



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 31, 2016

Ms. Tiffany Evans
Assistant City Attorney
Legal Department
City of Houston
P.O. Box 368
Houston, Texas 77002

OR2016-24177

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# 632361 (GC No. 23654).

The City of Houston (the "city") received a request for all information pertaining to specified donations made to the city. You state you will release some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note portions of Exhibit 2 of the submitted information are subject to section 552.022 of the Government Code. This section provides, in pertinent part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are

¹We 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.

public information and not excepted from required disclosure unless made confidential under this chapter or other law:

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

Gov't Code § 552.022(a) (3). Exhibit 2 contains a contract relating to the receipt of funds by the city which is subject to section 552.022(a)(3). This information must be released unless it is made confidential under the Act or other law. *See id.* Although you raise sections 552.107(1) and 552.111 of the Government Code, these sections are discretionary exceptions that protect a governmental body's interests and do not make information confidential under the Act. *See Open Records Decision Nos. 676 at 6 (2002) (attorney-client privilege under section 552.107 may be waived), 470 at 7 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver), 665 at 2 n.5 (2000) (discretionary exceptions generally).* Therefore, the city may not withhold the information subject to section 552.022 under section 552.107(1) or section 552.111. However, we note the Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider your assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence for the information subject to section 552.022. We will also address the applicability of sections 552.107 and 552.111 to the information not subject to section 552.022(a)(3).

Rule 503 of the Texas Rules of Evidence encompasses the attorney-client privilege and provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is “confidential” if 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). Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state the information subject to section 552.022(a)(3) consists of attachments to privileged attorney-client communications between city attorneys, city employees, and outside consultants that were made in furtherance of the rendition of professional legal services to the city. You state these communications were intended to be confidential and that the confidentiality has been maintained. Based on your representations and our review of the information at issue, we find you have established the information at issue consists of privileged attorney-client communications. Therefore, we conclude the city may withhold the information subject to section 552.022(a)(3), which we have marked, under Texas Rule of Evidence 503.

The city claims section 552.107 of the Government Code for the information in Exhibit 2 not subject to section 552.022 of the Government Code. Section 552.107(1) protects information that comes within the attorney-client privilege. *See* Gov’t Code § 552.107(1). The elements of the privilege under section 552.107 are the same as those for rule 503. 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* ORD 676 at 6-7. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

The city states the information at issue consists of communications between city attorneys, city employees, and outside consultants. The city states the communications were made for the purpose of facilitating the rendition of professional legal services to the city and these communications have remained confidential. Upon review, we find the city has demonstrated

the applicability of the attorney-client privilege to most of the information at issue. Therefore, with the exception of the information we marked for release, the city may generally withhold the information at issue under section 552.107(1) of the Government Code.² We note, however, the remaining information at issue consists of a communication with a private entity. During the time this communication was made, the city and private entity were engaged in contract negotiations; thus, their interests were adverse, and this communication is not privileged for purposes of section 552.107. Therefore, we find this remaining communication at issue is with an individual you have not demonstrated is a privileged party. Thus, we find you have not demonstrated the remaining information constitutes privileged attorney-client communications for the purposes of section 552.107(1). Accordingly, the city may not withhold this information, which we have marked for release, under section 552.107(1).

Additionally, we note some of the otherwise privileged e-mail strings include e-mails and attachments received from or sent to a non-privileged party. Furthermore, if those e-mails and attachments are removed from the otherwise privileged e-mail strings in which they appear and stand alone, they are responsive to the request for information. Therefore, if these non-privileged e-mails and attachments, which we have marked, are maintained by the city separate and apart from the otherwise privileged e-mail strings in which they appear, then the city may not withhold the non-privileged e-mails and attachments under section 552.107(1) of the Government Code.

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

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

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).

This office has also concluded section 552.111 exempts from disclosure a preliminary draft of a document intended for public release in its final form because the draft necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document. 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 of a preliminary draft of a policymaking document, including comments, underlining, deletions, and proofreading marks, 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 which the governmental body establishes it has a privity of interest or common deliberative process. 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.

The city states the remaining information in Exhibit 2 and the information in Exhibit 3 consist of advice, opinions, and recommendations relating to the city's policymaking. The city also states the information at issue contains draft documents that will be released to the public in final form. Further, the city informs us some of the communications at issue involve a representative of a private entity, with which the city states it shares a privity of interest. Upon review, we find the city may withhold some of the information at issue, which we have marked, under section 552.111. However, we find some of the remaining information at issue consists of either general administrative information that does not relate to policymaking, information that is purely factual in nature, or information communicated to parties with whom the city did not share a privity of interest. Thus, we find the city has failed to demonstrate how the remaining information at issue is excepted under section 552.111. Accordingly, the city may not withhold the remaining information at issue under section 552.111 of the Government Code.

In summary, the city may withhold the information subject to section 552.022(a)(3), which we have marked, under Texas Rule of Evidence 503. With the exception of the information we marked for release, the city may generally withhold the information you have marked

under section 552.107(1) of the Government Code; however, if the non-privileged e-mails and attachments we have marked are maintained by the city separate and apart from the otherwise privileged e-mail strings in which they appear, then the city may not withhold the non-privileged e-mails and attachments under section 552.107(1) of the Government Code. The city may withhold the information we have marked under section 552.111. 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.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,



Kavid Singh
Assistant Attorney General
Open Records Division

KVS/bhf

Ref: ID# 632361

Enc. Submitted documents

c: Requestor
(w/o enclosures)