



October 28, 2002

Ms. Tamara Pitts  
Assistant City Attorney  
City of Fort Worth  
1000 Throckmorton Street  
Fort Worth, Texas 76102

OR2002-6059

Dear Ms. Pitts:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 170600.

The City of Fort Worth (the "city") received a request for twenty categories of information related to the City Council, the Economic Development Council, and the city's planned convention center hotel. The requestor subsequently narrowed items 3, 6, 9, 12, and 15 of his request to information related to the planning, financing, construction, and operation of the city's planned convention center hotel. You state that the city has agreed to make some of the requested information available to the requestor. You claim that a portion of the requested information is excepted from disclosure under sections 552.101, 552.104, 552.106, 552.107, 552.110, 552.111, 552.131, and 552.137 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted representative sample of

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<sup>1</sup>As the city did not claim that any portion of the requested information was excepted from disclosure under section 552.106 within ten business days of receiving the request, we find that the city has waived this exception to disclosure. See Gov't Code §§ 552.301, .302. Further, as we did not receive comments stating the reasons why section 552.101 of the Government Code would allow portions of the requested information to be withheld from disclosure, we assume that this exception to disclosure is no longer being asserted by the city.

information.<sup>2</sup> We have also considered comments submitted by the requestor. Gov't Code §552.304.

Initially, we must address your obligations under section 552.301 of the Government Code. Under section 552.301(b), a governmental body that wishes to withhold information from public disclosure must request a ruling from this office not later than the tenth business day after the date of receiving the written request. Within fifteen days of receiving the request, the governmental body must submit to this office (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e)(1)(A)-(D). You did not, however, timely submit to this office a copy of Exhibit F, containing representative samples of a portion of the specific information requested.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). You argue that the information in Exhibit F is excepted from public disclosure under section 552.107 of the Government Code. Section 552.107 is a discretionary exception under the Public Information Act (the "Act") that does not constitute a compelling reason sufficient to overcome the presumption that the requested information is public. *See Gov't Code §552.007(a)*; Open Records Decision Nos. 522 (1989) (discretionary exceptions in general), 473 at 2 (1987) (discretionary exceptions under the Act can be waived). You also claim that section 552.137 of the Government Code, which makes certain e-mail addresses confidential, excepts a portion of the submitted information in Exhibit F from disclosure. Therefore, we will address whether any portion of Exhibit F is excepted from disclosure under section 552.137.

We next note that the submitted documents contain information that falls within the purview of section 552.022(a)(5). Section 552.022(a)(5) provides that "all working papers, research

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<sup>2</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.

material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate[,]" are not excepted from required disclosure unless they are made expressly confidential by law. Portions of the submitted information in Exhibit D fall under this category of information. Section 552.111 of the Government Code is a discretionary exception to disclosure that protects the governmental body's interests and is therefore not other law that makes information expressly confidential for purposes of section 552.022(a). *See* Open Records Decision Nos. 522 at 4 (1989) (discretionary exceptions in general), 473 (1987) (governmental body may waive section 552.111). Thus, none of the information subject to the purview of section 552.022(a) may be withheld under section 552.111. However, as you also raise sections 552.104, 552.110, and 552.131 for this information, we will consider your arguments under these exceptions for the records subject to section 552.022 as well as for the remaining submitted information.

You contend that section 552.131 of the Government Code excepts from public disclosure a portion of the requested information. Section 552.131 provides in pertinent part:

(a) Information is excepted from the requirements of Section 552.021 if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

- (1) a trade secret of the business prospect; or
- (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

Gov't Code § 552.131(a)(1)-(2). Section 552.131(a) is inapplicable to information about a financial or other incentive offered to the business prospect after a governmental body reaches an agreement with the business prospect. Gov't Code § 552.131(b),(c). You have provided no specific factual evidence that any of the information at issue relates to a business prospect's trade secret information,<sup>3</sup> or that the information relates to commercial or financial information the disclosure of which would cause the business prospect substantial competitive harm. Therefore, we find that no portion of the submitted information in Exhibits D, E, H, and I may be withheld under section 552.131 of the Government Code.

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<sup>3</sup>Section 552.305(d) of the Government Code requires the governmental body to make a good faith effort to notify a person whose proprietary interests may be implicated by a request for information where the information may be excepted from disclosure under sections 552.101, 552.110, 552.113, or 552.131. You do not indicate that you have notified any third parties of their right to submit their own arguments as to why the requested information is excepted from public disclosure. *See* Gov't Code § 552.305(d).

You argue that a portion of the submitted information is excepted from public disclosure under section 552.110 of the Government Code. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. Although the city argues that this information constitutes its own trade secret information, section 552.110 is not applicable to the property interests of a governmental body. Thus, the city may not withhold from disclosure the submitted information in Exhibits D, E, H, and I under section 552.110 of the Government Code.

You inform us that the city has been planning the building of a convention center hotel and that the submitted information in Exhibits D and J pertains to this project. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Section 552.104 protects a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). In this case, section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). Section 552.104 does not except information relating to competitive bidding situations once a contract has been awarded. Open Records Decision Nos. 306 (1982), 184 (1978).

You state that the city has not yet finalized a contract with the Hilton, and that release of the information in Exhibit J prior to finalization of the contract would give an unfair competitive advantage to a competitor. Based upon your representations and our review of the submitted documents, we find that release of the information in Exhibit J will give advantage to a competitor or bidder. Thus, we conclude that the city may withhold the information in Exhibit J under section 552.104 of the Government Code. We therefore conclude that the information in Exhibit J is excepted from disclosure based on section 552.104 until such time as the contract is awarded.

Section 552.104 also protects a governmental body's interests when it is involved in certain commercial transactions. When a governmental body seeks protection as a competitor we have stated that it must be afforded the right to claim the "competitive advantage" aspect of section 552.104 if it meets two criteria. The governmental body must first demonstrate that it has specific marketplace interests. *See* Open Records Decision No. 593 at 4 (1991). Second, a governmental body must demonstrate actual or potential harm to its interests in a particular competitive situation. A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104. *See id.* at 2. Whether release of particular information

would harm the legitimate marketplace interests of a governmental body requires a showing of the possibility of some specific harm in a particular competitive situation. *See id.* at 5, 10.

You claim release of the information at issue prior to the time that certain bonds are sold would severely weaken the city's economic position as it relates to the convention center hotel and disadvantage the interests of the city in this project. You do not, however, explain how or if the city is involved in a particular competitive situation pertaining to this project. You also claim that release of this information would harm Paine-Webber. Section 552.104 protects the interests of governmental bodies, not third parties. Open Records Decision No. 592 (1991). Based upon our review of your arguments and the submitted information in Exhibit D, we conclude that the city has failed to demonstrate actual or potential harm to its interests in a particular competitive situation. Accordingly, we conclude that the city may not withhold any portion of the information in Exhibit D from disclosure pursuant to section 552.104 of the Government Code.

We next address your section 552.111 claim for the information in Exhibit D not subject to the purview of section 552.022(a), and for the information in Exhibits E, G, H, and I. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.--Austin 2001, no pet.). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. 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.*, 37 S.W.3d at 160; ORD 615 at 4-5. The preliminary draft of a policymaking document that has been released or is intended for release in final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document. Open Records Decision No. 559 at 2 (1990). You assert that the submitted documents in Exhibit G are intra-agency memoranda. You state that the information in Exhibits D, E, H, and I was created by outside consultants acting on behalf of the city. You further state that the information presented by the consultants to the city was used during deliberations regarding policy decisions pertaining to the financing, developing, operating, and construction of the convention center hotel. After careful review, we find that a portion of the submitted information constitutes internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the city. We have

marked the information in Exhibits D, E, G, H, and I that the city may withhold under section 552.111 of the Government Code.

Finally, you claim that a portion of the submitted information is excepted from public disclosure under section 552.137 of the Government Code. Section 552.137 makes certain e-mail addresses confidential.<sup>4</sup> Section 552.137 provides:

(a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code §552.137. You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. The city must, therefore, withhold e-mail addresses of members of the public under section 552.137. We have marked this information accordingly.

We note that some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the city may withhold the information in Exhibit J from disclosure pursuant to section 552.104 of the Government Code. We have marked the information in Exhibits D, E, G, H, and I that the city may withhold under section 552.111 of the Government Code. The city must withhold the marked e-mail addresses of members of the public under section 552.137. The remaining submitted information must be released to the requestor in compliance with federal copyright law.

This letter ruling is limited to the particular records 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 records or any other circumstances.

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<sup>4</sup>House Bill 2589 also makes certain e-mail addresses confidential. *See* Act of May 22, 2001, 77th Leg., R.S., H.B. 2589, § 5 (codified at Gov't Code § 552.136). The language of section 552.136, as added by House Bill 2589, is identical to that of section 552.137.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Cindy Nettles". The signature is fluid and cursive, with the first name "Cindy" written in a larger, more prominent script than the last name "Nettles".

Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/jh

Ref: ID# 170600

Enc. Submitted documents

c: Mr. William Brewer  
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(w/o enclosures)