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ATTORNEY GENERAL OF TEXAS

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Ms. Nneka Kanu
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Legal Department
City of Houston
P.O. Box 368
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OR2016-03074

Dear Ms. Kanu:

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# 597588 (Houston GC Nos. 228347 and 22857).

The Houston Airport System (the "system") received a request for ten categories of information, including certain e-mail correspondence during a specified time period between named and specified individuals; the official appointment calendar of a named individual during a specified time period; the cell phone records of a named individual during a specified time period; information pertaining to travel expenses of a named individual during a specified time period; information pertaining to specified requests for proposals; information pertaining to any contract, subcontract, or affirmative action contract awarded to specified firms for any construction project; information pertaining to the monitoring of affirmative action contractors, stated goals, and performance by any contractor at the system during a specified time period.¹ You state you will make some information available to the requestor. You claim the submitted information is excepted from disclosure under

¹We note the system sought clarification of the information requested and the requestor responded to the request for clarification. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

sections 552.103, 552.104, 552.107, and 552.111 of the Government Code. You also state release of the submitted information may implicate the interests of third parties.² Accordingly, you notified these third parties of the request for information and of their right to submit arguments stating why their information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have received comments from Alliant, ABC, Horizon, Rogers, and Ross. We have considered the submitted arguments and reviewed the submitted representative sample of information.³

Section 552.104(a) of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov't Code § 552.104(a). The “test under section 552.104 is whether knowing another bidder's [or competitor's information] would be an advantage, not whether it would be a decisive advantage.” *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). You represent Exhibits 2 and 3 pertain to ongoing competitive bidding situations. In addition, you state the contracts at issue have not been awarded and, if the information at issue is released, then negotiations between the system and the selected bidders would be negatively impacted. You further state, if the contracts are not awarded to the selected bidders, then release of the information at issue could negatively impact the prices future bidders offer. After review of the information at issue and consideration of the arguments, we find the system has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the system may withhold Exhibits 2 and 3 under section 552.104(a) of the Government Code.⁴

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

²The third parties notified pursuant to section 552.305 are the following: Alliant Insurance Services, Inc. (“Alliant”); Anslow Bryant Construction, Ltd. (“ABC”); Arthur J. Gallagher and Co.; CYMI Autoarch Architects; DPR Construction; E.E. Reed Construction; Horizon International Group (“Horizon”); Marsh USA, Inc.; McGriff, Seibels, and Williams, Inc.; Rogers-O'Brien Construction (“Rogers”); Ross Group (“Ross”); SpawGlass; Teal Construction Company; USI/W.J. Alexander/Navarro Insurance Group/Resurgens Risk Management; and Willis of Texas, Inc.

³We assume the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

⁴As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

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 “to facilitate 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)(A), (B), (C), (D), (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: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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 claim Exhibits 4 and 5 are protected by section 552.107(1) of the Government Code. You state the information at issue consists of communications between attorneys for the City of Houston (the “city”), city employees, and system employees in their capacity as clients. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the system. You further state these communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information we have marked. Thus, the system may withhold information we have marked under section 552.107(1) of the Government Code.⁵ However, we find the system has failed to demonstrate the applicability of the attorney-client privilege to the

⁵As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

remaining information at issue and, thus, the system may not withhold any of it under section 552.107(1) of the Government Code.

Section 552.103 of the Government Code provides 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). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (1) litigation was 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, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You contend the remaining information in Exhibit 4 is related to pending litigation. You inform us, and have provided documentation demonstrating, litigation styled *The City of Houston v. Webber, LLC and Klotz Associates, Inc.* was pending on the date the system received the request. We note, however, the system is not a party to the pending litigation. Therefore, the system does not have a litigation interest in the matter for purposes of section 552.103. *See* Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990). In such a situation, we require an affirmative representation from the governmental body with the litigation interest that the governmental body wants the information at issue withheld from disclosure under section 552.103(a). You, as a representative of the city, affirmatively represent that the city objects to the release of the information at issue under section 552.103(a). You explain the information at issue is related to the pending lawsuit because it pertains to the basis of the pending litigation. Based on your representations, the submitted documentation, and our review of the information at issue, we find litigation was pending when the system received this request for information, and we find the information at issue is related to the pending litigation for purposes of section 552.103. Therefore, the

system may withhold the remaining information in Exhibit 4 under section 552.103 of the Government Code.

We note, however, the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* ORD 551 at 4-5. Thus, if the opposing party has seen or had access to information relating to the pending litigation through discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We also note the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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, writ ref’d n.r.e.); 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 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 severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *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 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.

You state Exhibit 6 consists of communications between city officials, city employees, and system employees regarding the city's filling of key executive management positions. You state the information at issue consists of advice, opinions, and recommendations pertaining matters of broad scope that affect governmental policy. We understand the information at issue contains a draft document that has been or will be released to the public in its final form. Based on your representations and our review of the information at issue, we find the system has demonstrated portions of the information at issue, which we have marked, consist of advice, opinions, or recommendations on the policymaking matters of the system. Accordingly, the system may withhold the information we have marked under section 552.111 of the Government Code. Upon review, however, we find the remaining information at issue is general administrative and purely factual information or does not pertain to policymaking. Thus, we find you have failed to establish that any portion of the remaining information at issue constitutes advice, opinions, recommendations, or other material reflecting the policymaking processes of the system. Accordingly, the system may not withhold any portion of the remaining information at issue under section 552.111 of the Government Code.

In summary, the system may withhold Exhibits 2 and 3 under section 552.104(a) of the Government Code. The system may withhold information we have marked under section 552.107(1) of the Government Code. The system may withhold the remaining information in Exhibit 4 under section 552.103 of the Government Code. The system may withhold the information we have marked under section 552.111 of the Government Code. The system must release the remaining 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

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

Sincerely,



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KJM/som

Ref: ID# 597588

Enc. Submitted documents

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