



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 6, 2009

Mr. Ray Rodriguez
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR2009-06040

Dear Mr. Rodriguez:

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# 342151 (COSA ORR #'s 09-0195 and 09-0208).

The City of San Antonio (the "city") received two requests for (1) the telephonic logs and e-mails between the office of a particular member of the city council, the city manager or members of her staff, representatives of a particular family, and city staff regarding the proposed sale, transfer, lease, or change in ownership of three particular pieces of property, (2) all information, reports, e-mails, and other communication generated by staff relating to the Real Estate Transactions Committee (the "committee") that is headed by an assistant city manager and whose membership is comprised of city staff, (3) the makeup of the committee, (4) who chairs the committee, (5) when and how the committee was created, (6) any reports the committee has generated, and (7) any action plans the committee is following or anticipates following or implementing. You state no committee exists. The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983). You state you have released some responsive information to the requestor. You claim portions of the submitted information are excepted from disclosure under sections 552.105, 552.106, 552.107, 552.111, and 552.131 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the submitted information contains a completed appraisal report that is subject to disclosure under section 552.022 of the Government Code. Section 552.022(a)(1) provides for required disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). Although you seek to withhold the submitted appraisal report under sections 552.105, 552.106, and 552.111 of the Government Code, these 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 (discretionary exceptions generally), 564 (1990) (statutory predecessor to section 552.105 subject to waiver), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). Consequently, we find you must release the submitted appraisal report, which we have marked.

You assert the information you have marked is excepted from disclosure under section 552.105 of the Government Code. Section 552.105 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 pertaining to such negotiations that is excepted from disclosure under section 552.105 may be withheld so long as the transaction relating to the negotiations is not complete. *See* ORD 310. Under section 552.105, 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 in regard to particular transactions is a question of fact. Thus, 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 indicate the city seeks to withhold a portion of the remaining information under section 552.105. You state the city has marked information that relates to "the ongoing negotiations concerning the location of real property which will be used for a public purpose and/or concern the appraisals of real or personal property for a public purpose prior to the award of final contracts for the property." You assert the city has made a good-faith determination

that release of the information you have marked under section 552.105 would impair or tend to impair the city's planning and negotiating position in regard to the transactions in question. Based on your representation and our review, we conclude section 552.105 is applicable to the information you have marked, and it may be withheld on that basis.¹

You seek to withhold some of the remaining information under section 552.107 of the Government Code. 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 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).

¹As our ruling is dispositive as to the information you have marked under section 552.105, we need not address your remaining arguments against disclosure of this information.

You state the remaining information you have marked under section 552.107 consists of communications made in confidence for the furtherance of the rendition of professional legal services. You have labeled all of the parties involved in these communications as either city attorneys, city staff, or outside legal counsel. You state the information you have marked is excepted from disclosure as privileged communications between attorney and client. We agree the information at issue does consist of communications that fall within the scope of the attorney-client privilege. The city may withhold the remaining information it has marked under section 552.107.²

Next, you assert a portion of the remaining information, which you have marked, is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 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." Gov't Code § 552.111. Section 552.111 encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). In Open Records Decision No. 615, this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, and opinions reflecting the policymaking processes of the governmental body. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *see also Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin, 2001, no pet.). The purpose of section 552.111 is "to protect from public disclosure advice and opinions on policy matters and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.).

An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. *See* ORD 615 at 5-6. 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, a preliminary draft of a policymaking document that has been released or is intended for release in final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document. *See* Open Records Decision No. 559 at 2 (1990). Section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* ORD 615 at 5. But, if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make

²As our ruling is dispositive as to the remaining information you have marked under section 552.107, we need not address your remaining arguments against disclosure of this information.

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).

You assert the remaining information you have marked under section 552.111 consists of communications reflecting the advice, opinion, or recommendations on policymaking matters of the city. You assert this information was created for internal use only and would not be available to a party in litigation with the city. Furthermore, you have marked some of the remaining information as a draft of a policymaking document, and have stated upon acceptance and finalization, the draft will be distributed to the public. We find a portion of the information the city has marked under section 552.111 is purely factual, and the city may not withhold this information. However, a portion of the information at issue consists of advice, recommendations, or opinions reflecting the policymaking processes of the city. We have marked the information that consists of the advice, recommendations, or opinions reflecting the policymaking processes of the city and the draft policymaking document, and the city may withhold this information under section 552.111.³

Next, the city raises section 552.131 of the Government code for its remaining submitted information. Section 552.131 relates to economic development information and provides in part:

(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

³As our ruling as to the remaining information you have marked under section 552.111 is dispositive, we need not address your argument under section 552.106 for this information.

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 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 state this information consists of economic development information the city may use in further negotiations. You inform us the city is seeking alternatives to address economic shortcomings and revitalize a particular piece of property. After reviewing your arguments and the remaining information, we find the city has not established the remaining information consists of a business prospect’s trade secret or commercial or financial information that would be excepted under section 552.131(a). Further, no third party has made any claims of either protected trade secret or commercial or financial information for the information responsive to this request. Thus, section 552.131(a) is inapplicable to the remaining information. We find one of the submitted attachments details financial incentives being offered to a business prospect by the city. We have marked this attachment and it may be withheld under section 552.131(b). However, the city has not established the remaining information details financial incentives being offered to a business prospect by the city. Therefore, the city may only withhold the attachment we have marked under section 552.131(b). The city may not withhold the remaining information under section 552.131, and we have marked this information for release.

We note a portion of the information marked for released in this instance appears to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See Open Records Decision No. 550 (1990).*

In summary, the city must release the completed appraisal report pursuant to section 552.022(a)(1) of the Government Code. The city may withhold the information it has marked under sections 552.105 and 552.107 and the information we have marked under sections 552.111 and 552.131(b). The remaining information must be released to the requestor. Any copyrighted information may only be released in accordance with copyright law.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Emily Sitton
Assistant Attorney General
Open Records Division

EBS/rl

Ref: ID# 342151

Enc. Submitted documents

c: Requestor
(w/o enclosures)