



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 19, 2016

Ms. Hilda Pedraza
City Clerk
City of Pharr
P.O. Box 1729
Pharr, Texas 78577

OR2016-16246

Dear Ms. Pedraza:

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# 618836.

The City of Pharr and the City of Pharr Economic Development Corporation (the "city") received three requests from two requestors for (1) contracts, proposals, and communications pertaining to two specified entities or two named individuals; (2) correspondence between city employees and a city official and a specified newspaper; and (3) e-mails between named city employees and officials pertaining to a specified entity during a specified time period. You claim the requested information is excepted from disclosure under sections 552.105, 552.107, 552.110, 552.111, and 552.131 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note portions of the submitted information, which we have marked, are not responsive to the instant request because they do not pertain to the specified entities, named

¹We assume 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.

individuals, or specified newspaper. The city need not release nonresponsive information in response to this request, and this ruling will not address that information.

We first address your argument under section 552.107 of the Government Code, as it is potentially the most encompassing. Section 552.107(1) of the Government Code protects information subject to 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).

You state some of the responsive submitted information constitutes communications between city attorneys, outside legal counsel for the city, city employees, and city officials that were made for the purpose of facilitating the rendition of professional legal services to the city. You also state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the city may withhold

the information we have marked under section 552.107(1) of the Government Code.² However, we note some of the remaining information consists of communications with parties the city was negotiating with at the time the communications were made. Thus, the interests of the city and the these parties were adverse at the time the communications at issue were made. *See* TEX. R. EVID. 503(b)(1)(c). Further, we find the city failed to demonstrate the remaining information at issue constitutes privileged attorney-client communications for the purposes of section 552.107(1). Therefore, the city may not withhold the remaining information at issue under section 552.107(1).

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

...

(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(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 seek to withhold some of the remaining information under section 552.105(2) of the Government Code. You inform us some of the remaining information pertains to the proposed location of developments that will serve a public purpose. You seek to withhold information pertaining to the purchase price of the land, projected development costs, and other costs under section 552.105. You inform us the proposed developments have been not been announced publically and the contracts related to these developments have not been

²As our ruling on this information is dispositive, we need not address your remaining arguments against its disclosure.

awarded or finalized. You explain release of this information would harm the city's negotiating position with respect to the acquisition of the property under consideration. We have no indication the city has failed to make such a determination in good faith. Based on your representations and our review, we conclude the city may withhold the information we have marked under section 552.105(2) of the Government Code.³ Upon review, however, we find the city has failed to establish the applicability of section 552.105 of the Government Code to any portion of the remaining information. Accordingly, the city may not withhold any of the remaining information at issue on that basis.

Section 552.131(b) of the Government Code provides:

...

(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(b). Section 552.131(b) protects information about a financial or other incentive offered to a business prospect by a governmental body or another person. The city states some of the remaining information is related to a pending business project. Further, the documents reveal the city is in the process of negotiating an incentive agreement with the companies at issue. Upon review, we find the city may withhold the information we have marked under section 552.131(b) of the Government Code.⁴ However, we find no portion of the remaining information pertains to a financial or other incentive offered to a business prospect by a governmental body or another person. Accordingly, the city may not withhold any of the remaining information under section 552.131(b) of the Government Code.

Although the city argues some of the remaining information is excepted under section 552.110 of the Government Code, that exception is designed to protect the interests of third parties, not the interests of a governmental body. *See id.* § 552.110 (excepts from disclosure trade secret or commercial or financial information obtained from third party). Thus, we do not address the city's argument under section 552.110.

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[.]" *Id.* § 552.111. This exception encompasses the deliberative process

³As our ruling on this information is dispositive, we need not address your remaining arguments against its disclosure.

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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. *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 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).

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 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).

The city contends some of the remaining information consists of advice, opinions, and recommendations relating to a policy matter of the city. However, the remaining information has been shared with individuals you have not shown to have a privity of interest with the city or is general administrative and purely factual information or does not pertain to policymaking. Thus, we find the city has failed to demonstrate any of the remaining information consists of advice, opinions, or recommendations on policymaking matters. Accordingly, none of the remaining information may be withheld under section 552.111 of the Government Code.

We note some of the remaining information is subject to section 552.136 of the Government Code.⁵ Section 552.136 of the Government Code states “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136; *see also id.* § 552.136(a) (defining “access device”). Accordingly, we find the city must withhold the ABA routing numbers and bank account numbers we have marked under section 552.136 of the Government Code.

We also note some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

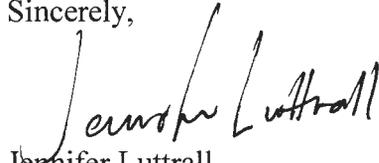
In summary, the city may withhold the information we have marked under sections 552.107(1), 552.105, and 552.131(b) of the Government Code. The city must withhold the ABA routing numbers and bank account numbers we have marked under section 552.136 of the Government Code. The remaining responsive information must be released, but any information protected by copyright may only be released in accordance with copyright law.

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.

⁵The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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,

A handwritten signature in black ink that reads "Jennifer Luttrall". The signature is written in a cursive style with a large initial "J".

Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/som

Ref: ID# 618836

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)