



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 9, 2004

Mr. Hector M. Lozano  
City Attorney  
City of Pearsall  
213 South Oak Street  
Pearsall, Texas 78061

OR2004-0202

Dear Mr. Lozano:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 194007.

The City of Pearsall (the "city") received a request for certain opinion letters by the city's auditors. You claim that the submitted information is excepted from disclosure under sections 552.111 and 552.116 of the Government Code. You also claim that release of the requested information may implicate the proprietary interests of a third party under section 552.101 of the Government Code. You state, and provide documentation showing, that you notified Leal & Carter, P.C., of the request and of its right to submit arguments to this office as to why the information should not be released..<sup>1</sup> See Gov't Code § 552.305(d);

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<sup>1</sup>Section 552.305 provides in relevant part that in giving notice to a private party whose proprietary interests may be implicated by a request for information, the governmental body must include:

(B) a statement, *in the form prescribed by the attorney general*, that the person is entitled to submit in writing to the attorney general within a reasonable time not later than the 10<sup>th</sup> business day after the date the person receives the notice:

- (i) each reason the person has as to why the information should be withheld; and
- (ii) a letter, memorandum, or brief in support of that reason.

Gov't Code § 552.305(d)(2)(B) (emphasis added). In the future, the city should use the attorney general's prescribed form, which is available at Appendix C of this office's Public Information Handbook and on the Attorney General's website at [www.oag.state.tx.us](http://www.oag.state.tx.us).

*see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note that 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 requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Leal & Carter, P.C., has not submitted any comments to this office explaining how release of the requested information would affect its proprietary interests. Therefore, Leal & Carter, P.C., has provided us with no basis to conclude that it has a protected proprietary interest in any of the submitted information. *See* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 639 at 4 (1996), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Thus, the submitted information is not excepted from disclosure under section 552.110.

You raise section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses information that other law makes confidential. *See* Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). However, you have not directed our attention to any law, nor are we aware of any law, under which any of the requested information is confidential for purposes of section 552.101. Thus, we find that the city has not demonstrated that section 552.101 is applicable to any of the submitted information.

You also raise section 552.116 of the Government Code. In Senate Bill 1581, which became effective on June 18, 2003, the Seventy-eighth Legislature amended section 552.116. As amended, section 552.116 provides, in pertinent part, as follows:

- (a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, or a municipality is excepted from [public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public disclosure] by this section.

(b) In this section:

(1) 'Audit' means an audit authorized or required by a statute of this state or the United States and includes an investigation.

(2) 'Audit working paper' includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Act of May 28, 2003, 78<sup>th</sup> Leg., R.S., ch. 379, § 1, 2003 Tex. Sess. Law Serv. 1604 (to be codified as amendment to Gov't Code § 552.116). A governmental body that invokes section 552.116 must demonstrate that the audit working papers are from an audit authorized or required by statute by identifying the applicable statute. You state that the submitted documents constitute audit working papers; however, you have not identified the applicable statute, if any, that authorized or required the audit. Thus, we find that you have not sufficiently demonstrated that the information at issue was prepared or maintained by a municipality in conducting an audit authorized or required by a statute of this state or the United States. *See* Gov't Code § 552.116(a), (b)(1), (b)(2). Therefore, the city may not withhold the submitted information under section 552.116.

You also contend that the submitted information is excepted from disclosure under section 552.111 of the Government Code. 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 deliberative or policymaking processes of the governmental body. Open Records Decision No. 615 at 5-6 (1993).

An agency's policymaking functions, however, 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. Open Records Decision No. 615 at 5-6 (1993). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *See Arlington Indep. Sch. Dist. v. Texas Atty. Gen.*, 37 S.W.3d 152, 160 (Tex. App.—Austin 2001, no writ); Open Records Decision No. 615 at 4-5. We note that section 552.111 is applicable to communications that involve a governmental body's consultants. *See* Open

Records Decision Nos. 631 at 2 (1995) (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 563 at 5-6 (1990) (private entity engaged in joint project with governmental body may be regarded as its consultant).

You state that the information you seek to withhold under section 552.111 relates to "opinion[s]' regarding use of the City's resources" given to the city by the city's auditors. Upon review, we agree that some of the submitted information consists of advice, recommendations, opinions, and other material reflecting the policymaking processes of the city. We have marked the information that the city may withhold pursuant to section 552.111. As the city claims no other exceptions, the remaining information must be released.

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.

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 Dep't of Pub. 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,



Amy D. Peterson  
Assistant Attorney General  
Open Records Division

ADP/sdk

Ref: ID# 194007

Enc. Submitted documents

c: Mr. Jose G. Trevino  
718 East San Marcos Street  
Pearsall, Texas 78061  
(w/o enclosures)