



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 3, 2006

Mr. Robert Fiederlein
Executive Director
Memorial City Management District
820 Gessner 18th Floor
Houston, Texas 77024

OR2006-08690

Dear Mr. Fiederlein:

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# 255781.

The Memorial City Management District (the "district") and Memorial City Redevelopment Authority (the "authority") received a request for "all correspondence, memos, emails, letters, reports and other document that [the district's executive director] or any member of [the executive director's] staff have sent or received within the past sixty (60) days." You indicate some of the requested information has been made available to the requestor but you claim that the submitted information is excepted from disclosure under sections 552.107, 552.110, 552.111, and 552.131 of the Government Code. Additionally, you claim that this information may be subject to the proprietary interests of Metro National Corporation ("Metro National"). You inform us, and provide documentation indicating, that you notified Metro National of the request and of its opportunity to submit comments to this office. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); 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 in certain circumstances). We have considered the submitted arguments and reviewed the

submitted information.¹ We note the requestor has also forwarded comments he submitted to the district. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege under section 552.107(1), 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. *See* 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 "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. *See* 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. *See In re Texas 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 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. *See* 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 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).

Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). 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).

¹ We note that the request was sent to you as the executive director of both the district and the authority, and you state you are briefing this office as the executive director of both entities. However, you have not informed us which entity maintains the information you have submitted to this office as responsive to the request. Thus, we understand that the responsive information at issue is maintained by both the district and the authority.

You have marked the submitted information you contend is protected by the attorney-client privilege. You explain that this marked information includes confidential communications between the authority's attorney and representatives of the district and authority for the purpose of providing legal services to the authority. You also explain that this marked information includes confidential communications between the authority's attorney and representatives of the City of Houston (the "city"). You inform us that pursuant to an agreement between the district, the authority, and the city, the authority administers the city's Reinvestment Zone No. 17 (the "zone") under the supervision of the city. You argue that "given the relationship among the [c]ity, the [z]one, and the authority," the exception provided by section 552.107 applies to the information at issue. Upon review of your arguments, we find that the communications at issue concern a matter of common interest between the district, authority, city, and zone. *See* Texas Rule of Evidence 503(b)(1)(C). Furthermore, you state that the information at issue was "not intended to be disclosed to third parties and such confidentiality has not been waived." Accordingly, based on your representations and our review, we conclude that the district and authority may withhold the information at issue, which we have marked, under section 552.107 of the Government Code.

Section 552.111 of the Government Code 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." Gov't Code § 552.111. Section 552.111 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, no writ); 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 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* 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. 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).

Further, section 552.111 can encompass communications between a governmental body and a third party consultant. *See* Open Records Decision Nos. 631 at 2 (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), 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body's consultants). For section 552.111 to apply in such instances, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See* Open Records Decision No. 561 at 9).

You have marked the remaining submitted information you contend is protected by the deliberative process privilege and excepted from disclosure under section 552.111. You state that "[t]he identified documents consist of advice, opinions or recommendations on two unrelated policymaking matters that have not yet been finalized and are therefore pre-decisional." You explain that "[t]he first involves on-going deliberations regarding Spring Branch Independent School District's participation in the [zone]." You further explain that "[t]he second policy matter discussed in the identified documents involves the location of Town & Country Way road, which is being considered as a public improvement to be financed with tax increment from the [zone.]" You inform us, and the submitted information reflects, that representatives of the district, authority, city, and zone have all been involved in these two identified policy matters; you have also identified a school finance consultant you state was hired by the authority to provide financial analysis. Based on your arguments, we conclude that city, zone, and the school finance consultant all share a privity of interest with the district and authority in regard to these matters. Furthermore, we agree that some of the information at issue consists of advice, opinions, and recommendations from these entities regarding a policymaking matter of the district and authority. We note, however, that some of the information at issue was shared with third parties, including Spring Branch Independent School District and Metro National. You have not demonstrated how the district and authority currently share a privity of interest or common deliberative process with these third parties and information shared with these third parties is not excepted under section 552.111. Moreover, we find that some of the information at issue consists of severable factual information that is also not excepted under section 552.111. We have marked the submitted information that the district and authority may withhold under section 552.111.

Next, you and Metro National contend some of the remaining submitted information is excepted under sections 552.110(b) and 552.131(a)(2) of the Government Code. Section 552.110(b) protects "[c]ommercial 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 § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. Gov’t Code § 552.110(b); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Section 552.131(a)(2) of the Government Code 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:

...

(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)(2). Section 552.131(a)(2) excepts from disclosure only “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.* This aspect of section 552.131 is co-extensive with section 552.110. *See id.* §§ 552.110, .131.

You state the information at issue “involves economic development discussions regarding the [a]uthority’s and the [d]istrict’s efforts to attract Metro National to locate [its] proposed [real estate development] projects within the [z]one, thus benefitting the [z]one by increasing its tax revenue base.” You state that release of the information at issue would reveal to Metro National’s competitors the nature of Metro National’s development projects, which you have described in detail, and, thus, cause Metro National substantial competitive harm. Upon review, we conclude that sections 552.110 and 552.131(a) applies to some of the information at issue and this information may be withheld under that exception. However, we find that you and Metro National have made only conclusory allegations that release of the remaining information at issue would cause Metro National substantial competitive injury and have provided no specific factual or evidentiary showing to support these allegations with regard to the information at issue. *See* Gov’t Code §§ 552.110, .131; *see also* 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). Thus, we conclude that neither sections 552.110 or 552.131

apply to any of the remaining information at issue. We have marked the submitted information that may be withheld under sections 552.110 and 552.131.

In conclusion, we have marked the information that may be withheld under sections 552.107, 552.110, 552.111, and 552.131 of the Government Code. The remaining submitted information must be released to the requestor.

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); *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 Office of the Attorney General 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. 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 "Ramsey A. Abarca", with a long, sweeping flourish extending to the right.

Ramsey A. Abarca
Assistant Attorney General
Open Records Division

RAA/eb

Ref: ID# 255781

Enc. Submitted documents

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