ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 9, 2010

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

OR2010-03415

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# 372120 (COSA File No. 09-1589).

The City of San Antonio (the "city") received a request for specified archived documents pertaining to former Mayor Ed Garza. You state the city has released most of the responsive information. You claim that some of the responsive information is subject to a previously issued Open Records Letter Ruling and that portions of the submitted information are excepted from disclosure under sections 552.107, 552.111, 552.116 of the Government Code. You also state that release of a portion of the submitted information may implicate the proprietary interests of a third party. Accordingly, you state, and provide documentation showing, you notified Air Florida Airways of the request for information and of its right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted information.

We note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, this office has not received

comments from Air Florida Airways explaining why its information should not be released. Therefore, we have no basis to conclude that Air Florida Airways has a protected proprietary interest in its submitted information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the city may not withhold any portion of the submitted information based upon the proprietary interests of Air Florida Airways.

Next, you inform this office that portions of the submitted information, which you have marked, were the subject of a previous ruling issued by this office, Open Records Letter No. 2004-6270 (2004). In that ruling, this office concluded that the city may withhold certain information under sections 552.107 and 552.111 of the Government Code. As we have no indication that the law, facts, or circumstances on which this prior ruling was based have changed, the city may continue to rely on that ruling as a previous determination and withhold the information you have marked in accordance with Open Records Letter No. 2004-6270. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and 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).

The city claims section 552.107(1) of the Government Code as an exception to disclosure for portions of the remaining information. Section 552.107(1) 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 Texas 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* TEX. R. EVID. 503(b)(1)(A)-(E). 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.* 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).

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 portions of the information you have marked constitute communications between city officials, city personnel, and city attorneys that were made for the purpose of providing legal advice to the city. You have identified the parties to the communications. You state these communications were made in confidence and their confidentiality has been maintained. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Therefore, the city may withhold the information you have marked under section 552.107 of the Government Code.[1]

You assert portions of the remaining information are excepted from disclosure under the deliberative process privilege encompassed by section 552.111 of the Government Code. *See* Gov't Code § 552.111; *see also* Open Records Decision No. 615 at 2 (1993). Section 552.111 of the Government Code excepts from public 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. 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

[1]As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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. The 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 also has 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 (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), 563 at 5-6 (1990) (private entity engaged in joint project with governmental body may be regarded as its consultant), 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). 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.

You state the information you have marked reveals advice, opinions, and recommendations pertaining to an agreement between the city and the Professional Golfers Association of America. You explain the documents at issue "reflect preliminary thoughts and analyses of the mayor and his staff as they considered the many options and details that would be

covered by the agreement." Further, you state some of the submitted information consists of draft documents pertaining to the agreement that necessarily reflect the advice, opinion, and recommendations of the drafters. You state the agreement "was ultimately finalized and made available to the public." Based on your representations and our review of the information at issue, we find you have established the deliberative process privilege is applicable to some of the information at issue, which we have marked. Therefore, the city may withhold the information we have marked under section 552.111 of the Government Code. However, we find that the remaining information consists of information that is either purely factual in nature or is a communication with a party whom you have not identified. You have not demonstrated that the city shares a privity of interest or common deliberative process with this unidentified party. *See* ORD 561 at 9. Thus, you have failed to demonstrate, and the information does not reflect on its face, that the remaining information reveals advice, opinions, or recommendations of the city that pertain to policymaking. Accordingly, we find none of the remaining information is excepted from disclosure under section 552.111, and it may not be withheld on that basis.

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 the requirements of Section 552.021. If information in an audit working paper is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 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, and provide documentation showing, that article V.A of Chapter 2 of the city's charter creates an Office of the City Auditor (the "city auditor") and authorizes the city auditor to conduct financial, fiscal compliance, and financial procedure audits of all city departments, offices, agencies and programs. You further inform us that the city auditor "serves at the will and pleasure of the [c]ity Council, and reports directly to the Mayor and Council." You state that the information you marked consists of audit working papers from an audit authorized and monitored by the city council pursuant to article V.A. You state that the final audit report has been released to the public. Based on your representations and our review of the information at issue, we conclude that the information you have marked consists of audit working papers that the city may withhold under section 552.116 of the Government Code.

Finally, we note that some of the remaining information is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are protected by copyright. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of materials protected by copyright, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

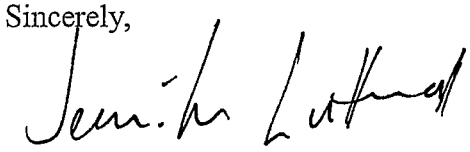
In summary, the city may continue to rely on Open Records Letter No. 2004-6270 as a previous determination and withhold the information you have marked in accordance with that ruling. The city may withhold the information (1) you have marked under section 552.107 of the Government Code; (2) we have marked under section 552.111 of the Government Code; and (3) you have marked under section 552.116 of the Government Code. The remaining information must be released, but any information subject to copyright may only be released in accordance with federal copyright law.

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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/dls

Ref: ID# 372120

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Vincent Zecca
15641 79th Street
Howard Beach, New York 11414
(w/o enclosures)