



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 17, 2015

Ms. Brandi M. Youngkin
Assistant City Attorney
City of Plano
P.O. Box 860358
Plano, Texas 75086-0358

OR2015-12047

Dear Ms. Youngkin:

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# 567688 (Plano File No. 15-006).

The City of Plano (the "city") received a request for all correspondence and documentation from several specified individuals and a specified department over a specified time period related to Liberty Mutual Insurance Company ("Liberty Mutual"). You claim the submitted information is excepted from disclosure under sections 552.106, 552.107, 552.110, 552.111, and 552.131 of the Government Code. Additionally, you state the proprietary interests of Liberty Mutual might be implicated by the request. Accordingly, you notified Liberty Mutual of the request and of its right to submit arguments to this office explaining why its information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have received arguments submitted by Liberty Mutual. We have considered the raised arguments and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (permitting interested third party to submit to attorney general reasons why requested information should or should not be released).

Initially, we note the city and Liberty Mutual assert portions of the responsive information are confidential pursuant to an agreement between the city and Liberty Mutual. However, information is not confidential under the Act simply because the party that submits the

information requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act through an agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

Section 552.106 of the Government Code excepts from disclosure “[a] draft or working paper involved in the preparation of proposed legislation” and “[a]n internal bill analysis or working paper prepared by the governor’s office for the purpose of evaluating proposed legislation[.]” Gov’t Code § 552.106(a), (b). Section 552.106 applies specifically to the legislative process and protects advice, opinion, and recommendation on policy matters in order to encourage frank discussion during the policymaking process. *See* Open Records Decision Nos. 615 at 2 (1993), 460 at 1-2 (1987). The purpose of section 552.106(a) is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body. Therefore, section 552.106 is applicable only to the policy judgments, recommendations, and proposals of persons who are involved in the preparation of proposed legislation and who have an official responsibility to provide such information to members of the legislative body. *See* Open Records Decision Nos. 460 at 1-2, 367 (1983) (statutory predecessor applied to recommendations of executive committee of State Board of Public Accountancy for possible amendments to Public Accountancy Act); *see also* Open Records Decision No. 429 at 5 (1985) (statutory predecessor to section 552.106 not applicable to information relating to governmental entity’s efforts to persuade other governmental entities to enact particular ordinances). Section 552.106 protects only policy judgments, advice, opinions, and recommendations involved in the preparation or evaluation of proposed legislation; it does not except purely factual information from public disclosure. *See* ORD 460 at 2.

You state the information in Exhibit B consists of advice, opinions, and recommendations relating to the city’s legislative decisions. However, upon review, we find you have failed to demonstrate any of the information in Exhibit B constitutes recommendations, opinions, or advice involved in the preparation or evaluation of proposed legislation for purposes of section 552.106. Accordingly, the city may not withhold any portion of Exhibit B under section 552.106 of the Government Code.

Section 552.107(1) of the Government Code protects information coming 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. 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 “to facilitate the rendition of professional legal services” to the client governmental body. 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. *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 a 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. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (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: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). 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 states the information in Exhibit B consists of communications involving a city attorney and other city employees. The city indicates these communications were intended to be, and have remained, confidential. Upon review, we find the city has demonstrated the applicability of the attorney-client privilege to the information in Exhibit B. Thus, the city may generally withhold the information in Exhibit B under section 552.107(1) of the Government Code. However, we note the e-mail strings we have marked includes e-mails received from and sent to a representative of Liberty Mutual. During the time these communications were made, the city and Liberty Mutual were engaged in negotiations; thus, their interests were adverse. Accordingly, at the time the communications at issue were made, the parties did not share a common interest that would allow the attorney-client privilege to apply. *See* TEX. R. EVID. 503(b)(1)(c): *In re XL Speciality Ins. Co.*, 373 S.W.3d 46.51 (Tex. 2012) (discussing common interest rule under attorney-client privilege). Furthermore, if the e-mails received from or sent to Liberty Mutual are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, if these non-privileged e-mails, which we have marked, are maintained by the city separate and apart from the otherwise privileged e-mail strings in which they appear, then the city may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code.

To the extent the non-privileged e-mail communications we have marked in Exhibit B are maintained by the city separate and apart from the otherwise privileged e-mail strings in

which they appear, we will address your arguments under section 552.111 of the Government Code for the non-privileged e-mail communications. In addition, we will address your arguments under section 552.111 of the Government Code for the entirety of information in Exhibit D. 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. Section 552.111 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). 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). When determining if an interagency memorandum is excepted from disclosure under section 552.111, we must consider whether the agencies between which the memorandum is passed share a privity of interest or common deliberative process with regard to the policy matter at issue. *See* Open Records Decision No. 561 at 9 (1990).

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 id.* (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 id.* 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).

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 argue the information at issue consists of intra-agency communications between city employees. You also contend some of the information at issue consists of drafts of documents. Upon review, we find the information we have marked constitutes drafts of policymaking documents. You state the city may release the drafts in Exhibit D to the public in their final form. Accordingly, to the extent the city will release the drafts in their final form, the city may withhold the draft documents we have marked in their entireties under section 552.111. However, to the extent these draft documents will not be released in their final form, the city may not withhold them on that basis. We agree portions of the remaining information, which we have marked, constitute policymaking advice, opinion, and recommendations. As such, the city may withhold the information we have marked under section 552.111 on the basis of the deliberative process privilege.¹ However, we find some of the remaining communications at issue involve individuals with whom you have not demonstrated the city shares a privity of interest or common deliberative process. Additionally, we find the remaining information consists of either general administrative information that does not relate to policymaking, or information that is purely factual in nature. Thus, you have failed to demonstrate how this information is excepted under section 552.111. Accordingly, we find none of the remaining information at issue may be withheld on this basis.

The city raises section 552.110 of the Government Code for the information in Exhibit C. We note section 552.110 is designed to protect the interests of third parties such as Liberty Mutual, not the interests of a governmental body. Thus, we do not address the city's arguments under section 552.110. However, we will address Liberty Mutual's arguments under 552.110 for its information.

¹As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

Section 552.110 of the Government Code protects (1) trade secrets and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a)-(b). Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts, which holds a trade secret to be:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business. . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* *Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.² RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 at 5 (1990). However, we cannot conclude section 552.110(a) is applicable unless it has been shown the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983). We note pricing

²The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

information pertaining to a particular contract is generally not a trade secret because it is “simply information as to single or ephemeral events in the conduct of the business,” rather than “a process or device for continuous use in the operation of the business.” RESTATEMENT OF TORTS § 757 cmt. b; *see also Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 255, 232 (1979), 217 (1978).

Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* Open Records Decision No. 661 at 5 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm).

Liberty Mutual argues some of its information consists of commercial information, the release of which would cause substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find Liberty Mutual has demonstrated the information of the types we have indicated constitutes commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the city must withhold the information of the types we have indicated under section 552.110(b) of the Government Code. However, we find Liberty Mutual has not made the specific factual or evidentiary showing required by section 552.110(b) that release of the remaining information at issue would cause Liberty Mutual substantial competitive harm. *See* ORD 661. Accordingly, the city may not withhold Liberty Mutual’s remaining information at issue under section 552.110(b).

Liberty Mutual asserts its remaining information at issue constitutes trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude Liberty Mutual has failed to establish a *prima facie* case that any portion of its remaining information meets the definition of a trade secret. We further find Liberty Mutual has not demonstrated the necessary factors to establish a trade secret claim for its remaining information. *See* ORD 402. Therefore, the city may not withhold any of Liberty Mutual’s remaining information under section 552.110(a) of the Government Code.

Liberty Mutual and the city raise section 552.131 of the Government Code for some of the information. Section 552.131 relates to economic development information and provides, in part:

- (a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

(1) a trade secret of the business prospect; or

(2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

(b) Unless and until an agreement is made with the 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(a)-(b). Section 552.131(a) protects the proprietary interests of third parties that have provided information to governmental bodies, not the interests of governmental bodies themselves. Accordingly, we will not address the city's assertion of section 552.131(a) of the Government Code for the information at issue. However, as Liberty Mutual also raises section 552.131(a), we address its arguments.

Section 552.131(a) excepts from disclosure only "trade secret[s] of [a] business prospect" and "commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." *Id.* § 552.131(a). This aspect of section 552.131 is co-extensive with section 552.110 of the Government Code. *See id.* § 552.110(a)-(b). Because we have already disposed of Liberty Mutual's claims under section 552.110, the city may not withhold any of Liberty Mutual's information under section 552.131(a) of the Government Code.

We note section 552.131(b) is designed to protect the interests of governmental bodies, not third parties. Accordingly, we will not address Liberty Mutual's argument's under section 552.131(b). However, as the city also asserts section 552.131(b) as an exception to disclosure, we will consider its applicability to the remaining information in Exhibit C and the remaining information in Exhibit D. Further, in the event the draft documents in Exhibit D will not be released to the public in their final form, we will consider the applicability of section 552.131(b) to such information. Section 552.131(b) protects information about a financial or other incentive that is being offered to a business prospect by a governmental body or another person. *Id.* § 552.131(b). We note, however, that the applicability of section 552.131 ends once the governmental body completes an agreement with the business prospect. *Id.* § 552.131(c). You indicate the information at issue in Exhibits C and D relates to ongoing economic development negotiations between the city and Liberty Mutual that include offerings of financial and economic incentives. Upon review, we find the information we have marked consists of information about financial or other incentives being offered to a business prospect by the city. Accordingly, the city may withhold the information we have marked under section 552.131 (b) of the Government Code. However, upon review, we find the city has not demonstrated any of the remaining information consists of information about a financial or other incentive being offered to a

business prospect. Consequently, none of the remaining responsive information may be withheld under section 552.131(b).

Section 552.101 of the Government Code excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). Upon review, we find some of the submitted information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, the city must withhold this information, which we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find you have not demonstrated how any of the remaining information at issue is highly intimate or embarrassing and not of legitimate public concern. Thus, the city may not withhold any portion of the remaining information under section 552.101 in conjunction with common-law privacy.

Section 552.137 of the Government Code 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). *See* Gov’t Code § 552.137(a)-(c). Section 552.137(c)(1) states an e-mail address “provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor’s agent” is not excepted from public disclosure. *Id.* § 552.137(c)(1). Section 552.137 does not apply to an institutional e-mail address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address of a vendor who seeks to contract with a governmental body, an e-mail address maintained by a governmental entity for one of its officials or employees, or an e-mail address provided to a governmental body on a letterhead. *See id.* § 552.137(c). The remaining information contains e-mail addresses that belong to individuals who may have a contractual relationship with the city. To the extent these e-mail addresses belong to individuals who are not in a contractual relationship with the city, the city must withhold such information, a representative sample of which we have marked, pursuant to section 552.137, unless the owners of the addresses affirmatively consent to their release. If the e-mail addresses belong to individuals who are in a contractual relationship with the city, the city may not withhold any of the e-mail addresses at issue under section 552.137 of the Government Code.

In summary, the city may generally withhold the information in Exhibit B under section 552.107(1) of the Government Code. However, if the non-privileged e-mails we

have marked are maintained by the city separate and apart from the otherwise privileged e-mail strings in which they appear, then the city may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code. To the extent the city will release the drafts at issue in their final form, the city may withhold the draft documents we have marked in their entireties under section 552.111. The city may withhold the information we have marked under section 552.111 on the basis of the deliberative process privilege. The city must withhold the information of the types we have indicated under section 552.110(b) of the Government Code. The city may withhold the information we have marked under section 552.131 (b) of the Government Code. The city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the e-mail addresses in the remaining information belong to individuals who are not in a contractual relationship with the city, the city must withhold such information, a representative sample of which we have marked, pursuant to section 552.137, unless the owners of the addresses affirmatively consent to their release. The city must release the remaining 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.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,



Joseph Behnke
Assistant Attorney General
Open Records Division

JB/som

Ref: ID# 567688

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Ms. Lauren M. Fincher
Counsel for the Liberty Mutual Insurance Company
Locke Lord, LLP
600 Congress, Suite 2200
Austin, Texas 78701
(w/o enclosures)