



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 11, 2014

Mr. James Kopp  
Assistant City Attorney  
City of San Antonio  
P.O. Box 839966  
San Antonio, Texas 78283

OR2014-06070

Dear Mr. Kopp:

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# 519405 (COSA File No. W023544).

The City of San Antonio (the "city") received a request for the following information for a specified period of time: (1) communications between specified city employees and entities and the International Association of Transportation Regulators (the "IATR"), a named individual, the Taxicab, Limousine and Paratransit Association (the "TLPA"), and/or Yellow Cab; (2) documents and communications pertaining to the IATR; (3) documents and communications pertaining to the TLPA; (4) documents and communications pertaining to companies whose business relates to the use of smart phones to summon for-hire transportation providers and pertaining to the related software; (5) documents and communications pertaining to two specified city ordinances; (6) documents and communications pertaining to amendments to specified provisions of the city code and pertaining to the enforcement of these provisions; and (7) documents and communications pertaining to enforcement activities directed at drivers who utilize smart phone applications as part of their business. You claim the submitted information is excepted from disclosure under sections 552.106, 552.107, and 552.111 of the Government Code. We have

considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* Gov't Code § 552.107(1). 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 at issue constitutes or documents a communication. *Id.* at 7. Second, the governmental body must demonstrate the communication was made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. *See* 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. *See 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 capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* 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, 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.” *See 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 the communication has been maintained. Section 552.107(1) generally excepts an entire communication that a governmental body has demonstrated as being 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) (attorney-client privilege extends to entire communication, including facts contained therein).

You claim some of the submitted information consists of communications between a city attorney and city employees that were made for the purpose of facilitating the rendition of professional legal services to the city. You state the communications have remained

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<sup>1</sup>We 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.

confidential and not been disclosed to non-privileged parties. Based on your representations and our review, we agree the city may withhold this information, which we have marked, under section 552.107(1) of the Government Code.<sup>2</sup>

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 a 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 may also be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

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

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<sup>2</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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 claim the remaining information consists of advice, opinion, and recommendations related to the city's policymaking. You inform us the parties involved in the communications are city employees, as well as an individual who has contracted with the city as a consultant to offer opinions on certain matters. Accordingly, we find you have established the individual shares a privity of interest with the city with respect to the information at issue. Upon review, we find the information we have marked consists of advice, opinion, and recommendations on the city's policymaking matters. Therefore, the city may withhold the information we have marked under section 552.111 of the Government Code.<sup>3</sup> However, we find the remaining information consists of general administrative information or information that is purely factual in nature. Therefore, the city may not withhold the remaining information under section 552.111 of the Government Code.

Section 552.106 of the Government Code excepts from disclosure "[a] draft or working paper involved in the preparation of proposed legislation" and "[a]n internal bill analysis or working paper prepared by the governor's office for the purpose of evaluating proposed legislation." Gov't Code § 552.106(a), (b). The purpose of section 552.106 is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body. *See* ORD 615 at 2. Therefore, section 552.106 is applicable only to the policy judgments, recommendations, and proposals of persons who are involved in the preparation of proposed legislation and who have an official responsibility to provide such information to members of the legislative body. *See id.* at 1; *see also* Open Records Decision No. 429 at 5 (1985) (statutory predecessor not applicable to information relating to governmental entity's efforts to persuade other governmental entities to enact particular ordinances). We note sections 552.111 and 552.106 are similar in that they both protect advice, opinion, and recommendation on policy matters in order to encourage frank discussion during the policymaking process. Open Records Decision No. 460 at 3 (1987). However, section 552.106 is narrower than section 552.111 in that it applies specifically to the legislative process. *Id.*

You generally assert the remaining information is excepted from disclosure under section 552.106 because it pertains to the proposed city ordinances. However, upon review, we find you have not demonstrated how this information constitutes advice, opinion, analysis, or recommendations for purposes of section 552.106. Accordingly, the city may not withhold the remaining information under section 552.106 of the Government Code.

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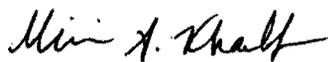
<sup>3</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

In summary, the city may withhold the information we have marked under sections 552.107(1) and 552.111 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](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,



Miriam A. Khalifa  
Assistant Attorney General  
Open Records Division

MAK/akg

Ref: ID# 519405

Enc. Submitted documents

c: Requestor  
(w/o enclosures)