



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 1, 2013

Ms. Donna L. Johnson
Olson & Olson, L.L.P.
2727 Allen Parkway, Suite 600
Houston, Texas 77019-2133

OR2013-11181

Dear Ms. Johnson:

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# 491736 (City Reference No. COD13-005).

The City of Dickinson (the "city"), which you represent, received a request for communications between HRWK, Inc. ("HRWK") and the city manager during March of 2013, as well as the city's contract with HRWK. The city states it has released or will release some of the requested information but claims the submitted information is excepted from disclosure under sections 552.103, 552.106, 552.107, and 552.111 of the Government Code. You also state, and provide documentation showing, you notified HRWK of the city's receipt of the request for information and of its right to submit arguments to this office as to why the requested information should not be released. *See Gov't Code § 552.305(d); see also* Open Records Decision No. 542 at 3 (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 claimed exceptions and reviewed the submitted information.

Initially, we note the submitted information contains a resolution of the city's council. Because laws and ordinances are binding on members of the public, they are matters of public record and may not be withheld from disclosure under the Act. *See* Open Records Decision No. 221 at 1 (1979) ("official records of the public proceedings of a governmental body are among the most open of records"); *see also* Open Records Decision No. 551

at 2-3 (1990) (laws or ordinances are open records). A resolution is an official record of a public proceeding. Accordingly, the city must release the submitted resolution.

Section 552.103 of the Government Code provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show section 552.103 is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); ORD 551 at 4. The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

You inform us and provide documentation showing that prior to the city's receipt of the request for information, the city brought a lawsuit against the Texas Comptroller of Public Accounts relating to the distribution of taxes under section 3853.202 of the Special District Local Laws Code. Therefore, we agree litigation was pending on the date the city received the request. However, upon review, we find you have not explained how the remaining information pertains to that pending litigation. Thus, you have not established any of the remaining information is excepted from disclosure under section 552.103 and the city may not withhold it on that basis.

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 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, 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, *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. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). 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 explain HRWK is a contractor that provides legislative and governmental affairs services to and on behalf of the city. *See* TEX. R. EVID. 503(b)(1)(c) (discussing privilege among parties “concerning a matter of common interest”); *see also In re Auclair*, 961 F.2d 65, 69 (5th Cir. 1992) (citing *Hodges, Grant & Kaufmann v. United States Government*, 768 F.2d 719,721 (5th Cir. 1985)) (attorney-client privilege not waived if privileged communication is shared with third person who has common legal interest with respect to subject matter of communication). You also explain the city is a member of the Gulf Coast Coalition of Cities (the “coalition”), which we understand is a coalition of cities that represents the interests of its members on gas and electric utility matters. The city asserts the remaining information constitutes confidential communications between and among representatives of the city, HRWK employees, other members of the coalition, and coalition attorneys that were made in furtherance of the rendition of professional legal services. The city also represents, as a member of the coalition, it is a privileged party to the communications. The city informs us the communications were intended to be confidential and their confidentiality has been maintained. Upon review, we find the city has

demonstrated the applicability of the attorney-client privilege to some of the remaining information. Therefore, the city may withhold this information, which we have marked, under section 552.107(1) of the Government Code.¹ However, we conclude you have not established any of the remaining information consists of privileged attorney-client communications. Therefore, the city may not withhold the remaining information under section 552.107.

You assert the remaining is excepted from disclosure under section 552.111 of the Government Code, which 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.” 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 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 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).

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

¹As our ruling is dispositive, we do not address your other arguments to withhold this information.

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.

You assert the remaining information is excepted from disclosure under section 552.111 because it contains advice, opinion, and recommendations on policymaking matters concerning the city. As noted above, HRWK is a contractor for the city. Thus, based on your representations and our review, we find you have established the deliberative process privilege is applicable to some of the remaining information. Therefore, the city may withhold this information, which we have marked, under section 552.111 of the Government Code.² However, we conclude you have not established the remaining information consists of advice, opinion, or recommendations of the city, or it is purely factual in nature. Accordingly, the city may not withhold any of the remaining information under section 552.111 and the deliberative process privilege.

You claim the remaining submitted information is excepted by section 552.106 of the Government Code. This section excepts from disclosure "[a] draft or working paper involved in the preparation of proposed legislation." Gov't Code § 552.106(a). Section 552.106 resembles section 552.111 of the Government Code in that both exceptions protect advice, opinion, and recommendation on policy matters, in order to encourage frank discussion during the policymaking process. *See* Open Records Decision No. 460 at 3 (1987). However, section 552.106 applies specifically to the legislative process and thus is narrower than section 552.111. *Id.* The purpose of section 552.106(a) is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body; therefore, this section 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. *See* Open Records Decision No. 460 at 1-2, 367 (1983) (statutory predecessor applied to recommendations of executive committee of State Board of Public Accountancy for possible amendments to Public Accountancy Act); *see also* Open Records Decision No. 429 at 5 (1985) (statutory predecessor to section 552.106 not applicable to information relating to governmental entity's efforts to persuade other governmental entities to enact particular ordinances). Section 552.106 protects only policy judgments, advice, opinions, and recommendations

²As our ruling is dispositive, we do not address your other argument to withhold this information.

involved in the preparation or evaluation of proposed legislation; it does not except purely factual information from public disclosure. *See* ORD 460 at 2. However, a comparison or analysis of factual information prepared to support proposed legislation is within the scope of section 552.106. *Id.* Upon review, we find you have failed to demonstrate how the remaining information constitutes recommendations, opinions, or advice involved in the preparation or evaluation of proposed legislation for purposes of section 552.106. Therefore, the city may not withhold any of the remaining information on that basis.

The remaining information contains the e-mail address of a member of the public. Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c).³ *See* Gov’t Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee’s work e-mail address because such an address is not that of the employee as a member of the public, but is instead the address of the individual as a government employee. The e-mail address at issue does not appear to be of a type specifically excluded by section 552.137(c), and you do not inform us a member of the public has affirmatively consented to its release. Therefore, the city must withhold the e-mail address we have marked under section 552.137.⁴

Finally, we note 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 requested information relating to it should be withheld from disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, HRWK has not submitted to this office any reasons explaining why the requested information should not be released. Thus, we have no basis for concluding any portion of the submitted information constitutes proprietary information of that third party, and the city may not withhold any portion of the submitted information on that basis. *See* 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.

To conclude, the city may withhold the information we have marked under sections 552.107 and 552.111 of the Government Code. The city must withhold the information we have

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. *See* Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987); *see, e.g.*, Open Records Decision No. 470 at 2 (1987).

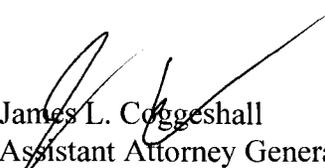
⁴This office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general opinion.

marked under section 552.137 of the Government Code. The city must release the remaining information to the requestor.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/tch

Ref: ID# 491736

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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(w/o enclosures)