



January 12, 2015

Ms. Julia Gannaway  
Counsel for the City of Nacogdoches  
Lynn, Ross & Gannaway, L.L.P.  
306 West Broadway Avenue  
Fort Worth, Texas 76104

OR2015-00561

Dear Ms. Gannaway:

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# 549646 (ORR #W001856-092414).

The City of Nacogdoches (the "city"), which you represent, received a request for various types of information pertaining to the requestor, her company, and a named property during a specified time period.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, 552.110, 552.111, and 552.131 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence.<sup>2</sup> You also state release of portions of the submitted information may implicate the proprietary interests of a third party. Accordingly, you state, and provide documentation showing, you notified this third party of the request for information and of his right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d) (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

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<sup>1</sup>You state the city sought and received clarification and narrowing of the information requested. *See* Gov't Code § 552.222 (providing that if request for information is unclear or over-broad, governmental body may ask requestor to clarify or narrow request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

<sup>2</sup>We note although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). We also note although you raise the attorney work product privilege, you provide no arguments explaining how this privilege is applicable. Therefore, we assume you no longer assert this privilege. *See* Gov't Code §§ 552.301, .302.

predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exceptions to disclosure under the Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>3</sup>

We note a portion of the submitted information, which we have marked, is not responsive to the present request because it was created after the request for information was received by the city.<sup>4</sup> The city need not release the non-responsive information we have marked in response to this request, and this ruling will not address that information.

Next, we note Exhibit 2A includes a court-filed document subject to section 552.022(a)(17) of the Government Code. Section 552.022(a)(17) provides for required public disclosure of “information that is also contained in a public court record[.]” unless the information is expressly made confidential under the Act or other law. Gov’t Code § 552.022(a)(17). You assert the information subject to section 552.022, which we have marked, is excepted from required public disclosure under sections 552.103 and 552.107(1) of the Government Code. However, these sections are discretionary exceptions to disclosure and do not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); ORDs 542 at 4 (statutory predecessor to section 552.103 may be waived), 676 at 10-11 (attorney-client privilege under section 552.107(1) may be waived); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the city may not withhold the information subject to section 552.022, which we have marked, under section 552.103 or section 552.107 of the Government Code. The Texas Supreme Court has held, however, 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). Accordingly, we will address your attorney-client privilege claim under rule 503 of the Texas Rules of Evidence for the information subject to section 552.022, which we have marked. We will also address your arguments against disclosure of the remaining responsive information not subject to section 552.022 of the Government Code.

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

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<sup>3</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.

<sup>4</sup>The Act does not require a governmental body to release information that did not exist when the request was received in response to a request for information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating 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 it is 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). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state the information at issue consists of communications between attorneys for the city and city officials and employees. However, upon review, we find the information subject to section 552.022 of the Government Code, which we have marked, consists of a court-filed document filed by the requestor on behalf of her company. Therefore, we find you have failed to demonstrate this information consists of a privileged attorney-client communication. Accordingly, the city may not withhold the information subject to section 552.022 of the Government Code, which we have marked, under rule 503 of the Texas Rules of Evidence.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. Gov't Code § 552.107. The elements of the privilege under section 552.107(1) are the same as those discussed above 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 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 portions of the remaining responsive information are excepted from disclosure under section 552.107(1) of the Government Code. You state the information at issue consists of communications between attorneys for the city and city officials and employees. You state the communications contain client confidences from proper representatives of the city to the attorneys as well as advice from the attorneys. You further state the attorney-client privilege was not waived for purposes of these communications. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to portions of the information at issue. Thus, the city may generally withhold the information we have marked under section 552.107(1) of the Government Code.<sup>5</sup> However, we note portions of the information we have marked consist of privileged e-mail strings which include e-mails received from non-privileged parties. If these e-mails are removed from the privileged e-mail strings and stand alone, they are responsive to the request for information. Therefore, if the non-privileged e-mails 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 these non-privileged e-mails under section 552.107(1) of the Government Code. Further, we find you have not demonstrated any portion of the remaining responsive information at issue consists of privileged attorney-client communications. Thus, the city may not withhold any portion of the remaining responsive information at issue under section 552.107(1) of the Government Code.

Section 552.103 of the Government Code provides, in pertinent part:

- (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.

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

(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 that (1) litigation was pending or reasonably anticipated on the date of the receipt of the request for information and (2) the information at issue is related to the pending or anticipated 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 from disclosure under section 552.103(a).

To establish litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” See ORD 452 at 4. Concrete evidence to support a claim litigation is reasonably anticipated may include, for example, the governmental body’s receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. See ORD 555 (1990); see also Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, or when an individual threatened to sue on several occasions and hired an attorney. See Open Records Decision Nos. 346 (1982), 288 (1981). On the other hand, this office has determined if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. See Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. See Open Records Decision No. 361 (1983).

You seek to withhold portions of the remaining responsive information under section 552.103. You inform us, and provide documentation showing, the requestor has made statements that she intends to sue the city, and has listed a claim against the city in one of her company’s bankruptcy filings. However, you do not inform us the requestor had taken any objective steps toward filing a suit against the city on the date the city received the present request for information. See Gov’t Code § 552.301(e)(1)(A). Having considered your representations, we find the mere possibility of a suit does not establish that litigation was pending or reasonably anticipated when the city received the request for information. See *id.* § 552.103(c); ORD 452 at 4; see also ORD 331 at 1-2 (mere chance of litigation not sufficient to trigger statutory predecessor to Gov’t Code § 552.103). Accordingly, we find

you have failed to demonstrate the city was a party to pending or anticipated litigation on the date of the request. Therefore, the city may not withhold any portion of the remaining responsive information at issue under section 552.103 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, 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). *See* ORD 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 id.* 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 that are 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).

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 Nos. 631 at 2 (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body’s request and performing task that is within governmental body’s authority), 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body’s consultants). 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 at 9. We note a governmental body does not have a privity of interest or common deliberative process with a third party with which the governmental body is engaged in contract negotiations, as the parties' interests are adverse. *See id.*

You state portions of the remaining responsive information demonstrate the agency memoranda and deliberative process exception. We understand you to claim the information at issue consists of advice, opinions, and recommendations relating to policymaking matters of the city. Further, you state the Nacogdoches Economic Development Corporation is the city's economic development partner. Based on your representations and our review, we find the information we have marked consists of advice, opinions, and recommendations related to policymaking matters of the city. Thus, the city may withhold the information we have marked under section 552.111 of the Government Code. Upon review, however, we find a portion of the remaining information at issue consists of a communication involving a third party with whom you have not demonstrated the city shares a privity of interest or common deliberative process. Further, the remaining information at issue is general administrative and purely factual information or does not pertain to policymaking. Therefore, we find you have failed to demonstrate how any portion of the remaining responsive information at issue consists of advice, opinions, or recommendations on policymaking matters. Accordingly, the city may not withhold any portion of the remaining responsive information at issue under section 552.111 of the Government Code.

You claim portions of the remaining responsive information are excepted from disclosure under section 552.110 of the Government Code, which protects (1) trade secrets, and (2) commercial or financial information, the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110. However, section 552.110 is designed to protect the interests of third parties, not the interests of a governmental body. *See generally* Open Records Decision No. 592 (1991). Thus, we do not address your argument under section 552.110 of the Government Code.

Section 552.131 of the Government Code relates to economic development information and provides, in part:

(a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

(1) a trade secret of the business prospect; or

(2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].

Gov't Code § 552.131(a)-(b). Section 552.131(a) protects the proprietary interests of third parties that have provided information to governmental bodies, not the interests of governmental bodies themselves. There has been no demonstration by a third party that any portion of the remaining responsive information constitutes a trade secret or that release of any of the information would cause a third party substantial competitive harm. *See* Open Records Decision Nos. 661 at 5-6 (1999), 552 at 5 (1990) (attorney general will accept private person's claim under section 552.110(a) of the Government Code if person establishes *prima facie* case for trade secret exception, and no one submits argument that rebuts claim as matter of law). Therefore, the city may not withhold any portion of the remaining responsive information at issue under section 552.131(a) of the Government Code.

Section 552.131(b) of the Government Code protects information about a financial or other incentive that is being offered to a business prospect by a governmental body or another person. Gov't Code § 552.131(b). You claim portions of the remaining responsive information demonstrate the confidential economic development exception because they consist of communications between a city attorney, city officials and employees, and an individual who is possibly interested in purchasing or investing in the specified property. Upon review, we find you have failed to demonstrate any portion of the remaining responsive information at issue consists of information about a financial or other incentive being offered to a business prospect by the city. Consequently, the city may not withhold any portion of the remaining responsive information at issue under section 552.131(b) of the Government Code.

Section 552.137 of the Government Code provides, "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). *Id.* § 552.137(a)-(c). The e-mail addresses at issue are not types excluded by subsection (c). Thus, the city must withhold the e-mail addresses we have marked and indicated under section 552.137 of the Government Code, unless their owners affirmatively consent to their public disclosure.

We note an interested third party is allowed ten business days after the date of his receipt of the governmental body's notice under section 552.305(d) to submit his reasons, if any, as to

why 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 the third party explaining why his information should not be released. Therefore, we have no basis to conclude this individual has a protected proprietary interest in the information at issue. *See id.* § 552.110; ORDs 661 at 5-6 (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 (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the city may not withhold any portion of the submitted information on the basis of any proprietary interest this individual may have in it.

In summary, the city may withhold the information we have marked under section 552.107(1) of the Government Code; however, the city must release the non-privileged e-mails we have marked if the city maintains them separate and apart from the otherwise privileged e-mail strings in which they appear. Further, the city may withhold the information we have marked under section 552.111 of the Government Code. The city must withhold the e-mail addresses we have marked and indicated under section 552.137 of the Government Code, unless their owners affirmatively consent to their public disclosure. 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](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,



Alley Latham  
Assistant Attorney General  
Open Records Division

AKL/dls

Ref: ID# 549646

Enc. Submitted documents

c: Requestor  
(w/o enclosures)