ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 24, 2010

Ms. Helen Valkavich
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR2010-02715

Dear Ms. Valkavich:

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# 371207 (COSA File No. 09-1536).

The City of San Antonio (the "city") received a request for information regarding tax abatements for Wal-Mart and H.E.B., Inc. for the past 20 years. You state the city will provide a substantial amount of the information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.106, 552.107, and 552.111 of the Government Code.[1] We have considered the exceptions you claim and reviewed the submitted information.

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. 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

[1]Although you also raise Texas Rule of Evidence 503, we note that, in this instance, the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 is section 552.107. *See* Open Records Decision No. 676 at 1-2 (2002).

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). 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 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 assert that portions of the submitted information, which you have marked, consist of "communications made in confidence for the purpose of furthering professional legal services being rendered to" the city. You further assert the communications were intended to remain confidential and that the confidentiality of the communications has been maintained. In addition, you have identified the parties to the communications at issue. Upon review of the submitted arguments and the information at issue, we find you have established that some of the information you have marked constitutes privileged attorney-client communications. Therefore, the city may withhold the portions of the submitted information we have marked under section 552.107 of the Government Code. However, the remaining information you seek to withhold under section 552.107 consists of communications with non-privileged parties, whom you have identified as employees of or attorneys for H.E.B., the company seeking a tax abatement from the city. Consequently, we find you have failed to demonstrate the applicability of section 552.107 to these communications, and they may not be withheld on that basis.

You also raise 552.111 for portions of the remaining information. Section 552.111 of the Government Code excepts from disclosure "an 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, 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. 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 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).

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.

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. We note that a governmental body does not have a privity of interest or common deliberative process with a private party with which the governmental body is engaged in contract negotiations. *See id.* (section 552.111 not applicable to communication with entity with which governmental body has no privity of interest or common deliberative process).

You state the information you seek to withhold under section 552.111 contains commentary from city staff regarding terms or issues considered during negotiations of a tax abatement agreement. You assert the information at issue reflects the "discussion and thought processes by and among city personnel on this subject." Upon review we find that portions of the remaining information consist of advice, recommendations, or opinions that pertain to the policymaking processes of the city. Therefore, the city may withhold the portions of the information we have marked under section 552.111 of the Government Code. However, we note that some of the information you have marked consists of the final draft of the tax phase-in agreement, a copy of which was attached to the city ordinance authorizing the agreement and seen by all parties. Additionally, we note that some of the information you have marked consists of communications with H.E.B. or documents created by H.E.B. We find that the city has not established privity of interest or common deliberative process with H.E.B. Accordingly, the city may not withhold any of the remaining information under section 552.111.

Finally, you contend that portions of the remaining information are excepted from disclosure under section 552.106 of the Government Code. Section 552.106 of the Government Code excepts from disclosure "[a] draft or working paper involved in the preparation of proposed legislation[.]" Gov't Code § 552.106(a). Like section 552.111, the purpose of section 552.106 is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body. *See* Open Records Decision No. 460 at 2 (1987). Therefore, section 552.106 is applicable only to the policy judgments, recommendations, and proposals of persons who are involved in the preparation of proposed legislation and who have an official responsibility to provide such information to members of the legislative body. *Id.* at 2. However, a comparison or analysis of factual information prepared to support proposed legislation is within the scope of section 552.106. *See* ORD 460 at 2.

You assert that the information you seek to withhold under section 552.106 represents drafts or working papers involved in the preparation of proposed legislation. You assert that they demonstrate the deliberative process of the city as it moved toward enacting legislation in the form of a municipal ordinance. However, upon review, we find the remaining information consists of communications between the city and H.E.B. employees or attorneys and documents created by H.E.B. staff. You do not inform us that H.E.B. had any official responsibility to provide legislative advice to the members of the city council. Likewise, you have not established that the city and H.E.B. share a privity of interest or common

deliberative process with respect to the city ordinance authorizing the tax phase-in agreement. *See* Open Records Decision No. 429 (1985) (exception not applicable to materials prepared by person or agency who has no official responsibility to do so but only acts as interested party who wishes to influence legislative process). We therefore conclude that the city may not withhold the remaining information under section 552.106 of the Government Code.

In summary, the city may withhold the information we have marked under sections 552.107 and 552.111. 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,

Kate Hartfield

Kate Hartfield
Assistant Attorney General
Open Records Division

KH/dls

Ref: ID# 371207

Enc. Submitted documents

c: Requestor
(w/o enclosures)