



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 28, 2009

Mr. Erik T. Dahler
General Counsel
Alamo Colleges
201 West Sheridan, Building C-8
San Antonio, Texas 78204-1429

OR2009-15312

Dear Mr. Dahler:

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# 359518.

Alamo Colleges (the "college") received a request for information pertaining to the proposed sale of Saint Paul Square. You state you have released some of the requested information to the requestor. Although we understand you to take no position with respect to the public availability of the submitted information, you state you have notified the City of San Antonio (the "city") of the request for information and of its right to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have received comments from the city, which contends the submitted information is excepted from disclosure under sections 552.104, 552.107, 552.111, and 552.131 of the Government Code. We have considered the submitted arguments and reviewed the submitted information.

Initially, you argue that the college holds the submitted information on behalf of the city. You contend that the city is the governmental body by or for which the submitted information is collected, assembled, or maintained pursuant to section 552.002(a) and therefore "retains ultimate responsibility for disclosing or withholding or releasing the information." Section 552.002(a) of the Government Code defines "public information" as "information that is collected, assembled, or maintained under a law or ordinance or in

connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." *Id.* § 552.002(a). We note that virtually all of the information that is in a governmental body's physical possession constitutes public information that is subject to the Act. *Id.* § 552.002(a)(1); *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). Upon review, we find the submitted information was collected or assembled or maintained by the college in connection with the transaction of official college business. Therefore, the submitted information is public information that the college must release unless it falls within the scope of an exception to disclosure. Gov't Code §§ 552.002, .021.

Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." *Id.* § 552.104(a). The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 at 8 (1991). This office has held 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. *See id.* First, the governmental body must demonstrate it has specific marketplace interests. *See id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *See 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. *See id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

The city states the submitted information relates to the pending sale of Saint Paul Square by the city to a third party. The city generally argues that release of this information would give outside parties and current potential buyers a competitive advantage in conducting "transactions with the city." However, the city has not provided any arguments explaining how the release of the submitted information would cause a specific threat of actual or potential harm to the city's interests in a specific competitive situation. Thus, we conclude the city has failed to establish the applicability of section 552.104 to the submitted information, and it may not be withheld on that basis.

Section 552.107(1) of the Government Code protects information that comes 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. *See* 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. *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 Tex. 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)-(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, *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.” *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 pet.). 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).

The city asserts the submitted information constitutes a communication between and among city staff, city attorneys, and outside counsel that was made for the purpose of providing legal advice to the city. However, the submitted information consists of a “term sheet” provided to the college by the city. Because the city has not explained the nature of its relationship with the college or otherwise demonstrated that the college would be a privileged party in this instance, we find the city has failed to establish that the submitted information constitutes or documents a privileged attorney-client communication. We therefore conclude this information may not be withheld under section 552.107 of the Government Code.

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.” 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 ORD 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 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). Further, 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 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).

Section 552.111 can also encompass communications between a governmental body and a third party, including a consultant or other party with a privity of interest. See Open Records Decision No. 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.

The city states the submitted document includes information and discussion related to recommendations regarding the revitalization and development of Saint Paul Square, which the city contends is "a major policy project." However, the submitted information consists of a document that contains terms under negotiation by the city and that is in the physical possession of the college. The city has not explained its relationship with the college. Accordingly, it has failed to demonstrate it shares a privity of interest or common deliberative process with the college. Further, we find the city has not shown that the submitted information consists of advice, opinion, or recommendation relating to policymaking. Therefore, we find the city has failed to demonstrate the applicability of section 552.111 to the submitted information, and it may not be withheld on that basis.

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). The city states the information at issue relates to ongoing negotiations with a business prospect. The city also states that an agreement has yet to be reached with the prospect. Upon review, we find the city has not demonstrated the submitted information reveals financial or other incentives that are being offered to the prospect. Thus, we conclude the college may not withhold the submitted information under section 552.131(b). As no further arguments against disclosure are made, the submitted information must be released.

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, toll free, at (888) 672-6787.

Sincerely,



Christina Alvarado
Assistant Attorney General
Open Records Division

CA/rl

Ref: ID# 359518

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

c: Ms. Helen Valkavich
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283
(w/o enclosures)