



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 23, 2020

Mr. Andrew Wipke
Assistant County Attorney
Fort Bend County Attorney's Office
401 Jackson Street, 3rd Floor
Richmond, Texas 77469

OR2020-24049

Dear Mr. Wipke:

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# 845599.

The Fort Bend County Judge's Office (the "county judge's office") received a request for five categories of information pertaining to a specified order. The county judge's office states it will release some information to the requestor. The county judge's office claims some of the submitted information is excepted from disclosure under sections 552.107, 552.111, 552.136, and 552.137 of the Government Code. We have considered the exceptions the county judge's office claims and reviewed the submitted information.

Initially, we note some of the submitted information is not responsive to the instant request for information because it was created after the county judge's office received the request for information. This ruling does not address the public availability of any information that is not responsive to the request, which we have marked, and the department is not required to release such information in response to this request.¹

Next, we note the requestor is a Texas State Representative. Section 552.008 of the Government Code grants access to requested information, including confidential

¹ As we are able to make this determination, we need not address the county judge's office's arguments against disclosure of this information.

information, to individual members, agencies, or committees of the Texas Legislature. Section 552.008 provides:

(a) [The Act] does not grant authority to withhold information from individual members, agencies, or committees of the legislature to use for legislative purposes.

(b) A governmental body on request by an individual member, agency, or committee of the legislature shall provide public information, including confidential information, to the requesting member, agency, or committee for inspection or duplication in accordance with this chapter if the requesting member, agency, or committee states that the public information is requested under this chapter for legislative purposes. A governmental body, by providing public information under this section that is confidential or otherwise excepted from required disclosure under law, does not waive or affect the confidentiality of the information for purposes of state or federal law or waive the right to assert exceptions to required disclosure of the information in the future. The governmental body may require the requesting individual member of the legislature, the requesting legislative agency or committee, or the members or employees of the requesting entity who will view or handle information that is received under this section and that is confidential under law to sign a confidentiality agreement that covers the information and requires that:

(1) the information not be disclosed outside the requesting entity, or within the requesting entity for purposes other than the purpose for which it was received;

(2) the information be labeled as confidential;

(3) the information be kept securely; or

(4) the number of copies made of the information or the notes taken from the information that implicate the confidential nature of the information be controlled, with all copies or notes that are not destroyed or returned to the governmental body remaining confidential and subject to the confidentiality agreement.

...

(c) This section does not affect:

(1) the right of an individual member, agency, or committee of the legislature to obtain information from a governmental body under other law, including under the rules of either house of the legislature;

- (2) the procedures under which the information is obtained under other law; or
- (3) the use that may be made of the information obtained under other law.

Gov't Code § 552.008(a)–(b), (c). In this instance, the requestor is Texas State Representative Gary Gates (“Representative Gates”). Representative Gates does not state, however, and it is not otherwise clear to this office, the request was made for legislative purposes. Accordingly, we must rule on the applicability of section 552.008 in the alternative. If Representative Gates made this request for legislative purposes, then the county judge’s office must make the responsive information available to him in accordance with section 552.008 of the Government Code. *See id.* § 552.008(b). We note section 552.008 permits a governmental body to require a member of the legislature to sign a confidentiality agreement for the protection of information obtained pursuant to this section. *Id.* In addition, release of this information under section 552.008 does not waive or affect the confidentiality of the information for the purposes of state or federal law or waive the right of the county judge’s office to assert exceptions to required public disclosure of this information to future requestors. *See id.* But, if this request for information was not made for legislative purposes, then the responsive information need not be released under section 552.008, and we will consider the county judge’s office’s arguments against its public disclosure.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See id.* § 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 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 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 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 county judge’s office states some of the submitted information consists of communications involving the county judge’s office’s attorneys, employees, and officials that were made in furtherance of the rendition of professional legal services to the county judge’s office. The county judge’s office states these communications were intended to be, and have remained, confidential. Based on the county judge’s office’s representations and our review, we find the county judge’s office has demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the county judge’s office may withhold the information it marked under section 552.107(1) of the Government Code.²

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

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

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.

The county judge's office states some of the remaining responsive information consists of advice, opinions, and recommendations relating to the county judge's office's policymaking. The county judge's office also states the information at issue contains draft documents that were released to the public in their final forms. Upon review, with the exception of the information we marked for release, we find the county judge's office may withhold the information it marked under section 552.111 of the Government Code. However, the information we marked for release consists of either general administrative information that does not relate to policymaking or information that is purely factual in nature. Thus, we find the county judge's office has failed to demonstrate how the remaining information at issue is excepted under section 552.111. Accordingly, the county judge's office may not withhold the information we marked for release under section 552.111 of the Government Code.

Section 552.136 of the Government Code provides, "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). Accordingly, the county judge's office must withhold the conference call access code it marked under section 552.136 of the Government Code.

Section 552.137 of the Government Code 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). The

e-mail addresses at issue are not excluded by subsection (c). Therefore, the county judge's office must withhold the personal e-mail addresses it marked and indicated under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

We note some of the remaining information may be subject to section 552.117 of the Government Code.³ Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See id.* § 552.117(a)(1). We note section 552.117 also encompasses a personal cellular telephone number, unless the cellular service is paid for by a governmental body. *See Open Records Decision No. 506 at 5-7 (1988)* (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See Open Records Decision No. 530 at 5 (1989)*. Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Accordingly, if the employee whose information is at issue timely requested confidentiality under section 552.024 of the Government Code and the cellular telephone service is not paid for by a governmental body, then the county judge's office must withhold the employee's cellular telephone number in the remaining responsive information under section 552.117(a)(1) of the Government Code.

In summary, if Representative Gates made this request for legislative purposes, then the county judge's office must make the responsive information available to him in accordance with section 552.008 of the Government Code. If Representative Gates did not make the request for legislative purposes, then the county judge's office: (1) may withhold the information it marked under section 552.107(1) of the Government Code; (2) may withhold the information it marked under section 552.111 of the Government Code, with the exception of the information we marked for release; (3) must withhold the conference call access code it marked under section 552.136 of the Government Code; (4) must withhold the personal e-mail addresses it marked and indicated under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure; (5) must withhold the employee's cellular telephone number in the remaining responsive information under section 552.117(a)(1) of the Government Code if the employee whose information is at issue timely requested confidentiality under section 552.024 of the

³ 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 No. 481 (1987), 480 (1987), 470 (1987)*.

Government Code and the cellular telephone service is not paid for by a governmental body; and (6) 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 <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,

Gerald A. Arismendez
Assistant Attorney General
Open Records Division

GAA/gw

Ref: ID# 845599

Enc. Submitted documents

c: Requestor
(w/o enclosures)