



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 19, 2006

Mr. Jesus Toscano, Jr.
Administrative Assistant City Attorney
City of Dallas
1500 Marilla Room 7BN
Dallas, Texas 75201

OR2006-14951

Dear Mr. Toscano:

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# 267100.

The City of Dallas (the "city") received a request for information regarding the fiscal impact of proposed development of property on Lake Ray Hubbard and Northlake. You state that some of the requested information will be released. You claim that other responsive information is excepted from disclosure under sections 552.104, 552.105, and 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.¹

We first note that the information submitted as Exhibit C is subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless the information is excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law. Gov't Code § 552.022(a)(1). Thus, because Exhibit C consists of a completed report made of, for, or by the city, that information must be released under section 552.022 unless it is protected by section 552.108 or expressly confidential under other law. You do not claim section 552.108.

¹This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the city to withhold any information that is substantially different from the submitted information. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

Although you seek to withhold Exhibit C under sections 552.105 and 552.111 of the Government Code, those sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See id.* § 552.007; *Open Records Decision Nos. 665 at 2 n.5 (2000)* (discretionary exceptions generally), 564 (1990) (statutory predecessor to Gov't Code § 552.105 subject to waiver), 470 at 7 (1987) (statutory predecessor to Gov't Code § 552.111 subject to waiver). As such, sections 552.105 and 552.111 are not other law that makes information confidential for the purposes of section 552.022. Therefore, the city may not withhold any of the information in Exhibit C under section 552.105 or section 552.111. However, because information that is subject to section 552.022 may be withheld under section 552.104 of the Government Code, we will consider your claim that Exhibit C is protected by that exception. *See Gov't Code § 552.104(b)* (information protected by Gov't Code § 552.104 not subject to required public disclosure under Gov't Code § 552.022(a)). We also will consider your claims under sections 552.104, 552.105, and 552.111 with respect to Exhibit B.

Section 552.104 excepts from public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). This exception protects a governmental body's interests in competitive bidding situations. *See Open Records Decision No. 592 (1991)*. 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. *See Open Records Decision No. 541 at 4 (1990)*. Section 552.104 does not protect information relating to competitive bidding situations once a contract has been awarded and is in effect. *See Open Records Decision Nos. 306 (1982), 184 (1978)*.

You inform us that the city has declined an offer for the property to which Exhibit C pertains and is considering whether to solicit bids. You contend that "[t]he city will not benefit from truly open competition for the sale of the property if potential purchasers of the property have knowledge of the fiscal impact to the city of the sale of the property." You do not inform us, however, that the city actually has any ongoing competitive interest in the sale of the property that would be harmed by the release of Exhibit C. Thus, we consider your contention that release of the information in question could give a bidder an unfair advantage to be entirely too speculative. Accordingly, we conclude that you have not demonstrated that public disclosure of Exhibit C would cause specific harm to the city's interests in any particular competitive bidding situation. *See Open Records Decision No. 541 at 4* (purpose of Gov't Code § 552.104 is to protect governmental body's purchasing interests by preventing competitor or bidder from gaining unfair advantage over other competitors or bidders); *see also Open Records Decision No. 453 at 3 (1986)* (quoting *Open Records Decision No. 46 (1974)*) (knowledge of identity of numerous potential bidders for requested commodity class not information that, if released, would give advantage to competitors or bidders). Therefore, the city may not withhold the information in Exhibit C under section 552.104. As you claim no other exception to the disclosure of that information, Exhibit C must be released.

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. This exception 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 (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 from disclosure only those internal communications that consist of advice, recommendations, and opinions that reflect 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) (Gov’t Code § 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). Moreover, 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).

We also have 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.

You state that the information submitted as Exhibit B is a draft document that pertains to a policy matter and reflects the policymaking process of the city. Having considered your representations and reviewed the information at issue, we conclude that the city may withhold Exhibit B under section 552.111 of the Government Code. As we are able to make this determination, we need not address your other arguments against disclosure of Exhibit B.

In summary: (1) the city must release Exhibit C under section 552.022(a)(1) of the Government Code; and (2) the city may withhold Exhibit B under section 552.111 of the Government Code.

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).

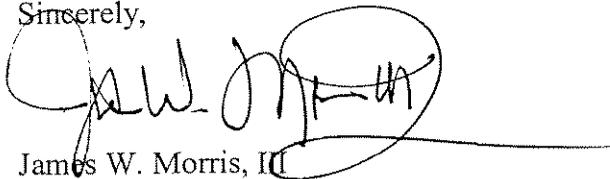
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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 "James W. Morris, III". The signature is stylized with a large, circular flourish at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/jww

Ref: ID# 267100

Enc: Submitted documents

c: Ms. Ruthann Devlin
5712 Spring Hollow Lane
The Colony, Texas 75056
(w/o enclosures)