



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 7, 2011

Ms. Cheryl K. Byles
Assistant City Attorney
City of Fort Worth
1000 Throckmorton Street, 3rd Floor
Fort Worth, Texas 76102

OR2011-03177

Dear Ms. Byles:

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# 410581 (Fort Worth PIR No. W004807).

The City of Fort Worth (the "city") received a request for all documents and communications during a specified time period referencing two specified addresses. You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

Initially, we note that some of the submitted information is subject to section 552.022 of the Government Code. This section provides in part that:

¹We note the city received the instant request for information on November 2, 2010, but did not request this decision until December 22, 2010. You explain the city required the requestor to make a deposit for payment of anticipated costs under section 552.263 of the Government Code and received the cost deposit on December 8, 2010. Based on your representations, we conclude the date of the city's receipt of this request was December 8, 2010, and the city complied with section 552.301 of the Government Code in requesting this decision. *See* Gov't Code § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to Gov't Code § 552.263, request for information is considered to have been received on date that governmental body receives deposit or bond); *see also id.* § 552.301(a)-(b), (e).

(a) [T]he following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code. § 552.022(a)(3). In this instance, one of the documents in Exhibit C-1 is a contract relating to the expenditure of public funds. Thus, the city must release this information pursuant to subsection 552.022(a)(3) unless it is expressly confidential under other law. Although you seek to withhold this information under section 552.111 of the Government Code, this section is a discretionary exception and does not make information confidential. See Open Records Decision Nos. 470 at 7 (1987) (statutory predecessor to section 552.111 deliberative process subject to waiver), 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the city may not withhold the information subject to section 552.022 under section 552.111. As you raise no additional exceptions against disclosure of this contract, it must be released.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 of the Government Code encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. Upon review, we find the information you have marked is highly intimate or embarrassing and of no legitimated public interest. Therefore, the city must withhold this information under section 552.101 in conjunction with common-law privacy.

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

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, 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 assert the information you have marked in the submitted e-mails constitutes communications between city employees and a city attorney that were made for the purpose of providing legal advice to the city. You also assert these communications were made in confidence and that 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 you have marked in the submitted e-mails. Therefore, the city may generally withhold the marked information in Exhibit C-2 under section 552.107(1) of the Government Code. We note one of the individual e-mails and some of the attachments contained in an otherwise privileged e-mail strings are communications with individuals whom you have not shown to be privileged parties. Thus, to the extent this non-privileged information, which we have marked, exists separate and apart from the submitted e-mail strings, it may not be withheld under section 552.107.

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); *see also* 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 only those internal communications that consist of advice, opinions, recommendations 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. *See 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, 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). 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 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 contend the information you have marked in Exhibit C-1 and the information in Exhibit C-3 consists of draft documents, notes, and a presentation that contain advice, opinion, and recommendations relating to policy matters of the city. You indicate the draft documents will be released in their final form. Therefore, we determine the city may withhold the information we have marked in Exhibit C-1 and the entirety of Exhibit C-3 under section 552.111 of the Government Code. However, most of the draft documents at issue have been communicated with a third party. You have not explained how the city shares a privity of interest or common deliberative process with this third party. *See id.* Accordingly, we find this information may not be withheld under section 552.111 of the Government Code.

Section 552.136 of the Government Code states “[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.”² Gov’t Code § 552.136. An access device number is one that may be used to (1) obtain money, goods, services, or another thing of value; or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument. *Id.* Accordingly, to the extent the attachments to the privileged e-mail string we have marked exist separate and apart, the city must withhold the account numbers we have marked under section 552.136 of the Government Code. We note, the remaining information contains payment amounts and a dates which do not constitute access device numbers and may not be withheld based on section 552.136.

In summary, the city must withhold the information you have marked under section 552.101 in conjunction with common-law privacy. The city may withhold the information you have marked in Exhibit C-2 under section 552.107(1) of the Government Code; however, to the extent the non-privileged information we have marked exists separate and apart from the otherwise privileged e-mail strings, it may not be withheld under section 552.107 of the Government Code. The city may withhold the information we have marked under section 552.111 of the Government Code. To the extent the attachments to the privileged e-mail string we have marked exist separate and apart, the city must withhold the account numbers we have marked under section 552.136 of the Government Code. The remaining information must be released.

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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,



Tamara Wilcox
Assistant Attorney General
Open Records Division

TW/tf

Ref: ID# 410581

Enc. Submitted documents

c: Requestor
(w/o enclosures)