



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 4, 2011

Mr. Warren M. S. Ernst
Chief of the General Counsel Division
Office of the City Attorney
City of Dallas
1500 Marilla Street
Dallas, Texas 75201

OR2011-03138

Dear Mr. Ernst:

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# 410779.

The City of Dallas (the "city") received a request for all information relating to the purchase of specified real property. You state the city will provide some of the requested information to the requestor. You claim that the remaining requested information is excepted from disclosure under sections 552.105, 552.107, and 552.111 of the Government Code and privileged under Texas Rule of Civil Procedure 192.3.¹ We have considered the arguments you claim and reviewed the submitted information, a portion of which constitutes a representative sample.²

¹Although you also raise Texas Rule of Evidence 503 for the information in Exhibit B, we note that, in this instance, the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107. See Open Records Decision No. 676 at 102 (2002).

²This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

Initially, you acknowledge and we agree, the documents in Exhibits C and D are subject to section 552.022 of the Government Code, which provides in pertinent part:

(a) [T]he 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[.]

Gov't Code § 552.022(a)(1). You explain the documents in Exhibits C and D consist of completed appraisal reports of real property that fall within the purview of section 552.022(a)(1). The city may only withhold 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.* Although you raise section 552.105 of the Government Code for Exhibits C and D, and section 552.111 of the Government Code for Exhibit D, these sections are discretionary in nature and thus may be waived. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 564 (1990) (statutory predecessor to section 552.105 subject to waiver), 470 at 7 (1987) (governmental body may waive statutory predecessor to section 552.111 deliberative process). As such, sections 552.105 and 552.111 do not constitute other law that make information expressly confidential for the purposes of section 552.022. Therefore, the city may not withhold the appraisal reports in Exhibits C and D under section 552.105 or section 552.111. However, you also assert the information is subject to Texas Rule of Civil Procedure 192.3. The Texas Supreme Court has held that “[t]he Texas Rules of Civil Procedure . . . [are] ‘other law’ within the meaning of section 552.022.” *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Thus, we will consider your argument for Exhibits C and D under this rule. We will also consider your arguments under sections 552.105, 552.107, and 552.111 for the remaining information not subject to section 552.022.

Section 552.105 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). Section 552.105 is designed to protect a governmental body's planning and negotiating position with respect to particular transactions. *Open Records Decision Nos. 564 at 2 (1990), 357 (1982), 310 (1982).* Information that is excepted from disclosure under section 552.105 that pertains to such negotiations may be excepted from disclosure so long as the transaction relating to that information is not complete. *See* ORD 310. 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 the information in Exhibit E reveals the possible purchase price of real property that the city intends to purchase from the requestor. Further, you explain that release of the information in Exhibit E would harm the city's negotiating position with respect to the acquisition of the property because the requestor is the owner of the property at issue. Based on your representations and our review, we conclude the city may withhold the information in Exhibit E under section 552.105 of the Government Code.

You assert the information at issue in Exhibit B, for which you have submitted a representative sample, is excepted from disclosure under the deliberative process privilege encompassed by section 552.111 of the Government Code. *See* Open Records Decision No. 615 at 2 (1993). 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. 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 reexamined 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 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. ORD 615 at 5; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). 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). However, 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. ORD 615 at 5-6; *see also Dallas Morning News*, 22 S.W.3d at 364 (section 552.111 not applicable to personnel-related communications that did not involve policymaking).

Further, section 552.111 does not generally except from disclosure facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 157; 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).

This office also has concluded a preliminary draft of a document that has been or 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 contend the information at issue in Exhibit B constitutes draft documents containing advice, opinion, and recommendations relating to the city's policy matters. You state the draft documents will be released to the public in their final form. Upon review, we find the documents in Exhibit B constitute drafts of policymaking documents. Accordingly, we determine the city may withhold the documents at issue in Exhibit B in their entirety under section 552.111 of the Government Code.³

We next address your argument that the appraisal reports subject to section 552.022 in Exhibits C and D are privileged under Texas Rule of Civil Procedure 192.3. Rule 192.3(e) provides that "[t]he identity, mental impressions, and opinions of a consulting expert whose mental impressions and opinions have not been reviewed by a testifying expert are not discoverable." A "consulting expert" is defined as "an expert who has been consulted, retained, or specially employed by a party in anticipation of litigation or in preparation for trial, but who is not a testifying expert." Tex. R. Civ. P. 192.7. You state that the city is acquiring land and has obtained expert advice from a licensed appraiser in preparing an appraisal report for possible eminent domain litigation. You also assert that the city does not anticipate calling those appraisers as witnesses in any litigation at this time, and that the appraisal reports, mental impressions, or opinions of the appraisers have not been reviewed by any testifying expert in preparation for litigation. Based on your representations and upon our review, we determine the city may withhold the appraisal reports in Exhibits C and D under Texas Rule of Civil Procedure 192.3(e).

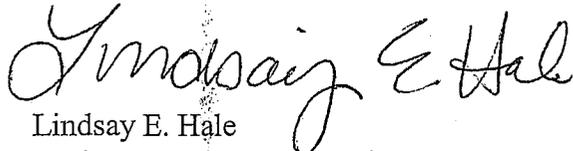
In summary: (1) the city may withhold the information in Exhibit E under section 552.105 of the Government Code; (2) the city may withhold the documents at issue in Exhibit B in their entirety under section 552.111 of the Government Code; and (3) the city may withhold the appraisal reports in Exhibits C and D under Texas Rule of Civil Procedure 192.3(e).

³As our ruling is dispositive, we need not address your remaining argument under section 552.107 of the Government Code for this information.

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,



Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/em

Ref: ID# 410779

Enc. Submitted documents

c: Requestor
(w/o enclosures)