



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 11, 2007

Ms. Zandra L. Pulis
Senior Counsel
Legal Services Division
City Public Service Energy
P.O. Box 1771
San Antonio, Texas 78296

OR2007-07274

Dear Ms. Pulis:

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# 281950.

The City Public Service Board of the City of San Antonio (the "board") received a request for specified categories of information pertaining to the board's involvement in the development of a Texas A&M University campus in the City of San Antonio.¹ You state that some of the requested information has been provided to the requestor, but claim that the submitted information is excepted from disclosure under sections 552.101, 552.105, 552.107, 552.111, 552.131, and 552.133 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 551.104(c) of the Government Code provides that "[t]he certified agenda or tape of a closed meeting is available for public inspection and copying only under a court order issued under Subsection (b)(3)." Thus, such information cannot be released to a member of the public in response to an open records request. *See Open Records Decision No. 495 (1988)*. You inform us that Exhibit A is a certified agenda of a closed board meeting; therefore, we agree that the board must withhold

¹You inform us that the requestor subsequently clarified portions of his request for information.

Exhibit A under section 552.101 of the Government Code in conjunction with section 551.104(c) of the Government Code.

You assert that Exhibit B is excepted under section 552.107 of the Government Code.² Section 552.107(1) protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, 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. 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. 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. *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 a 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. TEX. R. EVID. 503(b)(1). 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.*, 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. *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 inform us that Exhibit B is a confidential memorandum from the board’s general counsel to the board of trustees. You state that this communication was made in furtherance

²Although you raise section 552.101 of the Government Code in conjunction with the attorney-client privilege, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

of the rendition of professional legal services. You also assert that it was intended to be confidential and that its confidentiality has been maintained. Based on these representations, we agree that the board may withhold Exhibit B under section 552.107.

Section 552.105 of the Government Code excepts from disclosure information relating to “appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.” Gov’t Code § 552.105(2). “The opinions construing section [552.105], as well as the actual language of the exception, tie the provision to situations entailing the expenditure of public funds to acquire or use the subject property for public purposes in order to prevent speculation from inflating the price.” Open Records Decision No. 590 at 4 (1991); *see also* Open Records Decision No. 357 (1982). Section 552.105 is designed to protect a governmental body’s planning and negotiating position with regard to particular transactions. *See* Open Records Decision Nos. 564 at 2 (1990), 357 at 3 (1982). Information protected by section 552.105 that pertains to such negotiations may be withheld for so long as the transaction is not complete. *See* Open Records Decision No. 310 at 2 (1982).

Moreover, this office also has concluded that information about specific parcels of land obtained in advance of other parcels to be acquired for the same project could be withheld where release of the information would harm the governmental body’s negotiating position with respect to the remaining parcels. *See* ORD 564 at 2. A governmental body may withhold information “which, if released, would impair or tend to impair [its] ‘planning and negotiating position in regard to particular transactions.’” ORD 357 at 3 (quoting Open Records Decision No. 222 at 1-2 (1979)). The question of whether specific information, if publicly released, would impair a governmental body’s planning and negotiating position with regard to particular transactions is a question of fact. Accordingly, this office will accept a governmental body’s good-faith determination in this regard, unless the contrary is clearly shown as a matter of law. *See* ORD 564 at 2.

You indicate that slide 9 of Exhibit E consists of a map of proposed property that Texas A&M will acquire to establish a new campus. You argue that if this information is released, “the owners of the identified parcels [may] increase their sales prices, thus adversely affecting the final price of the property.” After review of your arguments and the information at issue, we conclude that the board may withhold slide 9 of Exhibit E under section 552.105 of the Government Code.

You assert that some of the remaining information is excepted under section 552.133 of the Government Code, which excepts from disclosure a public power utility’s information related to a competitive matter. Section 552.133(b) provides as follows:

Information or records are excepted from the requirements of Section 552.021 if the information or records are reasonably related to a competitive matter, as defined in this section. Excepted information or

records include the text of any resolution of the public power utility governing body determining which issues, activities, or matters constitute competitive matters. Information or records of a municipally owned utility that are reasonably related to a competitive matter are not subject to disclosure under this chapter, whether or not, under the Utilities Code, the municipally owned utility has adopted customer choice or serves in a multiply certificated service area. This section does not limit the right of a public power utility governing body to withhold from disclosure information deemed to be within the scope of any other exception provided for in this chapter, subject to the provisions of this chapter.

Gov't Code § 552.133(b). A "competitive matter" is defined as a matter the public power utility governing body in good faith determines by vote to be related to the public power utility's competitive activity, and the release of which would give an advantage to competitors or prospective competitors. *Id.* § 552.133(a)(3). Section 552.133(a)(3) lists thirteen categories of information that may not be deemed competitive matters. The attorney general may conclude that section 552.133 is inapplicable to the requested information only if, based on the information provided, the attorney general determines the public power utility governing body has not acted in good faith in determining that the issue, matter, or activity is a competitive matter or that the information requested is not reasonably related to a competitive matter. *Id.* § 552.133(c).

The board informs us that it is a public power utility for purposes of section 552.133. The board also has submitted a copy of a resolution delineating categories of information that the board has determined to be competitive matters for purposes of section 552.133. The board asserts that some of the submitted information comes within the scope of its resolution and therefore is protected from public disclosure under section 552.133. After reviewing the board's arguments and the submitted information, we cannot conclude that CPS failed to act in good faith. *See id.* Furthermore, we conclude that this information is reasonably related to a competitive matter as defined by the resolution at issue. Therefore, based on your representations and our review, we conclude that the board must withhold this information, which we have marked, under section 552.133 of the Government Code.

You assert that some of the remaining information is excepted under section 552.111 of the Government Code, which 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." 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, 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. 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).

This office has also 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 assert that the remaining information at issue consists of agency memoranda pertaining to development of a policy on managing or use of the property at issue. After review of your arguments and the information at issue, we agree that the board may withhold the information we have marked under section 552.111 of the Government Code. However, we find the board has failed to establish that the remaining information consists of the board's advice, opinion, and recommendation; therefore, the board may not withhold any of the remaining information under section 552.111.

You also raise section 552.131 of the Government Code. Section 552.131 relates to economic development information and provides in part the following:

(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].

Gov't Code § 552.131(a)-(b). 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.* This aspect of section 552.131 is co-extensive with section 552.110 of the Government Code. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999). We note that section 552.131(a) does not protect the interests of a governmental body regarding the release of information pertaining to economic development negotiations. Section 552.131(b) protects information about a financial or other incentive that is being offered to a business prospect by a governmental body or another person. *See Gov't Code § 552.131(b).* Section 552.131(b) protects the interests of governmental bodies, not third parties.

You assert that the documents at issue “describe financial and other incentives offered to an economic development business prospect, specifically the Texas A&M University System (“TAMU”), to impact its decision to establish a San Antonio campus” and that the board “has not entered into a final agreement with TAMU.” After review of your arguments, we agree that the board may withhold the information we have marked under section 552.131. The board has not established that the remaining information contains financial or other incentives that the board is offering to a business prospect; therefore, the board may not withhold any of the remaining information under section 552.131.

To conclude, the board must withhold Exhibit A under section 552.101 of the Government Code in conjunction with section 551.104(c) of the Government Code and the information we have marked under section 552.133 of the Government Code. The board may withhold Exhibit B under section 552.107 of the Government Code and the information we have

marked under sections 552.105, 552.111, and 552.131 of the Government Code. The board must release the remaining information. As our ruling is dispositive, we do not address your other arguments for exception of the submitted information.

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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/jb

Ref: ID# 281950

Enc. Submitted documents

c: Dr. Richard Tansey
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(w/o enclosures)