



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

This ruling has been modified by court action.
The ruling and judgment can be viewed in PDF
format below.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 29, 2011

Ms. Karen H. Brophy
Senior Assistant City Attorney
City of Irving
825 West Irving Boulevard
Irving, Texas 75060

The ruling you have requested has been amended as a result of litigation and has been attached to this document.

OR2011-04312

Dear Ms. Brophy:

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# 412721.

The City of Irving (the "city") received a request for all e-mails, text messages, memorandum, and correspondence sent to and from a named city employee to November 1, 2010 to December 31, 2010.¹ You state you have released most of the responsive information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.105 and 552.111 of the Government Code. You further state release of this information may implicate the proprietary interests of CSE Commercial Real Estate ("CSE") and Las Colinas Group, LLC ("Las Colinas"). Accordingly, you have notified both CSE and Las Colinas of the request and of their right to submit arguments to this office as to why their information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on

¹You note that the city sought and received a clarification of the information requested. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have received comments from Las Colinas. We have considered the submitted arguments and reviewed the submitted information, a portion of which consists of representative samples.²

We note Las Colinas seeks to withhold information the city has not submitted to this office for our review. This ruling does not address that information and is limited to the information submitted as responsive by the city.³ *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

Section 552.105 of the Government Code exempts from disclosure information relating to the following:

- (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.

Id. § 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 raise section 552.105(1) for the information in Exhibit B. You state the information at issue pertains to real estate owned by the city. You state the city solicited development ideas

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

³Accordingly, we do not address Las Colinas's exceptions against disclosure.

four years ago and that there “has been no public announcement of a project or a formal award of contract for the property.” You indicate the city has made a good-faith determination that release of the information at issue would place the city at a disadvantage in its “planning and ongoing negotiating position” with regard to the property. Based on your representations and our review, we conclude the city may withhold the information in Exhibit B under section 552.105(1) of the Government Code.⁴

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); *see also* 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 only those internal communications that consist of advice, opinions, recommendations 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. *See id.*; *see also City of Garland v. The 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).

This office also has 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

⁴As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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, 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. We note a governmental body does not have a privity of interest or common deliberative process with a private party with which the governmental body is engaged in contract negotiations. *See id.* (section 552.111 not applicable to communication with entity with which governmental body has no privity of interest or common deliberative process).

You contend that the information in Exhibit A consists of communications and draft documents related to a city public bond offering that contain advice, opinion, and recommendations relating to policy matters. You have identified the parties to the communications as city employees and consultants hired by the city. You indicate the draft documents will be released in their final form. Therefore, we determine the city may withhold the information we have marked in Exhibit A under section 552.111 of the Government Code. However, we find the remaining information in Exhibit A to be general administrative information that does not relate to policymaking or information that is purely factual in nature. Accordingly, the city may not withhold any portion of the remaining information at issue under section 552.111 of the Government Code.

In summary, the city may withhold the information in Exhibit B under section 552.105(1) of the Government Code. The city may withhold the information we have marked under section 552.111 of the Government Code. The remaining 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,



Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/dls

Ref: ID# 412721

Enc. Submitted documents

c: Mr. Charles E. Cotton
CSE Commercial Real Estate
4956 North O'Connor Boulevard
Irving, Texas 75062
(Third party w/o enclosures)

Mr. Robert Johnson
Counsel for Las Colinas Group, L.P.
Gardere Wynne Sewell, L.L.P.
600 Congress Avenue, Suite 3000
Austin, Texas 78701
(Third party w/o enclosures)

SC DEC 17 2015
At 3:06 P.M.
Velva L. Price, District Clerk

CAUSE NO. D-1-GN-11-001069

LAS COLINAS GROUP, L.L.C.,
Plaintiff,

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IN THE DISTRICT COURT OF

v.

TRAVIS COUNTY, TEXAS

TEXAS ATTORNEY GENERAL GREG
ABBOTT,
Defendant.

250th JUDICIAL DISTRICT

AGREED FINAL JUDGMENT

On this date, the Court heard the parties' motion for agreed final judgment. Plaintiff Las Colinas Group, L.L.C ("Las Colinas"), and Defendants Ken Paxton, Attorney General of Texas, appeared by and through their respective attorneys and announced to the Court that all matters of fact and things in controversy between them had been fully and finally resolved.

This is an action brought by Plaintiff Las Colinas to challenge Letter Ruling OR2011-04312 (the "Ruling"). The City of Irving (the "City") received a request from Brandon Formby (the "Requestor") pursuant to the Public Information Act (the "PIA"), Tex. Gov't Code ch. 552, for certain e-mails to and from City employees. These documents pertain to Las Colinas and contain information designated by Las Colinas as confidential, proprietary, trade secret, and commercial and financial information exempt from disclosure under the PIA ("Las Colinas Information"). The City requested a ruling from the Open Records Division of the Office of the Attorney General ("ORD"). ORD subsequently issued the Ruling, ordering the release of the Las Colinas Information.

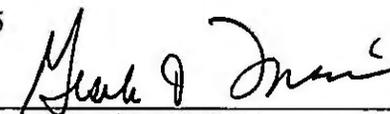
The parties have now represented to the Court that: (1) pursuant to Tex. Gov't Code § 552.327(2) the Attorney General has determined and represents to the Court that the Requestor has in writing voluntarily withdrawn his request, (2) in light of this withdrawal the lawsuit is now moot, and (3) pursuant to Tex. Gov't Code § 552.327(1) the parties agree to the dismissal of this cause.



IT IS THEREFORE ORDERED that:

1. Because the request has been withdrawn, no Las Colinas Information should be released in reliance on Letter Ruling OR2011-04312. Letter Ruling OR2011-04312 should not be cited for any purpose related to the Las Colinas Information as a prior determination by the Office of the Attorney General under Tex. Gov't Code § 552.301(f).
2. Within 30 days of the Court signing this Final Judgment, the Office of the Attorney General shall notify the City in writing of this Final Judgment and shall attach a copy of this Final Judgment to the written notice. In the notice, the Office of the Attorney General shall expressly instruct the City that pursuant to Tex. Gov't Code § 552.301(g) it shall not rely upon Letter Ruling OR2011-04312 as a prior determination under Tex. Gov't Code § 552.301(f) nor shall it release any Las Colinas Information in reliance on said Ruling, and if the City receives any future requests for the same or similar Las Colinas Information it must request a decision from the Office of the Attorney General, which shall review the request without reference to Letter Ruling OR2011-04312.
3. All costs of court are taxed against the parties incurring same.
4. This cause is hereby DISMISSED without prejudice.

SIGNED on Dec. 17, 2015

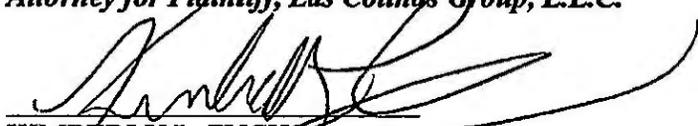

JUDGE PRESIDING

AGREED:



ROBERT F. JOHNSON III
Gardere Wynne Sewell LLP
600 Congress Avenue, Suite 3000
Austin, Texas 78701-2978
Telephone: (512) 542-7127
Facsimile: (512) 542-7327
State Bar No. 10786400

Attorney for Plaintiff, Las Colinas Group, L.L.C.



KIMBERLY L. FUCHS
State Bar # 24044140
Assistant Attorney General
Open Records Litigation
Administrative Law Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Telephone: (512) 475-4195
Facsimile: (512) 320-0167
matthew.entsminger@texasattorneygeneral.gov

Attorney for Defendant, Ken Paxton