pursuant to section 552.301(d), the governmental body must provide the requestor, within ten business days after the date of its receipt of the request for information, a statement the governmental body has asked for a decision from the attorney general and a copy of the governmental body's written communication to the attorney general asking

¹ We 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.

for a decision. *See id.* § 552.301(d). Further, pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). Pursuant to section 552.301(e-1), a governmental body that submits written comments to the attorney general under section 552.301(e)(1)(A) must, within fifteen business days of receiving the request for information, send a copy of those comments to the person who requested the information from the governmental body. *See id.* § 552.301(e-1).

You state, and provide documentation showing, the commission received the request for information on January 28, 2020. Additionally, you state, and provide documentation showing, the commission sought clarification of the information requested on February 11, 2020, and received a response from the requestor after business hours on February 11, 2020. *See id.* § 552.222 (providing 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 when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). Thus, February 12, 2020 is the date on which the commission is deemed to have received the request. You state the commission was closed on February 17, 2020 and operated on a skeleton crew on March 2, 2020. This office does not count the date the request was received or holidays, including skeleton crew days observed by a governmental body, for the purpose of calculating a governmental body's deadlines under the Act. Accordingly, the commission's ten- and fifteen-business-day deadlines were February 27, 2020, and March 6, 2020, respectively. The envelope in which the commission provided the information required by section 552.301(b) was postmarked February 16, 2020, and the information containing the information required by section 552.301(e) was submitted via inter-agency mail on March 4, 2020. *See Gov't Code* § 552.301(a)(1) (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Therefore, we find the commission complied with sections 552.301(b) and 552.301(e) of the Government Code in requesting a decision from this office. Additionally, we note the correspondence the commission submitted to this office requesting a ruling reflects the requestor was copied on the correspondence. Accordingly, we find the commission complied with the procedural requirements mandated by section 552.301(e-1) of the Government Code. Therefore, we will address your arguments against disclosure of the submitted information.

Section 552.104(a) of the Government Code excepts from disclosure information that a governmental body demonstrates, if released, would "harm its interests by providing an advantage to a competitor or bidder in a particular ongoing competitive situation or in a particular competitive situation where the governmental body establishes the situation at issue is set to reoccur or there is a specific and demonstrable intent to enter into the

competitive situation again in the future.” *Id.* § 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*, 466 S.W.3d 831, 841 (Tex. 2015). After review of the information at issue and consideration of the arguments, we find you have established the release of the information at issue would harm the commission’s interests by providing an advantage to a competitor or bidder in a particular ongoing competitive situation. Thus, we conclude the commission may withhold the information you marked under section 552.104(a) of the Government Code.²

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).

You assert some of the remaining information consists of communications between attorneys for the commission and commission employees and officials in their capacities as clients. You state these communications were made in furtherance of the rendition of

² As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

professional legal services to the commission. You state the 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. Accordingly, the commission 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.

You seek to withhold the remaining information under section 552.111 of the Government Code. You state the information at issue consists of internal communications between

commission employees and officials and preliminary drafts of documents. You state the information at issue consists of advice, opinions, and recommendations of commission employees and officials regarding policymaking matters. You do not state whether the draft documents will be released to the public in their final forms. Thus, to the extent the commission will release the draft documents you have marked to the public in their final forms, the commission may withhold them in their entirety under section 552.111 of the Government Code. However, to the extent the commission will not release the draft documents to the public in their final forms, the commission may not withhold them under section 552.111. Nevertheless, we find portions of the remaining information at issue consist of advice, opinions, or recommendations on the policymaking matters of the commission. Thus, the commission may withhold the information we have marked under section 552.111 of the Government Code. However, we find the remaining information 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 commission may not withhold any portion of the remaining information under section 552.111 of the Government Code on the basis of the deliberative process privilege.

In summary, the commission may withhold the information you marked under section 552.104(a) of the Government Code. The commission may withhold the information you marked under section 552.107(1) of the Government Code. To the extent the commission will release the draft documents you have marked to the public in their final form, the commission may withhold them in their entirety under section 552.111 of the Government Code. The commission may withhold the information we have marked under section 552.111 of the Government Code. 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 <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,

Alexandra C. Burks
Attorney
Open Records Division

ACB/eb

Ref: ID# 825812

Enc. Submitted documents

c: Requestor
(w/o enclosures)