



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 1, 2006

Ms. Alison Holland
Olson & Olson, L.L.P.
2727 Allen Parkway, Suite 600
Houston, Texas 77019-2133

OR2006-10241

Dear Ms. Holland:

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# 258313.

The City of Rosenberg (the "city"), which you represent, received a request for any interlined originals or draft, preliminary, or final documents of any type, along with any accompanying notes or faxes between representatives of the city and NewQuest Properties, Tristar Real Estate Investments, or BW Development concerning two specified properties. You state that the city has released some of the requested information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.107, 552.111, 552.131, and 552.137 of the Government Code. You further state that the release of the submitted information may affect the proprietary interests of third parties. Pursuant to section 552.305 of the Government Code, you were required to notify these third parties of the request and of their right to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.305(d); *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 Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that you have submitted some information that was created after the request was received. This information, which you have marked, is thus not responsive to the request for information. This ruling does not address the public availability of any

information that is not responsive to the request, and the city is not required to release that information in response to the request.

Next, we note, and you acknowledge, that you failed to raise section 552.131(b) of the Government Code within the ten-business-day period proscribed by section 552.301(b). *See* Gov't Code § 552.301(b). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *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 section 552.302); Open Records Decision No. 319 (1982). Normally, a compelling interest is demonstrated when some other source of law makes the information at issue confidential or third-party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). You claim that the submitted information is excepted from disclosure under subsection 552.131(b) of the Government Code. Unlike subsection 552.131(a), which protects third-party proprietary information, subsection 552.131(b) protects a governmental body's interests. Therefore, subsection 552.131(b) is a discretionary exception to disclosure and may be waived by a governmental body's failure to comply with section 552.301. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). The city has failed to comply with section 552.301, and has therefore waived its claim under subsection 552.131(b). Accordingly, the city may not withhold any of the submitted information under subsection 552.131(b) of the Government Code.

Next, 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, this office has not received comments from any third parties explaining how the release of the submitted information will affect their proprietary interests. Thus, we have no basis to conclude that the release of any portion of the submitted information would implicate the proprietary interests of any third parties. *See id.* §§ 552.110(a)-(b), .131(a); Open Records Decision Nos. Gov't Code § 552.110(b), party must show by specific factual evidence, not conclusory or generalized allegations, that release of information would cause that party substantial competitive harm), 552 at 5 (1990) (if governmental body takes no position under Gov't Code § 552.110(a), third party must establish *prima facie* case that information is trade secret). Accordingly, we conclude that none of the submitted information may be withheld based on the proprietary interests of any third parties.

Next, we address your claim that the documents in Exhibits B and C are excepted from disclosure under section 552.107 of the Government Code. Section 552.107 protects

information that is encompassed by the attorney-client privilege. *See* Gov't Code § 552.107(1). When asserting the attorney-client privilege, a governmental body maintains 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. *See 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, *see 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.” *See 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).

You state that the documents in Exhibits B and C constitute communications between legal counsel for the city and the city. You also explain that these documents constitute requests from the city for legal advice. You assert that confidentiality of these documents has been maintained. Based on your representations and our review of the information at issue, we agree that the information in Exhibit C constitutes a privileged attorney-client communication for purposes of section 552.107. However, we find that you have failed to demonstrate that the communications in Exhibit B were made “for the purpose of facilitating the rendition of professional legal services.” Furthermore, we note that these documents indicate on their face they have been disclosed to non-privileged parties, and thus are not

protected by the attorney-client privilege. Therefore, the city may withhold only the information in Exhibit C under section 552.107.

Next, we address your claim that the remaining information is excepted from disclosure under section 552.111 of the Government Code. 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." 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 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, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Dep't of Pub. 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, and opinions that reflect the policymaking processes of the governmental body. *See* ORD 615 at 5. Further, section 552.111 can encompass communications between a governmental body and a third party consultant. *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), 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). For section 552.111 to apply, 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* ORD 561 at 9 (1990).

You claim that the remaining documents "contain the intra-agency advice, opinions, and recommendations of the [c]ity as to an economic development project." However, you have failed to demonstrate that this information pertains to the policymaking processes of the city. Furthermore, we note that these documents were shared with outside parties. In this instance, you have not submitted any arguments explaining how the city shares a privity of interest or common deliberative process with these outside parties. Therefore, the city has failed to establish the applicability of section 552.111 to the information at issue. *See* Gov't Code § 552.301(e)(1) (requiring the governmental body to explain the applicability of the raised exception). Thus, none of the remaining information may be withheld under section 552.111 of the Government Code.

Finally, we address your claim under section 552.137 of the Government Code. Section 552.137 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). *See* Gov’t Code § 552.137(a)-(c)). The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). Thus, the city must withhold the e-mail addresses you have marked under section 552.137 unless the owners of the email addresses have affirmatively consented to their release. *See id.* § 552.137(b).

In summary, the city may withhold the information in Exhibit C under section 552.107 of the Government Code. The city must withhold the e-mail addresses you have marked under section 552.137 of the Government Code unless the owners of the email addresses have affirmatively consented to their release. 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).

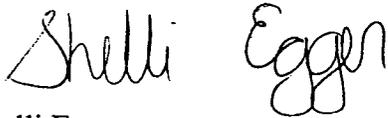
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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 that reads "Shelli Egger". The signature is written in a cursive style with a large, looped "E" at the end.

Shelli Egger
Assistant Attorney General
Open Records Division

SE/sdk

Ref: ID# 258313

Enc. Submitted documents

c: Mr. Gary J. Hannon
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(w/o enclosures)