



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 17, 2016

Ms. Tiffany Evans
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2016-23242

Dear Ms. Evans:

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# 629759 (GC#s 23601 to 23610).

The City of Houston (the "city") received ten requests from the same requestor for specified electronic documents the requestor created while in the employ of the city. You claim the submitted information is excepted from disclosure under section 552.111 of the Government Code. Additionally, you state release of this information may implicate the proprietary interests of Hewlett-Packard Company ("HP"). Accordingly, you state, and provide documentation showing, you notified HP of the request for information and of its right to submit arguments to this office as to why the information at issue should not be released. *See Gov't Code § 552.305(d); see also Open Records Decision No. 542 (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 exception you claim and reviewed the submitted representative sample of information.¹ We have also considered comments submitted by the requestor. *See Gov't*

¹We assume that 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 that those records contain substantially different types of information than that submitted to this office.

Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we address the requestor's contention the city did not comply with the procedural requirements of the Act. The requestor asserts he was not timely notified of the city's request for a ruling and other correspondence to this office as required by section 552.301 of the Government Code. 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 552.301(e-1), a governmental body that submits written comments to the attorney general under section 552.301(e)(1)(A) must send a copy of those comments to the requestor within fifteen business days of receiving the request for information. *Id.* § 552.301(e-1). Pursuant to section 552.302, a governmental body's failure to timely provide the requestor with the information required by section 552.301 results in the presumption that the information is public. *Id.* § 552.302. We note the city received the requests at issue after business hours on July 19, 2016. Therefore, for purposes of section 552.301, the city received the requests for information on July 20, 2016. We have no indication the city was closed for business any days between July 20, 2016 and August 10, 2016. Thus, the ten-business-day deadline to provide information to the requestor pursuant to section 552.301(d) was August 3, 2016 and the fifteen-business-day deadline to provide information to the requestor pursuant to section 552.301(e-1) was August 10, 2016. The envelope in which the city submitted to this office the information required by section 552.301(b) bears a meter-mark of August 3, 2016 and the envelope in which the city submitted to this office the information required by section 552.301(e) bears a meter-mark of August 10, 2016.² Thus, we conclude the city's correspondence to this office was timely mailed. Further, the city's correspondence to this office indicates the requestor was copied on it. *See id.* § 552.308(a) (prescribing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Consequently, we find the city complied with the procedural requirements mandated by section 552.301 of the Government Code.

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

²Pursuant to section 552.301(b) of the Government Code, 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 for information. *See* Gov't Code § 552.301(b). Pursuant to section 552.301(e) of the Government Code, a governmental body is required to submit to this office within fifteen business days of receiving an open records request: (1) written comments stating the reasons why the claimed 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).

information relating to that party should be withheld from public disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from HP explaining why the submitted information should not be released. Therefore, we have no basis to conclude HP has protected proprietary interests in the submitted information. *See id.* § 552.110; 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. Accordingly, the city may not withhold the submitted information on the basis of any proprietary interest HP may have in the information.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part, the following:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body; [and]

...

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate[.]

Gov't Code § 552.022(a)(1), (2), (3), (5). The submitted information includes completed reports and evaluations that are subject to subsection 552.022(a)(1). The city must release the information at issue pursuant to subsection 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. The submitted information also contains information in accounts, vouchers, and contracts relating to the receipt or expenditure of public or other funds by the city subject to subsection 552.022(a)(3), and information used to estimate the need for or expenditure of public funds or taxes by the city that is that is subject to subsection 552.022(a)(5). The city must release the information at issue subject to

subsections 552.022(a)(3) and (a)(5) unless it is made confidential under the Act or other law. The city seeks to withhold the information at issue under section 552.111 of the Government Code. However, section 552.111 is discretionary in nature and does not make information confidential under the Act. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (deliberative process privilege under statutory predecessor to Gov't Code § 552.111 subject to waiver). Therefore, the city may not withhold any of the submitted information subject to section 552.022 under section 552.111. However, we note portions of the information at issue are subject to section 552.136 of the Government Code.³ Because section 552.136 makes information confidential, we will consider the applicability of this exception to the information subject to section 552.022 as well as the remaining information. Further, we will address the city's arguments against disclosure of the remaining information.

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, 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, 364 (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 severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152, 157 (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, section 552.111 protects the factual information. *See* Open Records Decision No. 313 at 3 (1982).

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

This office has also concluded 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.

Section 552.111 can also encompass communications between a governmental body and a third party, including a consultant or other party with a privity of interest. *See* Open Records Decision No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). 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.

You assert the submitted information contains advice, opinion, and recommendations relating to the city's policy matters. You indicate some of the information at issue consists of communications with a third-party with which the city shares a privity of interest. You further seek to withhold drafts in the remaining information under section 552.111. Based on your representations and our review of the information at issue, we find the city has demonstrated portions of the submitted information consist of advice, opinions, or recommendations on the policymaking matters of the city, or consist of drafts of policymaking documents you state will be released to the public in their final form. Thus, the city may withhold the information at issue, a representative sample of which we marked, under section 552.111 of the Government Code. Upon review, however, we find the remaining information, which consists of general administrative or purely factual information, or other information you have failed to demonstrate consists of advice, opinion, or recommendations relating to the policymaking of the city, is not excepted under section 552.111. Accordingly, the city may not withhold the remaining information under section 552.111 of the Government Code.

We note the remaining information contains motor vehicle identification numbers. Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release. *See* Gov't Code § 552.130. Accordingly, the city must withhold the motor vehicle record information in the remaining information under section 552.130 of the Government Code.

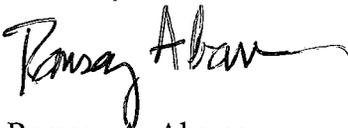
The remaining information also contains city account numbers. Section 552.136 states “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” *Id.* § 552.136(b); *see also id.* § 552.136(a) (defining “access device”). Accordingly, the city must withhold the account numbers in the remaining information under section 552.136 of the Government Code.

In summary, the city may withhold a portion of the submitted information, a representative sample of which we have marked, under section 552.111 of the Government Code. The city must withhold motor vehicle record information under section 552.130 of the Government Code. The city must withhold account numbers under section 552.136 of the Government Code. The city 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,



Ramsey A. Abarca
Assistant Attorney General
Open Records Division

RAA/bw

Ref: ID# 629759

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)