



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

August 4, 2016

Ms. Tiffany Evans  
Assistant City Attorney  
City of Houston  
P.O. Box 368  
Houston, Texas 77001-0368

OR2016-08308A

Dear Ms. Evans:

This office issued Open Records Letter No. 2016-08308 (2016) on April 13, 2016. Since that date, the City of Houston (the "city") informs us that, at the time of its request for a decision, the city failed to notify the third party at issue of the request. Thus, we must address the interests of the third party whose information is at issue. Consequently, this decision serves as the corrected ruling and is a substitute for the decision issued on April 13, 2016. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act ("Act")). This ruling was assigned ID# 622399 (GC No. 23026).

The city received a request for all communications involving a named city employee containing specified terms over a specified time period. You claim some the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. Additionally, you state release of some of the remaining information may implicate the proprietary interests of Chapman and Cutler, LLP ("Chapman"). Accordingly, you state, and provide documentation demonstrating, you notified the third party of the request for information and of its right to submit arguments to this office as to why the information at issue should not be released. *See id.* § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act

in certain circumstances). We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Chapman explaining why the information at issue should not be released. Therefore, we have no basis to conclude the third party has a protected proprietary interest in the information at issue. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case information is trade secret), 542 at 3. Accordingly, the city may not withhold the information at issue on the basis of any proprietary interest the third party may have in the information.

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 that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "to facilitate 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). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). 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.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit the

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<sup>1</sup>We assume that 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 that those records contain substantially different types of information than that submitted to this office.

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, orig. proceeding). 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 state Exhibits 2, 3, and 4 consist of communications between city attorneys, outside counsel and consultants for the city, and city employees in their capacities as clients. You state these communications were made in furtherance of the rendition of professional legal services to the city. You state these communications were not intended for third parties and the confidentiality of the communications has been maintained. Upon review, we find, with the exception of the information we have marked as non-privileged, the city has demonstrated the applicability of the attorney-client privilege to Exhibits 2, 3, and 4. Thus, with the exception of the information we have marked as non-privileged, the city may withhold Exhibits 2, 3, and 4 under section 552.107(1) of the Government Code.<sup>2</sup> However, the communications we have marked as non-privileged are with individuals the city has not demonstrated are privileged parties. Thus, we find the city has not demonstrated the information we have marked constitutes privileged attorney-client communications for the purposes of section 552.107(1). Therefore, the city may not withhold the information we have marked as non-privileged 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*, 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, 364 (Tex. 2000)

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<sup>2</sup>As our ruling is dispositive, we need not address the city’s remaining argument against disclosure of this information.

(section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions 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, 157 (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, section 552.111 protects the factual information. *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.

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 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 state Exhibit 5 and the non-privileged information we marked consist of drafts and communications exchanged between city officials and consultants consisting of advice, opinions, and recommendations regarding matters of broad scope that affect governmental policy. You do not state whether the draft documents will be released to the public in final form. Thus, to the extent the city will release the draft documents we have marked to the public in their final form, the city may withhold them in their entirety under section 552.111. To the extent the city will not release the draft documents we have marked to the public in their final form, the city may not withhold them in their entirety under section 552.111. We find some of this information, which we have marked, including information within the draft documents otherwise, consists of advice, opinions, and recommendations pertaining to a policymaking matter. Accordingly, the city may withhold the information we have marked under section 552.111 of the Government Code. As noted above, however, portions of the information you seek to withhold have been shared with individuals with whom you have not demonstrated the city shares a privity of interest.

Further, we find the remaining information at issue consists of either general administrative information that does not relate to policymaking or information that is purely factual in nature. Thus, we find the city has failed to demonstrate the remaining information is excepted under section 552.111. Accordingly, the city may not withhold the remaining information section 552.111 of the Government Code.

In summary, with the exception of the information we have marked as non-privileged, the city may withhold Exhibits 2, 3, and 4 under section 552.107(1) of the Government Code. To the extent the city will release the draft documents we have marked to the public in their final form, the city may withhold them in their entireties under section 552.111. The city may withhold the information we have marked in Exhibit 5 under section 552.111 of the Government Code. The city must release the remaining information to the requestor.

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,



Katelyn Blackburn-Rader  
Assistant Attorney General  
Open Records Division

KB-R/bw

Ref: ID# 622399

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Third Party  
(w/o enclosures)