



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 3, 2020

Mr. Joseph Behnke
Assistant General Counsel
Office of the Governor of the State of Texas
P.O. Box 12428
Austin, Texas 78711

OR2020-15328

Dear Mr. Behnke:

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# 831530 (OOG ID Nos. 111-20 and 1117-20).

The Office of the Governor of the State of Texas (the "governor's office") received two requests from different requestors for communications pertaining to seven specified terms sent to or from the governor's office and thirty-three named entities and individuals.¹ You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. You also state you notified third parties of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released.² *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have received and considered comments from the Texas Department of State Health Services ("DSHS"), one of the notified third parties. We have considered the

¹ We note the governor's office sought and received clarification of the first request. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

² As of the date of this letter, we have not received any comments from any of the remaining third-parties at issue explaining why any portion of the submitted information should not be released to the requestors.

submitted arguments and reviewed the submitted information, portions of which consist of representative samples.³

Initially, we note portions of the submitted information were the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2020-14833 (2020). In that ruling, we concluded the following: the governor's office must release the information subject to section 552.022(a)(17) of the Government Code; the governor's office must withhold certain information you marked under section 552.101 of the Government Code in conjunction with section 81.046 of the Health and Safety Code; the governor's office may withhold certain information you marked under section 552.107(1) of the Government Code; the governor's office may withhold certain information you marked under section 552.111 of the Government Code; the governor's office must withhold certain information you marked under section 552.101 of the Government Code in conjunction with sections 418.177, 418.181, and 418.182 of the Government Code; the governor's office must withhold certain information you marked under section 552.101 of the Government Code in conjunction with common-law privacy; and the governor's office must release the remaining information. We have no indication the law, facts, and circumstances on which Open Records Letter No. 2020-14833 was based have changed. Accordingly, the governor's office must rely on Open Records Letter No. 2020-14833 as a previous determination and withhold or release the identical information in accordance with that ruling.⁴ *See* Open Records Decision No. 673 (2001) (so long as law, facts, 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). We will address the submitted arguments for the remaining information, which is not subject to 2020-14833.

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. Section 552.101 encompasses information made confidential by other statutes, such as section 81.046 of the Health and Safety Code, which provides, in part:

(a) Reports, records, and information received from any source, including from a federal agency or from another state, furnished to a public health district, a health authority, a local health department, or [DSHS] that relate to cases or suspected cases of diseases or health conditions are confidential and may be used only for the purposes of this chapter.

³ 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 that those records contain substantially different types of information than that submitted to this office.

⁴ As we are able to make this determination, we need not address the arguments against disclosure of this information.

(b) Reports, records, and information relating to cases or suspected cases of diseases or health conditions are not public information under [the Act], and may not be released or made public on subpoena or otherwise except as provided by Subsections (c), (c-1), (d), and (f).

Health & Safety Code § 81.046(a)-(b). In Open Records Decision No. 577 (1990), this office concluded that any information acquired or created during an investigation under chapter 81 of the Health and Safety Code is confidential and may not be released unless an exception set out in the statute applies. *See id.* § 81.046(b)-(d), (f); ORD 577. The governor's office and DSHS state the information the governor's office marked relates to cases or suspected cases of contagious diseases, thus, section 81.046 governs the release of the information at issue. Based on these representations and our review, we agree section 81.046 governs the release of this information. Additionally, the governor's office and DSHS state none of the release provisions of section 81.046 are applicable in this instance. Accordingly, we determine the governor's office must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 81.046 of the Health and Safety Code.⁵

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. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate 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 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. *See 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 the confidentiality of a communication has been maintained. Section 552.107(1)

⁵ As our ruling on this information is dispositive, we need not address your remaining arguments against its disclosure.

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 governor's office attorneys and employees that were made for the purpose of providing legal services to the governor's office. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the governor's office has demonstrated most of information you marked consists of privileged attorney-client communications. Therefore, the governor's office may generally withhold the information you marked under section 552.107(1) of the Government Code.⁶ We note, however, one of these e-mail strings include an e-mail received from a non-privileged party. Furthermore, if the e-mail received from the non-privileged party is removed from the e-mail string and stands alone, it is responsive to the request for information. Therefore, if the non-privileged e-mail, which we marked, is maintained by the governor's office separate and apart from the otherwise privileged e-mail string in which it appears, then the governor's office may not withhold the non-privileged e-mail 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 severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex.*

⁶ As our ruling on this information is dispositive, we need not address your remaining argument against its disclosure.

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 state the information you marked consists of advice, opinions, and recommendations of governor's office employees and officials and employees of other state agencies with whom you state the governor's office shares a privity of interest regarding policymaking matters. You further state some of the information at issue consists of draft documents that were intended to be released in their final forms. Upon review, we find the information the governor's office marked consists of advice, opinions, or recommendations on the policymaking matters of the governor's office. Accordingly, the governor's office may withhold the information you marked under section 552.111 of the Government Code.

In summary, the governor's office must rely on Open Records Letter No. 2020-14833 as a previous determination and withhold or release the identical information in accordance with that ruling. The governor's office must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 81.046 of the Health and Safety Code. The governor's office may withhold the information you marked under section 552.107(1) of the Government Code; however, if the non-privileged e-mail, which we marked, is maintained by the governor's office separate and apart from the otherwise privileged e-mail string in which it appears, then the governor's office may not withhold the non-privileged e-mail under section 552.107(1) of the Government Code. The governor's office may withhold the information you marked under section 552.111 of the Government Code. The governor's office 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,

Jennifer Copeland
Assistant Attorney General
Open Records Division

JC/mo

Ref: ID# 831530

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)