



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 27, 2016

Ms. Theresa Pham
Counsel for the City of Dripping Springs
Bojorquez Law Firm, P.C.
12325 Hymeadow Drive, Suite 2-100
Austin, Texas 78750

OR2016-02011

Dear Ms. Pham:

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# 596060.

The City of Dripping Springs (the "city"), which you represent, received a request for all e-mails during a specified time period pertaining to specified subjects, including specified terms, and between specified parties pertaining to a specified subject. You state you are releasing some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.107, 552.111, and 552.137 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information, which we have marked, is not responsive to the instant request because it does not consist of e-mails or attachments to e-mails. This ruling does not address the public availability of any information that is not responsive to the request and the city is not required to release such information in response to this request.

¹Although you also raise section 552.101 for the submitted information, you provide no arguments explaining how this exception is applicable to the information at issue. Therefore, we assume you no longer assert this exception. *See* Gov't Code §§ 552.301, .302.

We note a portion of the responsive information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(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[.]

Gov't Code § 552.022(a)(1). The information we have marked consists of completed reports subject to section 552.022(a)(1). The city must release the completed reports pursuant to section 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. *See id.* Although you raise sections 552.107 and 552.111 of the Government Code for the completed reports, these sections are discretionary exceptions to disclosure and do not make information confidential under the Act. *See Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 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 section 552.111 subject to waiver).* Therefore, none of the information subject to section 552.022, which we have marked, may be withheld under section 552.107 or section 552.111 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence are “other law” that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Thus, we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503 for the completed reports. We will also consider your arguments under sections 552.107, 552.111, and 552.137 for the responsive information not subject to section 552.022.

Rule 503(b)(1) 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 the client's representative and the client's lawyer or the lawyer's representative;

(B) between the client's lawyer and the lawyer's representative;

(C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a

pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;

(D) between the client's representatives or between the client and the client's representative; 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 to further the rendition of professional legal services to the client or reasonably necessary to transmit the communication. *Id.* 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must 1) show that 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 that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. *See* ORD 676. Upon a demonstration of all three factors, the entire communication is confidential under Rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

You assert the completed reports consist of communications between city staff and city attorneys. You state the information at issue was communicated for the purpose of facilitating the rendition of professional legal services to the city, was intended to be confidential, and has remained confidential. Upon review, however, we find you have failed to demonstrate the information at issue constitutes privileged communications for purposes of Rule 503. Therefore, the city may not withhold the completed reports under Texas Rule of Evidence 503.

Section 552.107(1) of the Government Code 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*, 922 S.W.2d at 923.

You state the remaining responsive information not subject to section 552.022 consists of communications between city staff and city attorneys. You state the information at issue was communicated for the purpose of facilitating the rendition of professional legal services to the city, was intended to be confidential, and has remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information we have marked. Thus, the city may generally withhold the information we have marked under section 552.107(1) of the Government Code.² We note, however, one of these e-mail strings include an e-mail received from and sent to parties with whom you have not demonstrated the city shares a privileged relationship. Furthermore, if the e-mail received from and sent to non-privileged parties is removed from the e-mail string and stands alone, it is responsive to the request for information. Therefore, if the non-privileged e-mail, which we have marked, is maintained by the city separate and apart from the otherwise privileged e-mail string in which it appears, then the city may not withhold this non-privileged e-mail under section 552.107(1) of the Government Code. In that event, we will address your arguments under sections 552.111 and 552.137 of the Government Code for such information. Further, we find you have failed to demonstrate the remaining responsive information consists of privileged attorney-client communications made for the rendition of professional legal services. Accordingly, the city may not withhold any of the remaining responsive information 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, 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*, 22 S.W.3d 351 (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A

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

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 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 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 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.

You assert the remaining responsive information consists of opinions and recommendations regarding policymaking matters. You state the information at issue includes draft documents that reflect the opinions and recommendations of city staff. We understand the final version of these draft documents will be released to the public in their final form. Additionally, to the extent the non-privileged e-mail we marked exists separate and apart from the otherwise privileged e-mail string, you also seek to withhold that e-mail under section 552.111 of the Government Code. Based on your representations and our review, we find the city may withhold the information we have marked under section 552.111 of the Government Code.

However, we find the remaining responsive information consists of general administrative information that does not relate to policymaking or is purely factual in nature. Further, some of the remaining information at issue, including the non-privileged e-mail we marked, was communicated with individuals with whom you have not demonstrated the city shares a privity of interest or common deliberative process. Thus, we find you have failed to demonstrate the remaining responsive information is excepted under section 552.111. Accordingly, the remaining responsive information may not be withheld under section 552.111 of the Government Code.

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov’t Code § 552.137(a)-(c). Section 552.137 does not apply to an institutional e-mail address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address of a vendor who seeks to contract with a governmental body, an e-mail address maintained by a governmental entity for one of its officials or employees, or an e-mail address provided to a governmental body on a letterhead. *See id.* § 552.137(c). One of the e-mail addresses you marked is an e-mail address that is subject to section 552.137(c). Thus, the city may not withhold this e-mail address, which we have marked for release, under section 552.137. The remaining e-mail addresses you marked and we have marked are not one of the types specifically excluded by section 552.137(c). Accordingly, with the exception of the e-mail address we have marked for release, the city must withhold the e-mail addresses you marked and we have marked under section 552.137 of the Government Code, unless the owners of the addresses affirmatively consent to their release.

In summary, the city must release the marked completed reports pursuant to section 552.022(a)(1) of the Government Code. The city may generally withhold the information we have marked under section 552.107(1) of the Government Code; however, the city may not withhold the non-privileged e-mail we have marked if it is maintained separate and apart from the otherwise privileged e-mail string in which it appears. The city may withhold the information we have marked under section 552.111 of the Government Code. With the exception of the e-mail address we have marked for release, the city must withhold the e-mail addresses you marked and we have marked under section 552.137 of the Government Code, unless the owners of the addresses affirmatively consent to their release. The city must release the remaining responsive 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,

A handwritten signature in black ink, appearing to read 'Kenny Moreland', with a stylized flourish at the end.

Kenny Moreland
Assistant Attorney General
Open Records Division

KJM/som

Ref: ID# 596060

Enc. Submitted documents

c: Requestor
(w/o enclosures)