



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 7, 2005

Mr. Leo J. Welder, Jr.  
Welder, Leshin & Mahaffey, L.L.P.  
800 North Shoreline Boulevard, Suite 300 North  
Corpus Christi, Texas 78401-3700

OR2005-04978

Dear Mr. Welder:

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# 225715.

The Port of Corpus Christi Authority of Nueces County, Texas (the "PCCA"), which you represent, received a request for a report documenting all payments made by the PCCA to any company for services related to the development of a hotel, as well as any correspondence regarding the development of a hotel. You state that PCCA has not made any payments to any company for services related to the development of a hotel and does not have information responsive to that portion of the request.<sup>1</sup> You state that PCCA has made some of the information available for inspection but claim that the submitted information is exempted from disclosure under sections 552.104, 552.111, and 552.131 of the Government Code. Additionally, you state that some of the submitted information may contain proprietary information of FaulknerUSA ("Faulkner") and Ocean House Corpus Christi, Ltd. ("Ocean House"). You indicate that PCCA has notified Faulkner and Ocean House of PCCA's receipt of the request for information and of the right of each company to submit

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<sup>1</sup> The Act does not require a governmental body to disclose information that did not exist at the time the request was received, nor does it require a governmental body to prepare new information in response to a request. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975); see also Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 416 at 5 (1984).

arguments to this office as to why the requested information should not be released to the requestor. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted information.

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 information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Faulkner and Ocean House have not submitted to this office any reasons explaining why their information should not be released. We thus have no basis for concluding that any portion of the submitted information constitutes proprietary information, and none of it may be withheld on that basis. *See, e.g.,* Gov't Code § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). We now address your arguments.

Section 552.111 excepts from public disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." The purpose of this exception 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, no writ); 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 only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* Open Records Decision No. 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. The 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. *See* Open Records Decision No. 615 at 5. If, however, the 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

may also be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

This office also has concluded that 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.

Section 552.111 applies not only to a governmental body's internal memoranda, but also to memoranda prepared for a governmental body by an outside consultant with which the governmental body has a privity of interest or common deliberative process. *See* Open Records Decision Nos. 561 at 9 (1990), 462 at 14 (1987), 298 at 2 (1981). You inform us that PCCA is currently in negotiations with Faulkner for the development of a real estate project involving PCCA property (the "development site"). You contend that PCCA entered into a pre-development agreement with Faulkner that began the process of PCCA and Faulkner producing a master plan for the property in question, constructing a development financing plan, and ending with one or more ground leases and development agreements. However, you state that a final development agreement has not been reached with Faulkner. You represent that the PCCA will make final decisions to set the planning and development policy for the development site in an open meeting. Based upon your representations and our review of the submitted documents, we agree that some of the information you seek to withhold under section 552.111 consists of advice, opinions, and recommendations regarding a policymaking matter of the PCCA. *See* Open Records Decision No. 631 at 4 (1995) (information created by outside consultant for governmental body may constitute intra-agency memoranda that may be withheld under section 552.111 when outside consultant is acting at request of governmental body and performing task within authority of governmental body). The remaining submitted information the PCCA seeks to withhold under section 552.111 is either severable factual information or information from a party with whom privity of interest or common deliberative process has not been demonstrated. We have marked the submitted information that the PCCA may withhold under section 552.111.

You claim Exhibit H is excepted from disclosure under section 552.104.<sup>2</sup> Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a governmental body's interests in

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<sup>2</sup> Because our ruling under section 552.111 is dispositive as to the Draft Market & Feasibility Analysis in Exhibits G-1 and G-3, we do not address your arguments under section 552.104 of the Government Code for that information.

competitive bidding situations. *See* Open Records Decision No. 592 (1991). Moreover, section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a bidder or competitor will gain an unfair advantage will not suffice. *See* 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 argue the disclosure of Exhibit H would create a competitive advantage among PCCA bidders. However, you have not sufficiently demonstrated that release of Exhibit H would result in any actual or specific harm to PCCA in this instance. Therefore, PCCA may not withhold Exhibit H under section 552.104.

You contend the information in Exhibits G-5, G-6, and H is excepted under section 552.131 of the Government Code.<sup>3</sup> This section excepts from disclosure information relating to economic development negotiations involving a governmental body and business prospect that the governmental body seeks to have locate, stay, or expand in or near the governmental body's territory. *See* Gov't Code § 552.131(a). Section 552.131 provides:

(a) Information is excepted from [required public disclosure] 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.

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].

(c) After an agreement is made with the business prospect, this section does not except from [required public disclosure] information about a financial or other incentive being offered to the business prospect:

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<sup>3</sup> Because our ruling under section 552.111 is dispositive as to the Draft Market & Feasibility Analysis in Exhibits G-1 and G-3, as well as the related comments in Exhibits G-2A, G-2B, and G-2C, we do not address your arguments under section 552.131 of the Government Code for that information.

(1) by the governmental body; or

(2) by another person, if the financial or other incentive may directly or indirectly result in the expenditure of public funds by a governmental body or a reduction in revenue received by a governmental body from any source.

Gov't Code § 552.131. Section 552.131(a) excepts from disclosure only "trade secret[s] of [a] business prospect" and "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." *Id.* Neither Faulkner nor Ocean House has submitted any arguments to this office explaining the applicability of section 552.131(a). You contend section 552.131(a) applies to Exhibit H because it constitutes commercial or financial information the disclosure of which would cause substantial harm to Ocean House. However, PCCA has not sufficiently demonstrated that substantial competitive injury to Ocean House would likely result from the release of Exhibit H. *See* Open Records Decision No. 661 at 5-6 (1999) (business enterprise or governmental body must show by specific factual evidence that release of information would cause it substantial competitive harm); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

However, you also claim some of the information at issue is protected by section 552.131(b). This section excepts from disclosure information about incentives being offered to a business prospect "unless and until an agreement is made with the business prospect." You state that negotiations with Faulkner and Ocean House are ongoing and no final economic development agreements with either have been made. Based upon your representations, we agree that some of the information in Exhibits G-5 and G-6 is information about a financial or other incentive being offered to a business prospect. Accordingly, we have marked the information in these exhibits that may be withheld under section 552.131(b).

In summary, we have marked the information that may be withheld under sections 552.111 and 552.131 of the Government Code. The remaining submitted 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).

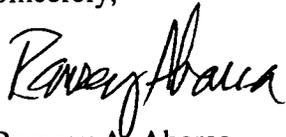
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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,



Ramsey A. Abarca  
Assistant Attorney General  
Open Records Division

RAA/jev

Ref: ID# 225715

Enc. Submitted documents

c: Ms. Alison Beshur  
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(w/o enclosures)