



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 24, 2009

Ms. Candice M. De La Garza
Assistant City Attorney
City of Houston, Legal Department
P.O. Box 368
Houston, Texas 77001-0368

OR2009-16741

Dear Ms. De La Garza:

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#362254.

The City of Houston Office of the Mayor (the "city") received 114 requests for information pertaining to Mayor Bill White (the "mayor"). You state a portion of the submitted information is not subject to the Act. You also state that a portion of the responsive information will be made available to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.105, 552.107, 552.111, 552.116, 552.130, 552.136, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially you state that a portion of the requested information was the subject of a prior ruling in Open Records Letter No. 2009-05121 (2009). In that ruling, this office concluded that the information pertaining to the mayor's private social affairs was not collected, assembled, or maintained by or for the mayor under a law or ordinance or in connection with the transaction of the city's official business; therefore, that information is not subject to the Act and need not be released. As we have no indication that the law, facts, and circumstances on which this prior ruling was based have changed, you must continue to rely on this prior ruling as a previous determination and need not release the information requested in this instance that was previously ruled upon in that decision. *See* Open Records Decision

¹We assume that 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.

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).

Next, you claim that the information in Exhibit 3 also contains information pertaining to the mayor's personal social affairs that is not subject to the previous determination because it was created after the date that request was received. You assert that this information is also not public information as defined by section 552.002 of the Government Code, and, thus, is not subject to the Act. The Act applies only to "public information." *See id.* § 552.021. Section 552.002 of the Government Code defines public information as:

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Id. § 552.002. Information is generally subject to chapter 552 when it is held by a governmental body and it relates to the official business of a governmental body or is used by a public official or employee in the performance of official duties. Open Records Decision No. 635 (1995). You explain that the information in Exhibit 3 "relates purely to the [m]ayor's personal schedule and family matters... and does not relate to any official business transactions or dealings for the [c]ity." You represent that the information in Exhibit 3 was not collected, assembled, or maintained in connection with the transaction of the city's official business. Based on your representations and our review, we find that Exhibit 3 was not collected, assembled, or maintained by or for the mayor under a law or ordinance or in connection with the transaction of official business. *See Gov't Code* § 552.002. Therefore, the information in Exhibit 3 is not subject to the Act and need not be released.

Next we note that you state that information in Exhibits 13, 14, and 15 was the subject of a prior ruling in Open Records Letter No. 2009-00902 (2009). In that ruling, this office concluded that a permanent resident card is confidential and must be withheld under section 552.101 of the Government Code in conjunction with section 1304(b) of title 8 of the United States Code. This office also concluded that personal financial information must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. Also, this office concluded that the city must withhold Texas motor vehicle information under section 552.130 of the Government Code. As we have no indication that the law, facts, and circumstances on which this prior ruling was based have changed, you

must continue to rely on this prior ruling as a previous determination and withhold the information in Exhibits 13, 14, and 15 that was previously ruled upon in that decision. *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).

You state that Exhibit 12 is excepted from disclosure under section 552.105 of the Government Code. Section 552.105 excepts from disclosure information relating to:

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Gov't Code § 552.105. We note that this provision is designed to protect a governmental body's planning and negotiating position with regard to particular transactions. *See* Open Records Decision Nos. 564 (1990), 357 (1982), 310 (1982). Information that is excepted from disclosure under section 552.105 that pertains to such negotiations may be excepted from disclosure so long as the transaction relating to that information is not complete. *See* ORD 310. A governmental body may withhold information "which, if released, would impair or tend to impair [its] 'planning and negotiating position in regard to particular transactions.'" Open Records Decision Nos. 357 at 3, 222 (1979). The question of whether specific information, if publicly released, would impair a governmental body's planning and negotiating position with regard to particular transactions is a question of fact. Accordingly, this office will accept a governmental body's good-faith determination in this regard, unless the contrary is clearly shown as a matter of law. *See* ORD 564.

You state the information in Exhibit 12 relates to the city's planning and negotiation positions regarding real properties identified in the submitted documents. You also state that disclosure of this information could adversely affect the city's potential future plans for the identified properties. Based on your representations and our review, we conclude that the city may withhold Exhibit 12 under section 552.105 of the Government Code.

You state the information in Exhibit 4 is excepted from disclosure under section 552.107(1) of the Government Code, which 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. 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). 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 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).

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, no pet.). 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 state the information in Exhibit 4 consists of confidential communications between city officials, city employees and outside legal counsel that were made for the purpose of facilitating the rendition of professional legal services to the city. You also state that the information was not intended for third parties and the confidentiality of these communications have been maintained. You have identified the parties to the communications. Based upon your representations and our review of the information at issue, we conclude that the city may withhold the information in Exhibit 4 under section 552.107(1) of the Government Code.

You assert that the information in Exhibits 6, 7, and 8 is excepted from disclosure under the deliberative process privilege encompassed by section 552.111 of the Government Code. *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, no writ); *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 that 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. 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. *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).

Section 552.111 can also encompass communications between a governmental body and a third-party consultant. *See* Open Records Decision Nos. 631 at 2 (1995) (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body's consultants). 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 at 9.

This 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.

You assert that Exhibit 7 contains a draft letter prepared by the mayor regarding the city's support of an applicant to a federal grant program that will be released to the public in its final form. You also assert that Exhibit 8 contains a draft contract that is intended for public release in its final form. We find that you have sufficiently demonstrated that the drafts in Exhibits 7 and 8 in their entirety pertain to the city's policymaking processes. Accordingly, the city may withhold Exhibits 7 and 8 in their entirety under section 552.111 of the Government Code.

With respect to Exhibit 6, you state this information contains interagency memoranda and communications containing policy making including potential funding sources, allocations for future parks projects, potential expansion of drainage projects, and the city's engagement with faith-based organizations. Upon review, we agree that portions Exhibit 6 consists of advice, recommendations, and opinions reflecting the city's policymaking processes. Therefore, we conclude the city may withhold the information we have marked in Exhibit 6 under section 552.111. However, you have failed to demonstrate how the factual, administrative, and personnel information contained in the remaining portions of Exhibit 6 constitutes advice, recommendations, opinions, or material reflecting the policymaking processes of the city. Further, we find that a portion of the remaining information was communicated with an outside party, and you have failed to demonstrate how the city shares a privity of interest or common deliberative process with this individual. Consequently, the remaining information in Exhibit 6 may not be withheld under section 552.111 of the Government Code.

You state Exhibit 9 is excepted from disclosure under section 552.116 of the Government Code. Section 552.116 of the Government Code provides as follows:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from [required public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [required public disclosure] by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history

background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You state the information in Exhibit 9 consists of a draft audit plan prepared by a city auditor within the office of the city Controller in conducting an audit pursuant to article VII, section 7 of the city charter. You further state that the city charter provides that the city Controller is an elected position charged with "conducting internal audits in accordance with professionally recognized auditing standards, of the operations of all [c]ity departments, offices, agencies, and programs." Based on your representations and our review of the information at issue, we conclude that the information in Exhibit 9 consists of audit working papers that the city may withhold under section 552.116 of the Government Code.

You assert that some of information in Exhibit 10 is excepted from disclosure under section 552.136 of the Government Code. Section 552.136(b) provides that "[n]otwithstanding any other provision of this chapter, 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." The city must withhold the credit card numbers you have marked under section 552.136.

You assert that some of information in Exhibit 11 is excepted under section 552.137 of the Government Code. Section 552.137 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 Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. The e-mail address at issue does not appear to be of a type specifically excluded by section 552.137(c), and you do not inform us that a member of the public has affirmatively consented to its release. Therefore, the city must withhold the e-mail address you have marked in addition to the e-mail address we have marked under section 552.137 of the Government Code.

In summary, the city must continue to rely on Open Records Letter No. 2009-05121 as a previous determination and withhold the information that is not subject to the Act in accordance with that ruling. The information in Exhibit 3 is not subject to the Act and need not be released. The city must continue to rely on Open Records Letter No. 2009-00902 as a previous determination and withhold or release the information in Exhibits 13, 14, and 15 in accordance with that ruling. The city must withhold Exhibit 12 under section 552.105 of the Government Code. The city may withhold the information in Exhibit 4 under section 552.107(1) of the Government Code. The city may withhold the Exhibits 7 and 8 in their entirety and the information we have marked in Exhibit 6 under section 552.111 of the Government Code. The city may withhold Exhibit 9 under section 552.116 of the Government Code. The city must withhold the credit card numbers you have marked under section 552.136 of the Government Code. The city must withhold the e-mail address you have marked in addition to the e-mail address we have marked under section 552.137 of the Government Code. The remaining information must be released.

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 http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Nneka Kanu
Assistant Attorney General
Open Records Division

NK/jb

Ref: ID# 362254

Enc. Submitted documents

cc: Requestor
(w/o enclosures)