



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

April 19, 2016

Ms. Sandra Garcia  
Assistant General Counsel  
Office of General Counsel  
Houston Community College  
P.O. Box 667517  
Houston, Texas 77266-7517

OR2016-04754A

Dear Ms. Garcia:

This office issued Open Records Letter No. 2016-04754 (2016) on February 29, 2016. We have examined this ruling and determined we will correct the previously issued ruling. *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 (the "Act"), chapter 552 of the Government Code). Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on February 29, 2016. Your request was assigned ID# 612242.

The Houston Community College (the "college") received a request for information pertaining to the college's West Loop Campus Parking Garage. You state the college has released some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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 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 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 the information submitted as Exhibits B-1, B-2, and B-3 (collectively, “Exhibit B”) consists of communications involving attorneys for the college, college employees and officials, and construction firms hired by the college with which the college enjoys a privileged relationship with respect to the communications at issue. You state these communications were made in furtherance of the rendition of professional legal services to the college. You state these communications were intended to be, and have remained, confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the college may withhold Exhibit B under section 552.107(1) of the Government Code.

You claim the information submitted as Exhibits C-1, C-2, C-3, and C-4 (collectively, “Exhibit C”) is excepted from disclosure under section 552.111 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 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).

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.

You state the information submitted as Exhibit C includes drafts of documents that relate to the college's policymaking functions. You inform us the documents at issue are intended for release to the public in their final form. Based on your representations and our review of the information at issue, we find the college has established the applicability of section 552.111 to portions of Exhibit C, which we have marked. Accordingly, the college may withhold the information we marked within Exhibit C under section 552.111 of the Government Code. However, we find you have not demonstrated the remaining information in Exhibit C consists of draft documents that will be released to the public in their final form, nor have you otherwise demonstrated the applicability of section 552.111 to the remaining information

at issue. Accordingly, the college may not withhold the remaining information in Exhibit C under section 552.111.

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 of the Government Code encompasses information protected by other statutes. As part of the Texas Homeland Security Act, sections 418.176 through 418.182 were added to chapter 418 of the Government Code. These provisions make confidential certain information related to terrorism. You assert the submitted information is made confidential by sections 418.177 and 418.182 of the Government Code. Section 418.177 provides,

Information is confidential if the information:

(1) is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity; and

(2) relates to an assessment by or for a governmental entity, or an assessment that is maintained by a governmental entity, of the risk or vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity.

*Id.* § 418.177. Section 418.181 provides,

Those documents or portions of documents in the possession of a governmental entity are confidential if they identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism.

*Id.* § 418.181. Section 418.182 provides, in relevant part,

(a) Except as provided by Subsections (b) and (c), information, including access codes and passwords, in the possession of a governmental entity that relates to the specifications, operating procedures, or location of a security system used to protect public or private property from an act of terrorism or related criminal activity is confidential.

(b) Financial information in the possession of a governmental entity that relates to the expenditure of funds by a governmental entity for a security system is public information that is not excepted from required disclosure under Chapter 552.

*Id.* § 418.182(a), (b). The fact that information may relate to a governmental body’s security concerns does not make the information *per se* confidential under the Texas Homeland

Security Act. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the Texas Homeland Security Act must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

The remaining information consists of communications and building plans regarding the construction of a parking garage on the college campus. We note the building at issue is critical infrastructure for the purposes of section 418.181 of the Government Code. *See id.* § 421.001 (defining "critical infrastructure" to include all public or private assets, systems, and functions vital to security, governance, public health and safety, economy, or morale of state or nation). Upon review, we find the submitted building plans reveal the technical details of particular vulnerabilities of a college building to an act of terrorism. Therefore, the college must withhold the submitted building plans, which we have marked, under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code.

You further argue the remaining information was "collected and assembled by the [c]ollege for the purpose of ensuring appropriate security measures were included in building construction plans to prevent acts of terrorism or related criminal activity." You explain the communications relay information detailing "entries and exits, security camera locations, and other sensitive security information used to protect the public and public property from acts of terrorism and other criminal activity" and you argue release of the information "would jeopardize the [c]ollege's security and emergency systems and affect the [c]ollege's ability to prevent and detect future acts of terrorism and related criminal activity." Upon review, we find the college has demonstrated portions of the remaining information are made confidential by sections 418.181 and 418.182 of the Government Code. Thus, the college must withhold this information, which we have marked, under section 552.101 of the Government Code.

However, you do not explain how any of the remaining information at issue was collected, assembled, or is maintained by or for the college for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity and relates to an assessment of the risk or vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity. Additionally, you do not explain how the information at issue identifies the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. Moreover, you have not demonstrated how the information at issue consists of access codes and passwords or reveals the location of a security system used to protect public or private property from an act of terrorism or related criminal activity. We note some of the information at issue is related to the expenditure of funds by the college for its security system. This information is subject to disclosure under section 418.182(b) of the

Government Code and may not be withheld under section 552.101 in conjunction with section 418.182(a) of the Government Code. *See id.* § 418.182(b); *see also id.* § 418.182(a) (section 418.182(a) not applicable to information subject to section 418.182(b)). Consequently, we find the college may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with section 418.177, 418.181, or 418.182 of the Government Code.

In summary, the college may withhold Exhibit B under section 552.107(1) of the Government Code and may withhold the information we marked within Exhibit C under section 552.111 of the Government Code. The college must withhold the information we have marked under section 552.101 of the Government Code in conjunction with sections 418.181 and 418.182 of the Government Code. The college 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,



Claire V. Morris Sloan  
Assistant Attorney General  
Open Records Division

CVMS/som

Ref: ID# 612242

Enc. Submitted documents

c: Requestor  
(w/o enclosures)