



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 17, 2011

Mr. Warren M. S. Ernst
Chief of the General Counsel Division
Office of the City Attorney
City of Dallas
1500 Marilla Street, Room 7BN
Dallas, Texas 75201

OR2011-10261A

Dear Mr. Ernst:

You ask this office to correct Open Records Letter No. 2011-10261 (2011). We note a governmental body is prohibited from requesting reconsideration of a decision issued under section 552.306 of the Government Code. *See* Gov't Code § 552.301(f). Nevertheless, when this office determines an error was made in the ruling process, we will correct the previously issued ruling. Accordingly, this decision is substituted for Open Records Letter No. 2011-10261 and serves as the correct ruling.

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# 424805.

The City of Dallas (the "city") received a request for eight categories of information relating to a specified address. You state some of the requested information either has been or will be released. You claim the submitted information is excepted from disclosure under sections 552.105, 552.107, and 552.111 of the Government Code and privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.3. We have considered your arguments and reviewed the information you submitted.¹

¹This letter ruling assumes the submitted representative samples of information are truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the city to withhold any information that is substantially different from the submitted information. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

Section 552.105 of the Government Code excepts from disclosure information relating to “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(2). Section 552.105 protects 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 protected by section 552.105 that pertains to such negotiations may be withheld for as long as the transaction is not complete. *See* ORD 310. This office also has concluded information about specific parcels of land obtained in advance of other parcels to be acquired for the same project may be withheld under section 552.105 where release of the information would harm the governmental body’s negotiating position with respect to the remaining parcels. *See* ORD 564 at 2. A governmental body may withhold information under section 552.105 “which, if released, would impair or tend to impair [its] ‘planning and negotiating position in regard to particular transactions.’” ORD 357 at 3 (quoting Open Records Decision No. 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 claim section 552.105 for the information submitted as Exhibit C. You inform us the city plans to purchase the property to which the information at issue pertains. You contend disclosure of Exhibit C “would give the [p]roperty owner an unfair advantage because the [p]roperty owner would obtain information on the value of the property.” You assert release of this information “would impair the city’s planning and negotiation position with regard to the sale of the [p]roperty” and would “strengthen the [p]roperty owner’s bargaining position.” Based on your representations and our review of the information at issue, we conclude the city may withhold Exhibit C under section 552.105 of the Government Code.²

Section 552.107(1) of the Government Code protects information that comes 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. *See* 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. *See* 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. *See 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 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

²As we are able to make this determination, we need not address your other claims for Exhibit C.

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. 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. See *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 claim section 552.107(1) for the information submitted as Exhibit B. You state Exhibit B consists of confidential attorney-client communications made in connection with the rendition of professional legal services. You have identified the parties to the communications. There is no indication the confidentiality of these communications has been waived. Based on your representations and our review of the information at issue, we conclude the city may withhold Exhibit B under section 552.107(1) of the Government Code.³

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 this privilege is to protect advice, opinion, and recommendation in the decisional process and 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 (1993), 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 section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, and opinions 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*

³As we are able to make this determination, we need not address your other claims for Exhibit B.

News, 22 S.W.3d 351 (Tex. 2000) (Gov't Code § 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). Moreover, 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 a preliminary draft of a document 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.

We note section 552.111 can encompass communications between a governmental body and a third party. *See* Open Records Decision Nos. 631 at 2 (1995) (Gov't Code § 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) (Gov't Code § 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (Gov't Code § 552.111 applies to memoranda prepared by governmental body's consultants). In order 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.* (Gov't Code 552.111 not applicable to communication with entity with which governmental body has no privity of interest or common deliberative process).

You claim the deliberative process privilege under section 552.111 for the information submitted as Exhibits D and E. You inform us Exhibit D consists of draft documents that will be released to the public in their final form. You contend Exhibit E contains opinions, advice, and recommendations concerning the timing of acquisition of properties. Having considered your representations and reviewed the information at issue, we note one of the documents in Exhibit D is a budget bid for fiscal 2011-12. We understand the city is in the process of formulating its budget for fiscal 2011-12. We conclude the city may withhold the

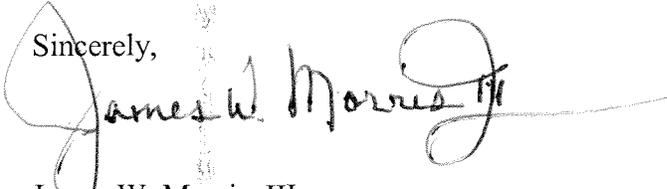
budget bid, which we have marked, under section 552.111 of the Government Code. We note the remaining information in Exhibit D is a draft contract signed by a private party. Because the city and the private party were in the process of negotiating the contract, their interests were adverse. Thus, we find the city and the private party did not share a privity of interest or common deliberative process with respect to the draft contract. We therefore conclude the city may not withhold the draft contract under section 552.111. Lastly, we find Exhibit E pertains to routine administrative matters and does not implicate the city's policymaking processes. We therefore conclude Exhibit E may not be withheld under section 552.111.

In summary, the city (1) may withhold Exhibit C under section 552.105 of the Government Code; (2) may withhold Exhibit B under section 552.107(1) of the Government Code; and (3) may withhold the information we have marked in Exhibit D under section 552.111 of the Government Code. The city must release the rest of the submitted information

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,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/em

Ref: ID# 424805

Enc: Submitted documents

c: Requestor
(w/o enclosures)