



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 2, 2016

Ms. Patricia A. Rigney
City Attorney
City of Pharr
P.O. Box 1729
Pharr, Texas 78577

OR2016-02561

Dear Ms. Rigney:

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# 596948 (PIR# 2015-604).

The City of Pharr (the "city") received a request for specified information pertaining to a named individual. You indicate you have released some information. You claim the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note portions of the submitted information are subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part, the following:

(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:

...

¹We note that section 552.101 does not encompass other exceptions under the Act. Additionally, although the city also raises section 552.101 of the Government Code in conjunction with the Texas Disciplinary Rules of Professional Conduct, 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).

(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). Portions of the submitted information consist of information in an account relating to the receipt or expenditure of public funds. Thus, the information we marked is subject to section 552.022(a)(3), and the city must release this information unless it is made confidential under the Act or other law. *See id.* Although you seek to withhold the information at issue under sections 552.107 and 552.111 of the Government Code, 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 Gov't Code § 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). Accordingly, the city may not withhold the information at issue pursuant to 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" for purposes of section 552.022(a). *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Thus, we will consider your assertion of the attorney client privilege under Texas Rule of Evidence 503 for the information subject to section 552.022(a)(3).

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).

We note the information subject to section 552.022(a)(3) is attached to a communication you state is between the city attorney and the members of the city’s governing board made expressly for the purpose of facilitating the rendition of legal services. You also state the communication was intended to be confidential and indicate that the confidentiality has not been waived. Based on your representations and our review, we find the information subject to section 552.022(a)(3) of the Government Code constitutes an attorney-client communication. Thus, the city may withhold the information subject to section 552.022(a)(3) pursuant to rule 503 of the Texas Rules of Evidence.

We next address your arguments against disclosure of the information not subject to section 552.022. 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 claim section 552.107(1) for the remaining information not subject to section 552.022. You indicate the information at issue consists of communications between the city attorney

and the members of the city's governing board made expressly for the purpose of facilitating the rendition of legal services. You also state these communications were intended to be confidential and indicate that the confidentiality has not been waived. Upon review, we find the city has demonstrated the applicability of the attorney-client privilege to the remaining information. Thus, the city may generally withhold the remaining information under section 552.107(1) of the Government Code. However, we note the communications include attachments received from or sent to a non-privileged party. Furthermore, if these attachments are removed from the communications and stand alone, they are responsive to the request for information. Therefore, if these non-privileged attachments, which we have marked, are maintained by the city separate and apart from the otherwise privileged communications to which they are attached, then the city may not withhold these non-privileged attachments under section 552.107(1) of the Government Code. In that event, we will address the city's arguments under section 552.111 of the Government Code for such information.

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, 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. 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 also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982). Upon review, we find the information at issue consists of communications with individuals you have failed to demonstrate share a privity of interest or common deliberative process with the city. Thus, we find you have not demonstrated the deliberative process privilege applies to this information. Accordingly, the city may not withhold any portion of the remaining information under section 552.111 of the Government Code.

In summary, the city may withhold the information subject to section 552.022(a)(3) of the Government Code pursuant to rule 503 of the Texas Rules of Evidence. The city may generally withhold the remaining information under section 552.107(1) of the Government Code, but must release the non-privileged information we marked if it is maintained by the district separate and apart from the otherwise privileged communications to which it is attached.

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,



Ashley Crutchfield
Assistant Attorney General
Open Records Division

AC/dls

Ref: ID# 596948

Enc. Submitted documents

c: Requestor
(w/o enclosures)