



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 23, 2014

Ms. Hadassah Schloss
Open Records Coordinator
Texas General Land Office
P. O. Box 12873
Austin, Texas 78711-2873

OR2014-19157

Dear Ms. Schloss:

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# 540460.

The Texas General Land Office (the "GLO") received a request for three categories of information related to the planning and building of public housing in the City of Galveston, Texas (the "city"). You state you have released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.103, 552.105, and 552.111 of the Government Code. You also state the release of a portion of the submitted information may implicate the proprietary interests of WFN Consulting, LLC ("WFN"). Accordingly, you state, and provide documentation showing, you notified this third party of the request for information and of its right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code §§ 552.304 (interested party may submit written comments stating why information should or should not be released), .305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from WFN. We have reviewed the submitted information and the submitted arguments.

Section 552.103 of the Government Code provides in pertinent part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show section 552.103(a) is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, *writ ref'd n.r.e.*); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a). *See* ORD 551.

To establish litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *See* Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim litigation is reasonably anticipated may include, for example, the governmental body’s receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, or when an individual threatened to sue on several occasions and hired an attorney. *See* Open Records Decision Nos. 346 (1982), 288 (1981). On the other hand, this office has determined if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

You contend the GLO is a party to litigation styled *Tryshatel McCardell vs. United States Department of Housing and Urban Development*, Civil Action No. 3:13-CV-439, in the United States District Court Southern Division of Texas, Galveston Division. You explain, and provide documentation showing, the litigation was dismissed by final appealable judgment on August 13, 2014. However, you state, “Several plaintiffs and defendants were dismissed along the way, including the GLO.” You have provided our office with the final judgment that references a May 23, 2014, court order wherein the GLO was dismissed as a

party in the litigation. We note the GLO received the present request for information on August 6, 2014, after it was dismissed from the litigation. However, you contend the GLO was a party to litigation at the time you received the present request for information because the time to appeal the judgment had not yet elapsed. When the GLO received the request, the court had not yet entered a final judgment from which a party may file an appeal. However, the court did issue an order dismissing some of the parties to the litigation. You do not inform us any party had taken any concrete steps to challenge the order on the date the GLO received the request for information. Having considered your representations, we find the mere possibility of a challenge does not establish that litigation was pending or reasonably anticipated when the GLO received the request for information. *See* Gov't Code § 552.103(c); ORD 452 at 4; *see also* ORD 331 at 1-2 (mere chance of litigation not sufficient to trigger statutory predecessor to Gov't Code § 552.103). Further, you provide documentation showing the plaintiff in this case filed an appeal on September 4, 2014. We note this was after the request for information was received. Accordingly, we find you have failed to demonstrate the GLO was a party to pending or anticipated litigation at the time of the request. Therefore, the GLO may not withhold any of the submitted information on the basis of section 552.103 of the Government Code.

Section 552.111 of the Government Code excepts from disclosure “[a]n 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, writ ref'd n.r.e.); 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). *See* ORD 615. 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. *See id.* 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. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *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 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.

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 Nos. 631 at 2 (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body's consultants). 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 third party with which the governmental body is engaged in contract negotiations, as the parties' interests are adverse. *See id.*

You state the information in Attachments D and E consists of advice, opinions, and recommendations relating to policymaking matters of the GLO. You also state the information in Attachment D and some of the information in Attachment E consist of draft policymaking documents that will be released to the public in their final forms, and which reflect the advice, opinions, and recommendations of GLO and WFN employees. Further, you state WFN was contracted by the GLO to provide advice, opinions, recommendations, and policymaking documents relating to the GLO's policy mission. Based on your representations and our review of the information at issue, we find the information in Attachment D and the information we have marked in Attachment E consist of advice, opinions, and recommendations related to policymaking matters of the GLO. Thus, the GLO may withhold Attachment D and the information we have marked in Attachment E under section 552.111 of the Government Code.¹ Upon review, however, we find some of the

¹As our ruling is dispositive of the information in Attachment D, we need not address your remaining argument against its disclosure.

remaining information in Attachment E involves contract negotiations between the GLO and WFN. As such, there is no privity of interest or common deliberative process between WFN and the GLO in these instances. Further, some of the remaining information in Attachment E is general administrative and purely factual information or does not pertain to policymaking. Thus, we find you have failed to demonstrate how any of the remaining information in Attachment E consists of advice, opinions, or recommendations on policymaking matters. Accordingly, the remaining information in Attachment E may not be withheld under section 552.111 of the Government Code.

Section 552.105 excepts 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.

Gov't Code § 552.105. This provision 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 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 that "if released, would impair or tend to impair [its] 'planning and negotiating position in regard to particular transactions.'" Open Records Decision Nos. 357 at 3, 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 indicate the GLO is in the process of acquiring land and properties as part of a project to re-build public housing in the city. You state the specific locations of the possible sites are not yet known to the public. You assert the information in Attachment F relates to strategies for the acquisition of these possible sites. Further, you state the GLO has made a good-faith determination that the release of information about these possible sites "would damage its negotiating position with respect to the acquisition of the property or properties necessary to bring the project to fruition." Based on your representations and our review, we conclude the GLO may withhold Attachment F under section 552.105 of the Government Code.²

In summary, the GLO may withhold Attachment D and the information we have marked in Attachment E under section 552.111 of the Government Code. The GLO may also withhold

²As our ruling is dispositive of the information in Attachment F, we need not address WFN's arguments against its disclosure.

Attachment F under section 552.105 of the Government Code. The remaining information in Attachment E 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Alley Latham
Assistant Attorney General
Open Records Division

AKL/eb

Ref: ID# 540460

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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