



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 18, 2013

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

OR2013-18205

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# 502771 (Fort Worth PIR No. W027203).

The City of Fort Worth (the "city") received a request for (1) all e-mails sent to or received by ten named individuals and any of the police chief's budget officers during a specified time period regarding the police department budget, and (2) any e-mails sent to or received by nine named individuals during a specified time period regarding the requestor or CBS 11. You claim the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note the submitted e-mail attachments are not responsive to the instant request because the requestor has explicitly excluded them from her request. This ruling does not address the public availability of non-responsive information, and the city is not required to release non-responsive information in response to this request.

¹Although you also raise rule 503 of the Texas Rules of Evidence, we note section 552.107 of the Government Code is the proper exception to raise for asserting the attorney-client privilege in this instance. *See* Open Records Decision No. 676 (2002).

Next, we must address the requestor's assertion the city failed to comply with section 552.301 of the Government Code in requesting this decision. Section 552.301 prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. *See id.* § 552.301. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See id.* § 552.301(b). Further, pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e). You inform us the city received the request for information on July 11, 2013, which the requestor modified on July 12, 2013. You state that on July 19, 2013, the city provided the requestor with a cost estimate and the requestor responded on the same day noting the July 12, 2013, modification of the request. *See id.* §§ 552.2615(a), .263(a). On July 22, 2013, the city sought further clarification of the request and the requestor responded on the same day confirming the clarification. *See id.* § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *see also City of Dallas v. Abbott*, 304 S.W.3d 380 (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). We understand that on July 23, 2013, the city provided the requestor with a cost estimate and a request for a deposit for payment of these charges. *See Gov't Code* §§ 552.2615(a), .263(a). You state the city received a deposit for payment of the anticipated costs on July 29, 2013. Thus, July 29, 2013 is the date on which the city is deemed to have received the request. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date that the governmental body receives deposit or bond). Accordingly, the ten-business-day deadline for requesting a ruling from this office was August 12, 2013, and the fifteen-business-day deadline was August 19, 2013. The city requested a ruling from this office on August 12, 2013, and submitted the required information on August 16, 2013. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Therefore, we find the city complied with the procedural requirements of section 552.301 of the Government Code in requesting this decision.

Next, we note the requestor generally asserts the subject matter of the requested information has previously been released by the city. The Act does not permit the selective disclosure

of information. *See id.* §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold that exact information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989). However, section 552.007 does not prohibit an agency from withholding similar types of information that are not the exact information that has been previously released. We note the requestor asserts that the city has sent outside parties information regarding the city's budget before it was finalized, the city's police chief discussed cutting positions in a department head meeting where citizens may have been present, and the city's mayor discussed the budget deficit on her blog. However, the requestor does not state the exact information at issue was released to any members of the public. Further, we have no indication the information at issue has been released in its exact form to any members of the public. Accordingly, we find section 552.007 of the Government Code is inapplicable to the information at issue, and we will address the city's arguments against disclosure of this information.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* Gov't Code § 552.107. 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, 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 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 responsive information in Exhibit C1 consists of confidential communications made in furtherance of professional legal services rendered to the city. You state these communications were exchanged between attorneys for the city, and employees and officers of the city acting in their capacities as clients or client representatives. You state these communications were intended to be confidential and that the 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 responsive information in Exhibit C1. Accordingly, the city may withhold the responsive information in Exhibit C1 under section 552.107(1) of the Government Code.²

Section 552.111 of the Government Code excepts from disclosure “[a]n 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 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

²As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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 has also 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 assert the responsive information in Exhibit C2 is protected by the deliberative process privilege found in section 552.111. You contend the information in Exhibit C2 consists of advice, opinion, and recommendations on policymaking matters, including drafting the city's budget for fiscal year 2014. You inform us the fiscal year 2014 budget has not yet been adopted, and the submitted e-mails contain both policy deliberations of the content of the proposed budget, and a draft of a document that may or may not be adopted with the final budget. However, you do not inform us whether the draft document will be released to the public in its final form. Therefore, if the draft document will be released to the public in its final form, the city may withhold it under section 552.111. If the draft document will not be released to the public in its final form, then the city may not withhold it under section 552.111. Further, we find the city may withhold the remaining information we have marked under section 552.111 of the Government Code. However, we find the remaining communications consist of general administrative and purely factual information. Thus, we find you have not demonstrated how these communications consist of advice, opinions, or recommendations pertaining to policymaking matters of the city. Accordingly, we conclude the city may not withhold any of the remaining responsive information under section 552.111 of the Government Code.

You inform us you will redact the information you have marked that is subject to section 552.117(a)(1) of the Government Code in accordance with section 552.024 of the Government Code.³ We have marked additional information subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family

³Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. *See* Gov't Code § 552.024(c)(2).

member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code.⁴ Gov't Code § 552.117(a). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the city may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. We note section 552.117 also encompasses a personal cellular telephone or pager number, unless the cellular or pager service is paid for by a governmental body. *See* Open Records Decision No. 506 at 5-7 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). The remaining information contains the cellular telephone numbers of city employees. To the extent the employees timely elected to keep such information confidential under section 552.024 and the cellular telephone service is not paid for by a governmental body, the city must withhold the cellular telephone numbers we have marked under section 552.117(a)(1) of the Government Code. If the employees did not make a timely election under section 552.024 or the cellular telephone number service was paid for by a governmental body, the city may not withhold the cellular telephone numbers we have marked under section 552.117(a)(1) of the Government Code.

In summary, the city may withhold the responsive information in Exhibit C1 under section 552.107 of the Government Code and the information we have marked in Exhibit C2 under section 552.111 of the Government Code. However, if the draft document will not be released to the public in its final form, then the city may not withhold it under section 552.111 of the Government Code. To the extent the employees timely elected to keep such information confidential under section 552.024 and the cellular telephone service is not paid for by a governmental body, the city must withhold the cellular telephone numbers we have marked under section 552.117(a)(1) of the Government Code. The city must release the remaining responsive information.

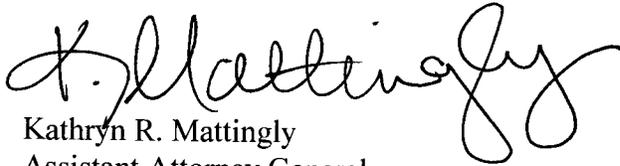
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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.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

⁴The 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).

providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in cursive script, appearing to read 'K. Mattingly', written in black ink.

Kathryn R. Mattingly
Assistant Attorney General
Open Records Division

KRM/tch

Ref: ID# 502771

Enc. Submitted documents

c: Requestor
(w/o enclosures)