



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 25, 2011

Ms. Xochil Rodriguez  
Assistant City Attorney  
City of San Antonio  
P.O. Box 839966  
San Antonio, Texas 78283

OR2011-02844

Dear Ms. Rodriguez:

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# 410153 (COSA File Nos. 10-2005, 11-0206, and 11-0209).

The City of San Antonio (the "city") received two requests for communications between a named city council member and a named entity or regarding the council member's employer, the employment contract between the council member and employer, and a specified memorandum regarding the council member.<sup>1</sup> You state the city will release some information. You claim the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. We understand release of this information may implicate the proprietary interests of NRP Group, L.L.C. ("NRP"). Accordingly, pursuant to section 552.305 of the Government Code you notified NRP of the request and of its right to submit arguments to this office explaining why its 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); *see also* 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 arguments

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<sup>1</sup>We note the city sought and received clarification from one of the requestors. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010).

on behalf of NRP. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note you have not submitted the requested employment contract. To the extent information responsive to this portion of the requests existed on the date the city received the corresponding request, we assume you have released it. If you have not released any such information, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible).

Next, you inform us some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2011-00428 (2011). In that ruling, we concluded the city may withhold certain information under section 552.107(1) of the Government Code. We have no indication the law, facts, and circumstances on which the prior ruling was based have changed. Accordingly, to the extent the information at issue in the current request is identical to the information previously requested and ruled upon by this office, we conclude the city must continue to rely on Open Records Letter No. 2011-00428 as a previous determination and withhold or release the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the submitted information is not encompassed by the previous ruling, we will consider the submitted arguments.

Next, we must address the city's procedural requirements under the Act. You raise section 552.111 of the Government Code for the submitted memorandum. We note the city received the first request for information on December 6, 2010, and submitted written comments to this office on December 29, 2010, explaining the reasons why the stated exceptions apply, along with a copy of the requested information.<sup>2</sup> In those comments, you claim the memorandum is excepted only under section 552.107 of the Government Code. However, in your February 3, 2011 communication to this office regarding the second request for information, you marked the submitted memorandum as also being excepted under section 552.111 of the Government Code. You have not, however, provided any arguments explaining why the memorandum is excepted under this section of the Act. *See* Gov't Code §§ 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested), (e)(2) (governmental body must submit requested information labeled to indicate which exceptions apply to which parts

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<sup>2</sup>A governmental body has fifteen business days from the receipt of the request for information to submit the information required by subsection 552.301(e) to the Office of the Attorney General. *See* Gov't Code § 552.301(e).

of the documents). Section 552.111 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (governmental body may waive section 552.111), 470 at 7 (1987) (governmental body may waive statutory predecessor to section 552.111 deliberative process). Because you did not timely raise this exception or provide arguments explaining why the memorandum is excepted under this section, we conclude you have waived your section 552.111 claim for this information. However, we will consider your arguments under this exception for the remaining information. We will also consider your timely raised exception under section 552.107 for the submitted memorandum.

Next, we note NRP has submitted arguments regarding information beyond that which the city submitted to this office for our review. This ruling does not address such information, and is limited to the information submitted as responsive to the request by the city. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested). As NRP has not submitted arguments against disclosure of any of the submitted information, the city may not withhold any information on the basis of NRP's arguments.

You assert the submitted memorandum, which you have marked, is protected by the attorney-client privilege. 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). 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, no pet.). 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 assert the submitted memorandum is a communication made for the purpose of facilitating the rendition of professional legal services to the city. You state the communication is between a city attorney and the council member named in the requests. You also state this information was intended to be confidential. However, the requestors state, and you acknowledge, the council member sent the memorandum at issue to her employer. Rule 511 of the Texas Rules of Evidence states a person waives the discovery privileges if she voluntarily discloses the privileged information unless such disclosure itself is privileged. TEX. R. EVID. 511. *See Jordan v. Fourth Supreme Judicial Dist.*, 701 S.W.2d 644, 649 (Tex. 1986). In *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 554 (Tex. 1990), the court held that because privileged information was disclosed to the Federal Bureau of Investigation, the Internal Revenue Service, and the *Wall Street Journal*, the attorney-client and work product privileges were waived. You state “[w]hile the Councilwoman did send the document to her other employer, the legal opinion referenced was directly relevant to that employer and the conduct of [c]ity business with said employer.” Based on these representations and our review, we find you have failed to show this disclosure to the employer is privileged under Rule 511. We therefore conclude the release of the memorandum constitutes a voluntary waiver of the attorney-client privilege for Rule 511 purposes. *See id.*; *In re Bexar County Criminal Dist. Attorney’s Office*, 224 S.W.3d 182 (Tex., 2007) (district attorney waived work product privilege for case file by disclosing file to private litigant pursuant to subpoena duces tecum without objection); *see also S.E.C. v. Brady*, 238 F.R.D. 429 (N.D. Tex., 2006) (attorney-client privilege waived by disclosure of documents to Federal Securities and Exchange Commission; noting Fifth Circuit has not adopted doctrine of selective waiver). Accordingly, the city may not withhold the submitted memorandum on the basis of section 552.107(1) of the Government Code.

Section 552.111 of the Government Code excepts from public disclosure “an 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. Section 552.111 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. 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 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 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 state the remaining information reveals advice, opinions, and recommendations of city staff regarding city council meeting notes. You also state some of the information at issue consists of a draft version of the city council meeting notes that necessarily reflects the advice, opinion, and recommendations of city staff. You do not indicate whether the draft city council meeting notes were released or are intended to be released in their final form. Based on your representations and our review, we find you have established the deliberative process privilege is applicable to the draft city council meeting notes. Therefore, provided the draft city council meeting notes will be released in their final form, the city may withhold this information, which we have marked, under section 552.111 of the Government Code. However, we find the remaining information is factual in nature or is general administrative information that does not relate to policymaking. We therefore conclude the city has failed to demonstrate the applicability of section 552.111 to the remaining information. Accordingly, no portion of the remaining information may be withheld on this basis.

We note a portion of the remaining information may be subject to section 552.117 of the Government Code.<sup>3</sup> Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for information. *See* Open Records Decision No. 530 at 5 (1989). Thus, the city may only withhold information under section 552.117(a)(1) on behalf of an official who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for information. Information may not be withheld under section 552.117(a)(1) on behalf of an official who did not timely request under section 552.024 that the information be kept confidential. You do not inform this office whether the council member whose personal information is at issue elected to keep her information confidential before the city received the present requests for information. Therefore, we must rule conditionally. To the extent the council member timely elected to withhold her personal information under section 552.024 of the Government Code, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code. To the extent the council member did not timely elect confidentiality, the city may not withhold the marked information under section 552.117(a)(1).

In summary, to the extent any portion of the requested information was ruled upon in Open Records Letter No. 2011-00428, the city must continue to rely on Open Records Letter No. 2011-00428 as a previous determination and withhold or release the identical information in accordance with that ruling. The city may withhold the draft city council meeting notes, which we have marked, under section 552.111 of the Government Code. To the extent the council member timely elected to withhold her personal information under section 552.024 of the Government Code, the city must withhold the information we have marked under section 552.117 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.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free,

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<sup>3</sup>The 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).

at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Mack T. Harrison  
Assistant Attorney General  
Open Records Division

MTH/em

Ref: ID# 410153

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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