



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 20, 2008

Mr. Terry Jacobson
Jacobson, Beard & Edmondson, P.C.
733 West Second Avenue
Corsicana, Texas 75110

OR2008-11441

Dear Mr. Jacobson:

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# 319486.

The City of Corsicana (the "city"), which you represent, received three requests from the same requestor for information concerning water rights and water sales negotiations between the city and LS Power, LLC ("LS Power"), correspondence between the city and LS Power, information concerning pertaining to LS Power sharing the cost of the city's new water line from the intake station to the water treatment plant, and information regarding the city's involvement in "getting the water to the power plant including information regarding the connection point between the line running from the proposed line which will run from the power plant to the city's raw water line and the water line itself." You state that you have released some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.104, 552.105, 552.110, 552.111, and 552.131 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments from the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note that a portion of the submitted information, which we have marked, was created after the request for information was received. Thus, this information is not responsive to the request. This decision does not address the public availability of the non-responsive information, and that information need not be released.

Next, the requestor contends that the city is in violation of the procedural requirements of the Act. Section 552.301 prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301 states in pertinent part:

(d) A governmental body that requests an attorney general decision must provide to the requestor, not later than the 10th business day after the date of its receipt of the written request for information:

(1) a written statement that the governmental body wishes to withhold the requested information and has asked for an attorney general decision about whether the information is within an exception to public disclosure; and

(2) a copy of the governmental body's written communication to the attorney general asking for the decision or, if the governmental body's written communication to the attorney general discloses the requested information, a redacted copy of that written communication.

Id. § 552.301(d). The requestor asserts that the city did not "send [the requestor] a letter in advance of asking for your decision" and that the city should have used first class United States mail with cancelled postage to correspond with the requestor. The city asserts that it received the request for information on May 30, 2008. Thus, pursuant to the procedural requirements of section 552.301(d) the city was required to mail a copy of the request for a ruling to the requestor no later than June 13, 2008. We note that the photocopy of the envelope the requestor provided this office bears a metered mail mark of June 12, which indicates that the letter was deposited in the mail within the required period. *See* Gov't Code § 552.308. Thus, the city was timely in informing the requestor that it had sought a ruling from this office. Therefore, we determine that the requestor has not established that the city violated the procedural requirements of section 552.301.

Next, we note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides in part:

(a) the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108; and

...

(5) all working papers, research materials, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate[.]

Gov't Code § 552.022(a)(1),(5). Some of the submitted information, which we have marked, is subject to sections 552.022(a)(1) and 552.022(a)(5) of the Government Code. Therefore, the city may only withhold the information subject to section 552.022(a)(1) if it is excepted from disclosure under section 552.108 of the Government Code, or is expressly made confidential under other law. *See id.* The city may only withhold the information subject to section 552.022(a)(5) if it is confidential under other law. You assert that all of the information subject to section 552.022 is excepted from disclosure under sections 552.104, 552.105, 552.110, 552.111 and 552.131 of the Government Code. We note that sections 552.105, 552.111, and 552.131(b) are discretionary exceptions to disclosure that protect the governmental body's interests and may be waived. *See Open Records Decision Nos. 564 (1990) (statutory predecessor to section 552.105 subject to waiver); 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver), 665 at 2 n.5 (discretionary exceptions in general).* As such, sections 552.105, 552.111, and 552.131(b) are not other law that makes information confidential for the purposes of section 552.022; therefore, the city may not withhold the information at issue under these sections. However, as section 552.022 does not apply to information that is subject to section 552.104 of the Government Code and section 552.110 of the Government Code can constitute other law for purposes of section 552.022, we will consider your arguments under these exceptions for the information subject to section 552.022 as well as for the remaining information. *See Gov't Code § 552.104(b).*

Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations, including those in which the governmental body may wish to withhold information in order to obtain more favorable offers. *See Open Records Decision No. 592 at 8 (1991).* Moreover, 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. *Open Records Decision No. 541 at 4 (1990).* This office has held that a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the "competitive advantage" aspect of this exception if it can satisfy two criteria. First, the governmental body must demonstrate that it has specific marketplace interests. *See Open Records Decision No. 593 at 3 (1991).* Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *Id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body's legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body's demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *Id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See Open Records Decision No. 514 at 2 (1988).*

You state that the information subject to 552.022, and a portion of the remaining information in Category 1, relates to the cost projections, budgets, and estimates the city has made concerning a particular water project. You assert that disclosure of this information would provide potential bidders with a competitive advantage, as they would be able to adjust their bids to meet the city's budget for the project, rather than basing their bids upon their own costs and projected profit. You also assert that the remaining information in Category 1 is excepted under section 552.104 because it relates to how the city establishes its price for raw water sales and that revealing how the city establishes its raw water price would allow its competitor to understand the city's "offers, negotiations, and cost structure" in connection with the sale of raw water. However, we note that the city has not started the bidding process for the water project at issue. You inform us that "the only document signed thus far is a commitment to negotiate with LS Power in the event it acquires an air permit from TCEQ." Therefore, any negotiations would be dependant on LS Power obtaining a permit, which, as of the date of the ruling request, had not occurred. Since the scope of the water project depends on the actions of a third party, it is unclear when, if ever, the bidding process might begin. Also, although the city claims that the release of a portion of the submitted information would allow a competitor to understand the city's cost structure regarding raw water sales, the city has not established that it is currently involved in a competitive situation with regard to the sale of raw water.

Therefore, after review of your arguments, we find that you have not established that the city has an ongoing competitive interest that would be harmed by the release of the information at issue. Further, we find that because costs and circumstances would change for future contracts, the assertion that release of the submitted information would give a competitor or bidder an unfair advantage in bidding on possible future contracts is too speculative. See Open Records Decision No. 509 at 5 (1988), Therefore, the city may not withhold the submitted information under section 552.104 of the Government Code.

Section 552.110 provides as follows:

- (a) A trade secret obtained from a person and privileged or confidential by statute or judicial decision is excepted from the requirements of section 552.021.
- (b) 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 is excepted from the requirements of Section 552.021.

Gov't Code § 552.110(a), (b). By its terms, section 552.110 only protects the interests of a private entity or person from whom information is obtained. *Id.* This provision does not protect the interests of a governmental body that receives proprietary information, nor does it allow a governmental body to assert section 552.110 for information it creates. In this instance, all of the information at issue was created by the city or on behalf of the city. You

have not identified any third parties on whose behalf this information should be withheld. Therefore, none of the submitted information may be withheld under section 552.110 of the Government Code. As you have raised no additional exceptions, the information subject to 552.022 must be released. We now address your remaining exceptions for the information not subject to section 552.022.

You seek to withhold the submitted information under section 552.105. Section 552.105 of the Government Code excepts from disclosure information relating to:

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) 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. 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 (1990), 357 (1982), 310 (1982). Information protected by section 552.105(2) that pertains to such negotiations may be withheld for so long as the transaction has not been completed. *See* ORD 310 at 2. This office 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 (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.

You state that the information in Category 1 relates to the location of real property to be acquired for a public purpose. You state that the release of this information would harm the city's negotiations for purchase of the property in question. However, we note that much of the information in Category 1 does not relate to the location or purchase price of specific property, and you have not identified any specific information within the submitted documents, the release of which you claim would cause harm to the city. *See* 552.301(e)(2) (governmental body must label copy of requested information to indicate which exceptions apply to which parts of the copy) Accordingly, we find that you have not shown that section 552.105 is applicable to any of the submitted information, and the city may not withhold any of the submitted information under section 552.105.

Section 552.111 of the Government Code 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.” See 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 (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, opinions, and other material reflecting the policymaking processes of the governmental body. See ORD 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). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5.

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.

Section 552.111 can also 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), 462 at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body’s consultants). 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.

You assert that the information in Category 1 reflects the internal deliberative process discussions of the city with respect to raw water sales. You assert that the submitted information in Category 2 consists of a preliminary draft contract that will ultimately be released to the public. Based upon your representations and our review, we find that the city may withhold the information we have marked in Category 1 and the entirety of Category 2 under section 552.111 of the Government Code.

Section 552.131(b) of the Government Code provides that “[u]nless and until an agreement is made with [a] 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(b). You state that the disclosure of the remaining responsive information would provide the public and LS Power with information that could put the city at a competitive disadvantage when negotiating with LS Power. However, upon review, we determine that the remaining responsive information does not disclose incentives offered by the city to a business prospect. Accordingly, no part of the remaining submitted information may be withheld pursuant to section 552.131(b).

In summary, the city must release the information that we have marked as subject to section 552.022 of the Government Code. The city may withhold the information we have marked in Category 1 under section 552.111 of the Government Code. The city may withhold Category 2 under section 552.111 of the Government Code. The remaining 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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

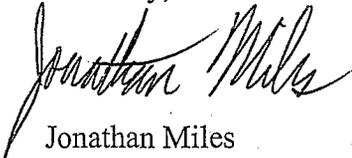
will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to 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 challenge 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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/jh

Ref: ID# 319486

Enc. Submitted documents

c: Ms. Vicky Prater
P.O. Box 1896
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(w/o enclosures)