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OPEN RECORDS DIVISION

GOVERNOR GREG ABBOTT

January 26, 2016

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#: 15-525  
ORD ID#: 602680

Dear Mr. Gordon:

On December 30, 2015, the Office of the Governor ("OOG") received a public information request under the Texas Public Information Act ("PIA"), Chapter 552, Government Code, from Mr. Isaiah Smith. A copy of the request is attached as Exhibit A.<sup>1</sup>

The OOG is releasing most responsive information to Mr. Smith, including the unmarked information within Exhibit B. The OOG asserts the remaining responsive information is excepted from required public disclosure under the PIA. Pursuant to section 552.301(a) of the Government Code, this brief is submitted to seek a decision as to whether sections 552.107 and 552.111 of the Government Code apply to the information at issue. The OOG has also notified the Texas Department of Public Safety ("DPS"), the U.S. Department of Homeland Security, and the U.S. Department of State of the request pursuant to section 552.305 of the Government Code, to allow it to submit arguments against release of the information contained within Exhibit C. The OOG has copied Mr. Smith as a recipient of this brief pursuant to sections 552.301(d) and 552.301(e-1) of the Government Code. Representative samples of the information at issue are attached as Exhibit B and Exhibit C.

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

The OOG asserts the information marked within Exhibit B consists of privileged attorney-client communications. Section 552.107(1) of the Government Code excepts from required public

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<sup>1</sup> For purposes of calculating deadlines, the OOG was closed for holiday on December 31, 2015, January 1, 2016, and January 18, 2016, and observed a skeleton crew day on January 19, 2016.

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.” 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. ORD-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. ORD-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).

Some of the information marked within Exhibit B consists of communications between and among OOG attorneys and OOG employees on various legal matters. Other communications are between OOG attorneys and Office of the Attorney General (“OAG”) attorneys representing the State of Texas on the coordination of legal services to the Governor. This information constitutes or reveals communications between privileged parties that were made for the purpose of providing professional legal services to the Governor and the OOG. Further, these communications were not intended to be disclosed and have not been disclosed to non-privileged parties. *See* Tex. R. Evid. 503(a)(5). Therefore, the OOG contends the information marked within Exhibit B may be withheld in its entirety 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.” 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. ORD-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.”), *affirmed*, 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. ORD-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. 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).

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* 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 consists of all of the above. First, it includes a document with written impressions of an OOG employee that reflect the employee's recommendations and advice on policy matters.<sup>2</sup> Second, the information includes communications between OOG policy directors, analysts, and employees, communicating in their official capacities. Third, the information contains communications between the OOG and DPS. The OOG, as the chief executive office of the State of Texas, shares a privity of interest with DPS with regard to specific policy-making matters. Therefore, the communications marked consist of advice, recommendations, and opinions regarding these policy-making matters. Fourth, and relatedly, the information marked includes a draft document reflecting communications between the OOG and officials from other states. The OOG, in representing the interests of the State of Texas within multi-state projects, also shares a privity of interest with other states with regard to specific policy-making matters. Next, there is a memorandum summarizing the advice, opinions, and recommendations of an OOG employee directing policy guidelines. Finally, the information marked includes a draft document, intended for release in its final form, along with communications between OOG employees concerning revisions to this draft document. This preliminary draft represents the drafter's advice, opinions, and recommendations with regard to the form and content of the final document.

In sum, all of the marked communications relate to policy matters of the OOG. Therefore, the OOG asserts the information marked is excepted from disclosure under section 552.111 of the Government Code and the deliberative process privilege.

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<sup>2</sup> The original unmarked document is being released in full.

### 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) 463-8470 or [publicrecords@gov.texas.gov](mailto:publicrecords@gov.texas.gov).

Sincerely,



Jessica Vu  
Assistant General Counsel  
Office of Governor Greg Abbott

cc:               Isaiah Smith  
(without        Isaiah Smith Campaign  
Exhibits)      *iscampaign@usa.com*

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Attachments: Exhibit A – Copy of original request  
Exhibit B – Copy of information at issue  
Exhibit C – Copy of information that may implicate Texas Department of Public Safety, U.S. Department of Homeland Security, and U.S. Department of State Department interests