



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

March 4, 2003

Ms. Mary Ann Pruett
City Attorney
City of Missouri City
1522 Texas Parkway
Missouri City, Texas 77489

OR2003-1408

Dear Ms. Pruett:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 177297.

The City of Missouri City (the "city") received a request for four categories of information relating to the city's proposed "Missouri City Utility Policy" for a specified period of time. You state that the city has no objection to releasing some responsive information and has provided the requestor with other responsive information. You claim, however, that portions of the remaining requested information are excepted from disclosure pursuant to sections 552.103, 552.106, 552.110, and 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

Initially, we note that portions of the submitted information are subject to section 552.022 of the Government Code. Section 552.022 makes certain information public, unless it is expressly confidential under other law. *See* Gov't Code § 552.022(a). One category of public information under section 552.022 is "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108." Gov't Code § 552.022(a)(1). The submitted "City Manager Reports" that we have marked constitute completed reports made of, for, or by the city that are subject to section 552.022(a)(1) and must be released, unless they are confidential under "other law" or are excepted from disclosure under section 552.108 of the Government Code. You do not claim that any portion of these marked reports is excepted from disclosure under section 552.108. Although the city claims that portions of these reports are excepted from disclosure pursuant to sections 552.103 and 552.111 of the Government Code, we note that these exceptions are discretionary exceptions under the Public Information Act (the "Act") that do

not constitute "other law" that makes information confidential.¹ Accordingly, we conclude that the city may not withhold any portion of these reports pursuant to sections 552.103 or 552.111 of the Government Code. However, since the city claims that a portion of one of these reports is excepted from disclosure pursuant to section 552.110 of the Government Code, we will address the city's claim with respect to that information.

Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (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. *See* Gov't Code § 552.110. Although the city claims that a portion of one of the reports that are subject to section 552.022(a)(1) is excepted from disclosure pursuant to section 552.110 of the Government Code, we find that the city has failed to demonstrate that this information constitutes either a trade secret of any interested third party or information the release of which would cause substantial competitive harm to such a party. *See* Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm). Accordingly, we conclude that the city may not withhold any portion of this particular information pursuant to section 552.110 of the Government Code.

Section 552.111 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." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts

¹ Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *see also Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin, 2001, no pet.). The purpose of section 552.111 is "to protect from public disclosure advice and opinions on policy matters and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. *See Open Records Decision No. 615 at 5-6 (1993)*. In addition, information created for a governmental body by an outside consultant acting in an official capacity on behalf of the governmental body is encompassed by section 552.111. *See Open Records Decision No. 462 (1987)*. A preliminary draft of a policymaking document that has been released or is intended for release in final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document. *See Open Records Decision No. 559 at 2 (1990)*.

You state that portions of the information at issue are drafts of the city's proposed utility policy, internal notes made by city staff regarding strategy and analysis of meetings concerning the policy, and e-mail correspondence among city staff and its consultants regarding the formation of this policy. Based on our review of your representations and this information, we agree that some of this information constitutes drafts and communications between city staff and outside consultants that consists of advice, opinions, and recommendations reflecting the policymaking processes of the city. Accordingly, we conclude that the city may withhold the information that we have marked pursuant to section 552.111 of the Government Code.

Section 552.106 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. Section 552.106 ordinarily applies only to persons with a responsibility to prepare information and proposals for a legislative body. *See Open Records Decision No. 460 (1987)*. Section 552.106(a) protects drafts of legislation that reflect policy judgments, recommendations, and proposals prepared by persons with some official

responsibility to prepare them for the legislative body. *See* Open Records Decision No. 429 at 5 (1985). We note that the purpose of section 552.106 is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body, and therefore, it does not except from disclosure purely factual information. *See id.* at 2. However, a comparison or analysis of factual information prepared to support proposed legislation is within the ambit of section 552.106. *See id.*

You state that portions of the information at issue constituting various drafts and commentary made by city staff and its consultants regarding the proposed city utility policy should be protected from disclosure under section 552.106 because they are deliberative in nature and reflect policy judgments, recommendations, and proposals. After carefully reviewing your representations and the remaining information at issue, we find that no portion of this remaining information that you claim to be excepted from disclosure under section 552.106 constitutes drafts or working papers involved in the preparation of proposed legislation that reflect policy judgments, recommendations, and proposals prepared by persons with official responsibility to prepare them for the city. Accordingly, we conclude that the city may not withhold any portion of this remaining information pursuant to section 552.106 of the Government Code.

We note that some e-mail addresses that are contained within the remaining submitted information are subject to section 552.137 of the Government Code. Section 552.137 provides in relevant part:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. Section 552.137 requires the city to withhold e-mail addresses of members of the public that are provided for the purpose of communicating electronically with the city, unless the members of the public with whom they are associated have affirmatively consented to their release. Section 552.137 does not apply to a government

employee's work e-mail address or a business's general e-mail address or web address. Accordingly, we conclude that the city must withhold e-mail addresses of individuals that are contained within the remaining submitted information that were provided for the purpose of communicating electronically with the city pursuant to section 552.137 of the Government Code, unless the individuals with whom they are associated have affirmatively consented to their release. We have marked a representative sample of such e-mail addresses.

In summary, the city may withhold the information that we have marked pursuant to section 552.111 of the Government Code. The city must withhold e-mail addresses of individuals that are contained within the remaining submitted information that were provided for the purpose of communicating electronically with the city pursuant to section 552.137 of the Government Code, unless the individuals with whom they are associated have affirmatively consented to their release. The city must release the remaining submitted information to the requestor.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental

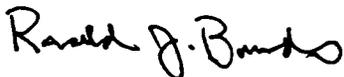
body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/lmt

Ref: ID# 177297

Enc. Marked documents

Ms. Mary Ann Pruett - Page 7

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(w/o enclosures)