



GOVERNOR GREG ABBOTT

December 20, 2022

Justin Gordon
Open Records Division
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

Re: Open Records Letter Ruling Request
OOG ID#: 728-22

Dear Mr. Gordon:

On December 8, 2022, the Office of the Governor (the "OOG") received a modified request under the Public Information Act (the "PIA") from Mr. Robert Montoya. A copy of the request is attached as Exhibit A. Pursuant to section 552.301(a), the OOG requests a decision from your office on whether certain responsive information is excepted from disclosure under the PIA. Our office submits this brief in accordance with sections 552.301(b) and 552.301(e).

The OOG has released some information to the requestor. The OOG asserts the remaining responsive information is excepted from required public disclosure under sections 552.107 and 552.111 of the Government Code. The information at issue is attached as Exhibit B. The OOG has copied the requestor as a recipient of this brief pursuant to sections 552.301(d) and 552.301(e-1).

I. Information Excepted From Required Public Disclosure Under Section 552.107: Privileged Attorney-Client Communications

The OOG asserts the information at issue consists of privileged attorney-client communications. Section 552.107(1) of the Government Code excepts from required public disclosure information "that the attorney general . . . is prohibited from disclosing because of a duty to the client under the Texas Rules of Evidence or the Texas Disciplinary Rules of Professional Conduct." Tex. Gov't Code § 552.107. Section 552.107 protects information that falls 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. Tex. Att'y Gen. 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 "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. Tex. R. Evid. 503(b)(1). Third, the privilege applies only to communications between or among clients,

client representatives, lawyers, and lawyer representatives. *Id.* 503(b)(1)(A), (B), (C), (D), (E). 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 to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Section 552.107(1) applies to communications between a governmental body and its attorney made in confidence to further the attorney’s rendering of professional legal services to the governmental body. Attorney General opinions applying section 552.107(1) have permitted governmental bodies to withhold information their attorneys have received or generated in the capacity of a legal advisor. *See* Tex. Att’y Gen. Open Records Decision No. 462 at 10-11 (1987) (applying section 3(a)(7), predecessor to Section 552.107(1)). 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 information within Exhibit B reflects communications between attorneys for the OOG and OOG officials and staff discussing certain legal matters. Thus, the information at issue constitutes or reveals communications between privileged parties that were made for the purpose of providing professional legal services to the OOG. Further, these communications were not and are not intended to be disclosed and have not been disclosed to non-privileged parties. Therefore, the OOG contends the information within Exhibit B may be withheld under section 552.107(1) of the Government Code.

II. Information Excepted From Required Public Disclosure Under Section 552.111: Deliberative Process Privilege

Section 552.111 of the Government Code excepts from required public disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Tex. Gov’t Code § 552.111. Your office has construed section 552.111 to encompass the deliberative process privilege by excepting from disclosure internal communications consisting of advice, recommendations, or opinions reflecting the policy making processes of a governmental body. Tex. Att’y Gen. Open Records Decision No. 615 at 5 (1993); *accord City of Garland v. Dallas Morning News*, 969 S.W.2d 548, 556 (Tex. App.—Dallas 1998) (“Section 552.111 . . . excepts only those internal communications consisting of advice, recommendations, and opinions reflecting the policy-making processes of the governmental body at issue.”), *aff’d*, 22 S.W.3d 351 (Tex. 2000). 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* Tex. Att’y Gen. Open Records Decision No. 313 at 3 (1982). The purpose of section 552.111 is “to protect advice and opinions on policy matters and to encourage frank and open discussion within an agency in connection with its decision-making processes.” *Dallas Morning News*, 969 S.W.2d at 556.

Your office has also concluded that 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* Tex. Att’y Gen. 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.

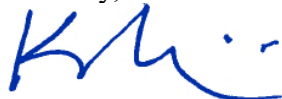
The information marked within Exhibit B includes such communications subject to section 552.111 of the Government Code. This information includes communications between OOG employees and officials communicating in their official policy-making capacities. In the communications, the individuals were providing advice, opinions, and recommendations about matters of broad scope, and the release of these deliberations would have a chilling effect on the frank and open discussion necessary for the decision-making process. The information at issue also includes preliminary drafts circulated between parties with a common deliberative process, communicating in their policy-making capacities. These draft statements and documents were intended for public release in their final forms. Moreover, these drafts reflect the drafters' advice, opinions, and recommendations with regard to the form and content of the final statements and documents.

Thus, the OOG asserts that the information marked under section 552.111 within Exhibit B is excepted from disclosure under section 552.111 of the Government Code and the deliberative process privilege. The OOG is not seeking to withhold any final versions of policy statements or documents.

III. Conclusion

On behalf of the OOG and pursuant to section 552.301 of the Government Code, I respectfully request an open records letter ruling as to the applicability of the above raised exceptions. If you have any questions or need additional information, please contact me at (512) 475-2256.

Sincerely,



Kieran Hillis
Public Information Coordinator
Assistant General Counsel
Office of Governor Greg Abbott

cc: Mr. Robert Montoya
Texas Scorecard
VIA EMAIL ONLY (w/o Exhibit B)



GOVERNOR GREG ABBOTT

December 20, 2022

Justin Gordon
Open Records Division
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

RE: OOG ID# 728-22

Dear Mr. Gordon:

In accordance with section 552.308(b) of the Government Code, the Office of the Governor certifies the undersigned sent the attached letter related to OOG ID# 728-22 to the Open Records Division of the Office of the Attorney General by depositing the letter into interagency mail on December 20, 2022.

Sincerely,

A handwritten signature in blue ink, appearing to read "KH", with a horizontal line extending to the right.

Kieran Hillis
Public Information Coordinator
Assistant General Counsel
Office of Governor Greg Abbott

EXHIBIT A

From: [Robert Montoya](#)
To: [Public Records](#)
Subject: 728-22 Montoya - Request for Narrowing or Clarification_Reply
Date: Wednesday, December 7, 2022 5:11:35 PM

[EXTERNAL SENDER] - Do not click on links or open attachments in unexpected messages.

Kieran Hillis,

Thank you for reaching out.

We are seeking communications sent and received by Governor Abbott and his immediate executive staff (Chief of Staff, Deputy Chief of Staff, and Senior Advisors).

Thanks,
Robert Montoya
Investigative Reporter
Texas Scorecard
(p) 888-410-1836 ext 710
[Texas Scorecard](#) | Twitter: @RobbyMontoya

On Wed, Dec 7, 2022 at 4:41 PM Public Records <publicrecords@gov.texas.gov> wrote:

Mr. Montoya,

This email seeks to narrow or clarify your request to avoid the production of and potential charges for responsive information that you are not interested in receiving. Additionally, clarifying or narrowing the scope of your public information request can assist the OOG in providing responsive information to you more quickly and potentially avoid the need for a decision from the Office of the Attorney General.

Your original request seeks, in part, “communications in the possession of the governor’s office, including but not limited to the governor and his chief of staff [regarding certain matters involving named individuals]” from July 1, 2022 to November 28, 2022. Please respond to the following request for clarification or narrowing:

- **Please clarify:** In seeking communications in the possession of “the governor’s office,” do you seek communications sent and received by the entire OOG, or just Governor Abbott and his immediate executive staff (Chief of Staff, Deputy Chief of Staff, and Senior Advisors)?

Your narrowing or clarification of this request does not preclude you from making future requests for additional information. After we receive your response, we can begin a search of our records for the information you are seeking. If the OOG does not receive a response from you by the 61st day after the date this email is sent, your request will be considered withdrawn. See Gov’t Code § 552.222(d), (g). The withdrawal of your request does not preclude you from requesting the same or other information in the future. You can reach us at publicrecords@gov.texas.gov with any questions.

Sincerely,

Kieran Hillis
Public Information Coordinator
Assistant General Counsel
Office of the Governor

From: Robert Montoya <rmontoya@texasscorecard.com>
Sent: Monday, November 28, 2022 7:07 PM
To: Public Records <publicrecords@gov.texas.gov>
Subject: 728-22 Montoya - Request for Information

[EXTERNAL SENDER] - Do not click on links or open attachments in unexpected messages.

Kieran Hillis,

Hope you're doing well.

Please find attached our open records request.

Feel free to contact me if you have any questions or concerns.

Thanks,

Robert Montoya

Investigative Reporter

Texas Scorecard

(p) 888-410-1836 ext 710

[Texas Scorecard](#) | Twitter: [@RobbyMontoya](#)