



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

This ruling has been modified by court action.
The ruling and judgment can be viewed in PDF
format below.



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 6, 2016

Mr. Michael Bostic
Assistant City Attorney
City of Dallas
1500 Marilla Street, Room 7DN
Dallas, Texas 75201

The ruling you have requested has been amended as a result of litigation and has been attached to this document.

OR2016-19971

Dear Mr. Bostic:

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# 625133.

The City of Dallas (the "city") received a request for all e-mails, text messages, and written communications sent and received by a named councilperson for a specified time period including fifteen different search terms, as well as any written correspondence during the same time period between the councilperson and the mayor. You state the city will release some information. 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 representative sample of information.²

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

¹Although you raise Texas Rule of Evidence 503, we note the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107 of the Government Code. *See* Open Records Decision No. 677 (2002).

²We 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.

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 you marked consists of communications involving city officials, city staff, the city attorney, and the interim city attorney. You state the communications were made for the purpose of rendering legal advice and opinion and these communications have remained confidential. Upon review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the city may withhold the information you marked 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 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 some of the remaining information consists of internal deliberations of city officials and city staff on policymaking matters. You also state the remaining information includes drafts of policymaking documents that are intended for release to the public in their final form. Thus, you state the information at issue consists of advice, opinions, and recommendations of the city pertaining to its policymaking functions. Based on your representations and our review of the information at issue, we find the city has demonstrated the information you marked consists of advice, opinions, or recommendations on the

policymaking matters of the city. Thus, the city may withhold the information you marked 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).

We note you marked certain e-mail addresses within the submitted information to be withheld under section 552.137. You further state that none of the exceptions listed in section 552.137(c) are applicable to these addresses. Upon review, however, we note you marked the personal e-mail address of the named councilperson. We note the e-mail in which the councilperson’s e-mail address is marked pertains to the transaction of official city business. Accordingly, the city may not withhold the councilperson’s personal e-mail address under section 552.137 of the Government Code. *See Austin Bulldog v. Leffingwell*, No. 03-13-00604-CV, 2016 WL 1407818 (Tex. App.—Austin, April 8, 2016, no pet.) (holding personal e-mail addresses of government officials used to conduct official government business are not e-mail addresses of “members of the public” for purposes of Gov’t Code § 552.137(a)). With regard to the remaining e-mail address you marked, and we also marked, we are unable to determine whether it is the personal e-mail address of a city official or employee. Therefore, we must rule conditionally. To the extent the remaining e-mail address you marked, and we also marked, is the personal e-mail address of a city official or employee, this information is not excepted from disclosure under section 552.137, and may not be withheld on that basis. To the extent the remaining e-mail address at issue is not the personal e-mail address of a city official or employee, this information is excepted from disclosure under section 552.137, unless the owner of the e-mail address affirmatively consents to its release.

In summary, the city may withhold the information you marked under section 552.107(1) of the Government Code. The city may withhold the information you marked under section 552.111 of the Government Code. The city must release the personal e-mail address of the named councilperson. To the extent the remaining e-mail address you marked, and we also marked, is not the personal e-mail address of a city official or employee, this information must be withheld under section 552.137 of the Government Code, unless the owner of the e-mail address affirmatively consents to its release. The city 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, 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 that reads "Ramsey Abarca". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Ramsey A. Abarca
Assistant Attorney General
Open Records Division

RAA/dls

Ref: ID# 625133

Enc. Submitted documents

c: Requestor
(w/o enclosures)

SEP 14 2018

At 8:46 a.m.
Velva L. Price, District Clerk

CAUSE NO. D-1-GN-16-004661

CITY OF DALLAS,
Plaintiff,

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IN THE DISTRICT COURT OF

v.

TRAVIS COUNTY, TEXAS

KEN PAXTON, ATTORNEY GENERAL
OF TEXAS,
Defendant.

98th JUDICIAL DISTRICT

AGREED ORDER OF DISMISSAL

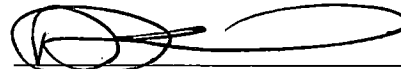
This is a suit under the Public Information Act (PIA), Government Code chapter 552, in which Plaintiff City of Dallas sought declaratory relief from Open Records Letter Ruling OR2016-19971. Pursuant to Tex. Gov't Code § 552.327, the Court may dismiss a suit brought under the PIA if all parties agree to the dismissal and the Attorney General determines and represents to the Court that the requestor has voluntarily withdrawn the request for information or has abandoned the request.

The Attorney General has determined and represents to the Court that the requestor has withdrawn the request to the extent it encompasses the information at issue in this lawsuit. Accordingly, the Parties request that the Court enter this Agreed Order of Dismissal. The Court agrees entry of this order is appropriate.

IT IS THEREFORE ADJUDGED, ORDERED, AND DECLARED that:

1. Plaintiff's cause of action against Defendant is dismissed without prejudice upon the agreement of all Parties pursuant to Tex. Gov't Code § 552.327;
2. Plaintiff is not bound by OR2016-19971 and may request a new ruling from the Attorney General concerning the information that was at issue in this lawsuit;
3. All relief not expressly granted is denied; and
4. This Order disposes of all claims between the Parties and is final.

Signed this 14 day of September, 2018.

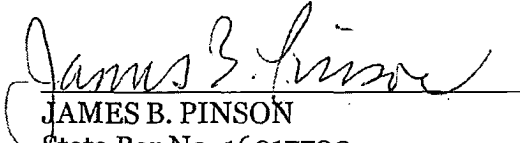


JUDGE PRESIDING

Hon. Dustin Howell



AGREED:



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