



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 18, 2012

Ms. Michelle M. Kretz
Assistant City Attorney
City of Fort Worth
1000 Throckmorton Street, 3rd Floor
Fort Worth, Texas 76102

OR2012-14833

Dear Ms. Kretz:

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# 465358 (CFW No. W018101).

The City of Fort Worth (the "city") received a request for incoming and outgoing e-mails from four named individuals regarding specified topics during a specified time period. You state the city has no records responsive to a portion of the request.¹ You claim portions of the submitted information are excepted from disclosure under sections 552.107 and 552.111 of the Government Code.² You also state release of a portion of the submitted information may implicate the proprietary interests of third parties. Accordingly, you notified the third parties of the request and of their right to submit arguments to this office as to why the

¹The Act does not require a governmental body to release information that did not exist when it received a request or to create responsive information. See *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

²Although you also raise sections 552.101 and 552.130, you make no arguments regarding the applicability of these exceptions. Accordingly, we assume you no longer assert these sections. See Gov't Code §§ 552.301(b), (c), .302. In addition, although you also raise Texas Rule of Civil Procedure 192.5, the proper exception to raise when asserting the work product privilege for information not subject to section 552.022 of the Government Code is section 552.111. See Open Records Decision Nos. 676 (2002), 677 (2002).

requested information should not be released.³ See Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the circumstances). We have considered the submitted arguments and reviewed the submitted information. We have also considered comments submitted by the requestor's attorney. See Gov't Code § 552.304 (interested third party may submit comments to this office stating why the information at issue should or should not be released).

Initially, we note the requestor excluded account numbers, e-mail addresses, personal information about city employees, identifying information of donors, and membership information for the Fort Worth Police Historical Association from the scope of her request. Accordingly, these types of information are not responsive to the present request for information. This ruling does not address the public availability of non-responsive information, and the city need not release such information in response to this request. To the extent the submitted information falls outside the excluded categories, it is responsive to the request, and must be disposed of in accordance with the rest of this ruling.

Next, we must address the requestor's attorney's assertion that the city failed to timely notify the requestor of its request for a ruling as required by section 552.301(d) of the Government Code. Section 552.301 of the Government Code prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(d), a governmental body must provide the requestor with (1) a written statement that the governmental body wishes to withhold the requested information and has asked for a decision from the attorney general, and (2) a copy of the governmental body's written communication to the attorney general within ten business days of receiving the request for information. *Id.* § 552.301(d). Pursuant to section 552.302, a governmental body's failure to comply with section 552.301 results in the presumption that the information is public.

You state the city received the request on June 26, 2012. You also state the city was closed on July 4, 2012 for the Independence Day holiday. We note the city requested and received clarification of portions of the request on July 10, 2012, and then again on July 13, 2012. See Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). We have no indication that the city did not act in good faith in seeking clarification of the request. Therefore, we consider the city's ten-business-day period under section 552.301 for requesting a decision to have begun on July 13, 2012, the date the city received the requestor's response to the request for

³The third parties notified pursuant to section 552.305 are: Gwen Maxwell, Mike Barber, Ron Carey, and Thomas Wiederhold of the Fort Worth Police Historical Association.

clarification. *See City of Dallas v. Abbott*, 304 S.W.3d 380, 384 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). Thus, the city's ten-business-day deadline was July 27, 2012. Therefore, upon review of the submitted information, we conclude the city complied with the requirements of section 552.301(d) in seeking a ruling from this office, and we will address its arguments against disclosure.

Next, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See Gov't Code* § 552.305(d)(2)(B). As of the date of this ruling, we have not received comments from any of the third parties. Thus, we have no basis to conclude any of the third parties have a protected proprietary interest in any of the submitted information. *See id.* § 552.110(a)-(b); 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 the 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 of the information at issue on the basis of any proprietary interest the third parties may have in the submitted information.

Section 552.107 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 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 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)*. 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. *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 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 e-mails you have marked in Exhibit C-2 consist of attorney-client privileged communications made between attorneys for the city and employees and officers of the city in their capacities as client or client representatives for the purpose of facilitating the rendition of professional legal services to the city. You state the communications were intended to be, and have remained, confidential. Accordingly, we find you have demonstrated the applicability of the attorney-client privilege to a portion of the e-mails you marked in Exhibit C-2, and the city may withhold this marked information under section 552.107. However, we find you have not established how the remaining information you seek to withhold under section 552.107 of the Government Code consists of privileged attorney-client communications, and this information may not be withheld on that basis.

Section 552.111 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* (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 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.

You have marked the remaining e-mails in Exhibit C-2 under section 552.111 and state this information consists of advice, opinion, or recommendations on policymaking matters. You further state a portion of this information consists of draft documents "related to deliberation of the issuance of a Mayor and Council Communication." Based on your representations and our review, we find the city may withhold the information we have marked in Exhibit C-2 under section 552.111 of the Government Code. However, we find the remaining information at issue is purely factual in nature or does not consist of draft documents or advice, opinion, or recommendations on policymaking matters. Thus, we conclude you failed to demonstrate the applicability of the deliberative process privilege to the remaining information at issue, and it may not be withheld under section 552.111 of the Government Code.

In summary, the city need not release non-responsive information. The city may withhold the information we have marked in Exhibit C-2 under sections 552.107 and 552.111 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,



Kristi L. Wilkins
Assistant Attorney General
Open Records Division

KLW/ag

Ref: 465358

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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