



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 18, 2011

Mr. Michael S. Copeland  
Utility Attorney  
City of Denton  
215 East McKinney  
Denton, Texas 76201

OR2011-15150

Dear Mr. Copeland:

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# 433427.

The City of Denton (the "city") received five requests for any e-mails to or from five specified individuals concerning "the procurement and delivery of land rights for the Denton Municipal Electric 69kV Kings Row to Spencer Transmission Line upgrade project."<sup>1</sup> You claim that the submitted information is excepted from disclosure under sections 552.105 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

Initially, we note some of the submitted information is the same information that was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2011-14957 (2011). Thus, with regard to the submitted information that was previously requested and ruled upon by this office, which we have marked, as we have no indication the laws, facts and circumstances on which the previous ruling was based have changed, the city must continue to rely on Open Records Letter No. 2011-14957 as a

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<sup>1</sup>The five requests were joined together by the city because each request relates to the same project.

<sup>2</sup>We assume the "representative sample" of information 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 those records contain substantially different types of information than those submitted to this office.

previous determination and either withhold or release the requested information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes information is or is not excepted from disclosure). To the extent the requested information is not identical to the information ruled on in Open Records Letter No. 2011-14957, we will consider your claimed exceptions.

You assert the submitted information is excepted from public disclosure based on the attorney work product privilege. Section 552.111 of the Government Code encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as:

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
- (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5. A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. TEX. R. CIV. P. 192.5; ORD 677 at 6-8. In order for this office to conclude the information was made or developed in anticipation of litigation, we must be satisfied that:

- (a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

*Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7.

You state the submitted information consists of communications between the city's attorneys, staff, representatives, and consultants. You further state the city faces a substantial probability of condemnation litigation regarding properties discussed in the information at issue. However, you also state a route for the proposed electric transmission line has not been selected. We note the submitted information does not concern the acquisition of the discussed properties, but consists of e-mails regarding proposed locations for the electric transmission line, how to present certain information to the public, and the hiring of consultants for this project. In Open Records Decision No. 677, our office held information created in a governmental body's ordinary course of business may be considered to have been prepared in anticipation of litigation, and thus constitutes attorney work product, if the governmental body explains to this office the primary motivating purpose for the routine practice that gave rise to the information. ORD 677 at 8; *see also Brotherton*, 851 S.W.2d at 206. You have not explained that the city's primary motivating purpose for the creation of this information was anticipation of litigation. Thus, we find you have not demonstrated the submitted information consists of material prepared or mental impressions developed in anticipation of litigation or for trial. Accordingly, the city may not withhold the submitted information under section 552.111 of the Government Code on the basis of the work-product privilege.

You also state the information is excepted from disclosure under the deliberative privilege process encompassed by section 552.111 of the Government Code, which 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; *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, 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*, 22 S.W.3d 351 (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 has also concluded 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.

You state the information at issue consists of the advice, opinions, and recommendations of city employees involving policymaking matters. You explain the policymaking matters at issue pertain to capital improvements regarding infrastructure of the city's electric utility, including the relocation of an electric transmission line within the city. Based on your representations, we find the city has demonstrated some of the information at issue consists of advice, opinions, and recommendations pertaining to the policymaking functions of the city. This information, which we have marked, may be withheld under the deliberative process privilege of section 552.111 of the Government Code. We further find you have demonstrated portions of the remaining information at issue, which we have marked, consist of draft documentation pertaining to the policymaking functions of the city. However, you do not explain whether the marked draft documents will be released to the public in their final form. Accordingly, to the extent the marked draft documents will be released to the public in their final form, the city may withhold this information under section 552.111 of the Government Code. Conversely, to the extent the city will not release the marked draft documents to the public in their final form, the information may not be withheld in its entirety under section 552.111 of the Government Code. However, we find you have failed to show how the remaining information consists of advice, opinions, or recommendations on the policymaking matters of the city. Accordingly, the remaining information may not be withheld under section 552.111 of the Government Code.

You claim some of the remaining information is excepted from public disclosure under section 552.105 of the Government Code. 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. But the

protection offered by section 552.105 is not limited solely to transactions not yet finalized. 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 some of the remaining information relates to the location and price of real property. You contend release of this information would potentially damage the city's negotiating position with respect to the future acquisition of real property for the project at issue. We note, however, you state the city "placed a map of [the] alternate routes for the public's inspection and information on the [city's] website." Upon review, we find you have failed to demonstrate the information at issue is excepted from disclosure under section 552.105(1) of the Government Code. Further, the information at issue does not contain pricing information for section 552.105(2) purposes. We therefore conclude the city may not withhold any of the remaining information under section 552.105 of the Government Code.

We note some of the remaining information may be subject to section 552.117 of the Government Code.<sup>3</sup> Section 552.117(a)(1) excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former official or employee of a governmental body who timely requests this information be kept confidential under section 552.024. *See* Act of May 24, 2011, 82<sup>nd</sup> Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)(1)). Additionally, section 552.117 encompasses personal cellular telephone numbers, provided the cellular telephone service is paid for by the employee with his or her own funds. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Therefore, to the extent the

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<sup>3</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

employees whose cellular telephone numbers we marked timely requested confidentiality for this information under section 552.024 and the cellular telephone services are not paid for by the city, the city must withhold this information under section 552.117(a)(1). To the extent these employees did not so elect or the cellular telephone services are paid for by the city, the information we marked may not be withheld under section 552.117(a)(1). Additionally, the city must withhold the remaining marked information under section 552.117(a)(1) of the Government Code if the employee whose information we have marked timely elected to keep his personal information confidential pursuant to section 552.024. The city may not withhold this information under section 552.117(a)(1) if the employee did not make a timely election to keep the information confidential.

Next, we note some of the remaining information is subject to section 552.137 of the Government Code, which excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c).<sup>4</sup> See Gov’t Code § 552.137(a)-(c). The e-mail address at issue is not excluded by subsection (c). Therefore, the city must withhold the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure.<sup>5</sup>

In summary, with regard to the submitted information that was previously requested and ruled upon by this office, which we have marked, the city must continue to rely on Open Records Letter No. 2011-14957 as a previous determination and either withhold or release the requested information in accordance with that ruling. The city may withhold the information we have marked under section 552.111 of the Government Code, including the draft documents we have marked, to the extent the marked draft documents will be released to the public in their final form. The city must withhold (1) the cellular telephone numbers we have marked under section 552.117(a)(1) of the Government Code, to the extent the employees timely requested confidentiality for this information under section 552.024 and the cellular telephone services are not paid for by the city; (2) the remaining information we have marked under section 552.117(a)(1), to the extent the employee timely requested

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<sup>4</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

<sup>5</sup>We note the remaining information contains the requestor’s e-mail address. This requestor has a special right of access to his e-mail address, which would otherwise be confidential with regard to the general public. See Gov’t Code § 552.023(a). We further note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. Accordingly, if the city receives another request for this information from an individual other than one with a right of access under section 552.023, the city is authorized to withhold the requestor’s e-mail address under section 552.137 without the necessity of requesting an attorney general decision.

confidentiality for this information under section 552.024; and (3) the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure. 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](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,



Sean Opperman  
Assistant Attorney General  
Open Records Division

SO/dls

Ref: ID# 433427

Enc. Submitted documents

c: Requestor  
(w/o enclosures)