



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 3, 2017

Ms. Nneka E. Kanu
Assistant City Attorney
Legal Department
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2017-06848

Dear Ms. Kanu:

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# 651571 (GC No. 24036).

The City of Houston (the "city") received a request for all e-mail and text communications between a named individual and city council members including any of seven specified terms, during a specific date range. The city states it will release some information. The city claims the submitted information is excepted from disclosure under sections 552.107, 552.108, and 552.111 of the Government Code. We have considered the exceptions the city claims and reviewed the submitted representative sample of information.¹

Initially, we note the submitted information includes court-filed documents. Section 552.022(a)(17) of the Government Code provides for required public disclosure of "information that is also contained in a public court record[.]" unless the information is expressly made confidential under the Act or other law. Gov't Code § 552.022(a)(17). Although the city seeks to withhold the court-filed documents, which we have marked, under section 552.107 of the Government Code, section 552.107 is a discretionary exception to disclosure that protects a governmental body's interests and does 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). Therefore, the city may not withhold the

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

court-filed documents we marked under section 552.107. However, the Texas Supreme Court has held the Texas Rules of Evidence are “other law” within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider the city’s assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence for the information subject to section 552.022(a)(17). Additionally, we will address the city’s arguments against disclosure of the information not subject to section 552.022.

Texas Rule of Evidence 503(b)(1) provides as follows:

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 it is not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must (1) show 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 the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding).

The city asserts the information subject to section 552.022(a)(17) of the Government Code should be withheld under the attorney-client privilege of rule 503. The city explains the information at issue consists of a confidential communication between attorneys for the city and city employees in their capacities as clients. The city states the information was communicated for the purpose of the rendition of legal services to the city. The city states the communication at issue has not been, and was not intended to be, disclosed to third parties. Therefore, the city may withhold the information subject to section 552.022(a)(17) under rule 503 of the Texas Rules of Evidence.

Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. Gov't Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. The city states the information it has marked pertains to a criminal investigation conducted by the city's police department that concluded in a result other than conviction or deferred adjudication. Therefore, we agree section 552.108(a)(2) is applicable to the information at issue. Accordingly, the city may withhold the information it has marked under section 552.108(a)(2) of the Government Code.²

Next, we address the city's argument under section 552.107 of the Government Code for the information that is not subject to section 552.022 of the Government Code. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See id.* § 552.107(1). The elements of privilege under section 552.107 are the same as those discussed 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. 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 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).

The city states the remaining information it marked consists of confidential communications between attorneys for the city and city employees in their capacities as clients. The city states the information at issue was communicated for the purpose of the rendition of legal services to the city. The city states these communications have not been, and were not intended to be, disclosed to third parties. Upon review, we find the city has demonstrated the applicability of the attorney-client privilege to some of the communications at issue, which we have marked. Therefore, the city may generally withhold the information we have marked under section 552.107(1) of the Government Code. However, we note one of the otherwise privileged e-mail strings includes an e-mail with parties the city has not shown to

²As our ruling is dispositive, we need not address the city's remaining argument against disclosure of this information.

be privileged. Furthermore, if this e-mail is removed from the e-mail string and stands alone, it is responsive to the instant request. Therefore, if the city maintains the non-privileged e-mail, which we have marked, separate and apart from the otherwise privileged e-mail string in which it appears, then this information may not be withheld under section 552.107(1) of the Government Code. Additionally, we find the remaining information the city has marked was communicated with a party the city has not shown to be privileged. Accordingly, the city may not withhold any portion of the remaining information it has 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 (1993), 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 that 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). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5. 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.

The city asserts the information it has marked consists of advice, recommendations, and opinions regarding policymaking decisions. The city states the information at issue consists of draft documents that reflect the deliberations of the city's staff. The city states the information at issue has been released to the public in its final form. Based on these representations and our review, we find the city may withhold the information it has 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).³ *See Gov't Code* § 552.137(a)-(c). The e-mail addresses at issue are not excluded by subsection (c). Therefore, the city must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless their owners affirmatively consent to their public disclosure.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See Gov't Code* §§ 552.117(a)(1), .024. We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See Open Records Decision No. 506 at 5-6 (1988)* (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See Open Records Decision No. 530 at 5 (1989)*. Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Therefore, to the extent the individual whose information is at issue timely requested confidentiality under section 552.024 of the Government Code and the cellular telephone service is not paid for by a governmental body, the city must withhold the information we marked under section 552.117(a)(1) of the Government Code.

³The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987)*.

In summary, the city may withhold the information subject to section 552.022(a)(17) under rule 503 of the Texas Rules of Evidence. The city may withhold the information it has marked under section 552.108(a)(2) of the Government Code. The city may generally withhold the information we have marked under section 552.107(1) of the Government Code; however, 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. The city may withhold the information it has marked under section 552.111 of the Government Code. The city must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless their owners affirmatively consent to their public disclosure. To the extent the individual whose information is at issue timely requested confidentiality under section 552.024 of the Government Code and the cellular telephone service is not paid for by a governmental body, the city must withhold the information we marked under section 552.117(a)(1) of the Government Code. 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,



Rahat Huq
Assistant Attorney General
Open Records Division

RSH/som

Ref: ID# 651571

Enc. Submitted documents

c: Requestor
(w/o enclosures)