



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 26, 2003

Mr. Charles Kimbrough
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Austin, Texas 78701-2443

OR2003-5990

Dear Mr. Kimbrough:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 186584.

The Village of Bee Cave (the "village"), which you represent, received a request for all communications from or to any village employee or elected official during a specified time period concerning the construction, planning, development, zoning, or annexation of certain named properties. You state that you have made some of the requested information available to the requestor. You claim that the remaining requested information is excepted from disclosure under sections 552.103, 552.105, 552.106, 552.107, 552.110, 552.111, 552.117, 552.131, and 552.137 of the Government Code.¹ In addition, you indicate that you notified the third party developers (the "developers") of the request for information and of each party's right to submit arguments as to why the requested information should not be released.² See Gov't Code § 552.305 (permitting interested third party to submit to attorney

¹As you did not raise section 552.103 as an exception to disclosure within ten business days of receiving the request, or submit to this office written comments stating the reasons why section 552.103 would allow the information to be withheld within the fifteen business days of receiving the request, we find that you have waived this exception. See Gov't Code §§ 552.301, .302; see also *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103), Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 473 (1987) (city's failure to meet 10-day deadline waived protections of sections 552.103 and 552.111).

²The following third parties received notice pursuant to section 552.305: CCNG Development Company, L.P., CCNG Properties, L.P. and CCNG Realty, Inc. (collectively "CCNG"), Milam Galleria Holdings, L.L.C. ("Milam"), Baldwin Properties, Ltd., Robert B. Baldwin III, and the Estate of Dorothy Baldwin (collectively "Baldwin"), and Palisades Developers, LPD ("Palisades").

general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act (the "Act") in certain circumstances. We have received arguments from attorneys for Baldwin, CCNG and Milam as to why their information should not be released. We have considered the exceptions you claim, all submitted arguments, and reviewed the submitted information.³

We will address your argument under section 552.131 first as it is the most inclusive. You claim that the information submitted as document nos. 2-7, 10, 14-16, 18-24, 26, 29-96, 98, 105-106, and 111-126 consists of economic development information that is excepted from public disclosure under section 552.131 of the Government Code. Section 552.131 provides:

(a) Information is excepted from the requirements of Section 552.021 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 the requirements of Section 552.021.

³We note that under section 552.305(d), an interested third party has 10 business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Palisades has not submitted to this office its reasons explaining why the village should not release Palisades's information. Therefore, we have no basis from which to conclude that Palisades has a protected proprietary interest in any of the responsive information. *See* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990).

(c) After an agreement is made with the business prospect, this section does not except from the requirements of Section 552.021 information about a financial or other incentive being offered to the business prospect:

(1) by the governmental body; or

(2) by another person, if the financial or other incentive may directly or indirectly result in the expenditure of public funds by a governmental body or a reduction in revenue received by a governmental body from any source.

Gov't Code, § 552.131. You state that the village currently is involved in economic development negotiations with the developers that include discussions of "economic and other incentives." You indicate that the village and the developers have yet to reach an agreement. Based on your representations and our review of the submitted documents you seek to withhold under this exception, we conclude you may withhold document nos. 2-7, 10, 14-16, 18-24, 26, 29-96, 98, 105-106, and 111-126 in their entirety under section 552.131(b) of the Government Code.

Next, we will address your argument under section 552.107 of the Government Code. You argue that documents nos. 8, 9, 17, 25, 27, 28, 97, 99-104, and 107-110 are excepted under section 552.107, which 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 "for the purpose of facilitating 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 Texas 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 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 to whom disclosure is made in

furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of 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, no writ). 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). Having considered your arguments and the information you seek to withhold under section 552.107, we agree that most of this information constitutes privileged attorney-client communications. We note, however, that you have failed to identify one of the parties to the communication in documents 100 and 101, and thus failed to establish that the confidentiality of these two documents has been maintained. Thus, you may only withhold document nos. 8, 9, 17, 25, 27, 28, 97, 99, 102-104, and 107-110 under section 552.107(1).

You assert that document nos. 1, 11-13, 100 and 101 are excepted under section 552.111 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 only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. Open Records Decision No. 615 at 5-6 (1993). An agency's policymaking functions, however, 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. Open Records Decision No. 615 at 5-6 (1993). We note that section 552.111 is applicable to communications that involve a governmental body's consultants. *See* Open Records Decision Nos. 631 at 2 (1995) (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), 563 at 5-6 (1990) (private entity engaged in joint project with governmental body may be regarded as its consultant). The 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. Open Records Decision No. 559 at 2 (1990). Section 552.111 is not applicable, however, to communications with a party with which the governmental body has no privity of interest or common deliberative process. *See* Open Records Decision No. 561 at 9 (1990). After reviewing your arguments and document nos. 1, 11-13, 100 and 101, we agree that

documents 1 and 11-13 may be withheld under section 552.111 of the Government Code. We note, however, that although you submitted a list of all interested parties, you failed to identify one of the individuals participating in the submitted communications. Thus, for documents 100 and 101, this office was unable to discern whether the unidentified individual is an employee of any of the interested parties. Thus, you have failed to demonstrate the required privity of interest or common deliberative process required by section 552.111 to these two documents, and they may not be withheld under this exception.

You also assert that document nos. 100 and 101 are excepted under section 552.105 of the Government Code. Section 552.105 excepts from required public disclosure information "relating to"

(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 exception protects a governmental body's planning and negotiating position with respect to particular transactions and its protection is therefore limited in duration. Open Records Decision No. 357 (1982). To show the applicability of section 552.105, a governmental body must first make a good faith determination that the release of information could damage its negotiating position with respect to the acquisition of property, subject to review by this office. Open Records Decision No. 564 (1990). Section 552.105(1) is generally inapplicable when the governmental body has publicly announced the project. Section 552.105(2) is generally inapplicable once the governmental body has entered into a final contract for the property at issue. Open Records Decision No. 222 (1979). After reviewing documents 100 and 101, we conclude you have not established the applicability of section 552.105 to these documents because you have failed to demonstrate how release would harm the village's planning and negotiating position. As you raise no other arguments with regard to this information, document nos. 100 and 101 must be released.

Finally, you assert that certain e-mail addresses within the submitted documents are excepted under section 552.137 of the Government Code. That section provides that "[a]n 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 [the Act]." See Gov't Code § 552.137(a). You state that no member of the public has affirmatively consented to the release of any of the e-mail addresses contained within the submitted materials. Therefore, the village must withhold the e-mail addresses we have marked in document nos. 100 and 101 under section 552.137 of the Government Code.

To summarize, we conclude that: (1) you may withhold document nos. 2-7, 10, 14-16, 18-24, 26, 29-96, 98, 105-106, and 111-126 in their entirety under section 552.131(b) of the Government Code, (2) you may withhold document nos. 8, 9, 17, 25, 27, 28, 97, 99, 102-104, and 107-110 under section 552.107(1), (3) you may withhold document nos. 1 and 11-13 under section 552.111 of the Government Code, and (4) you must withhold the e-mail addresses we have marked in document numbers 100 and 101 under section 552.137 of the Government Code. The remaining information in document numbers 100 and 101 must be released 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,



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Assistant Attorney General
Open Records Division

SIS/lmt

Ref: ID# 186584

Enc. Submitted documents

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