



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 25, 2006

Mr. Michael Bostic  
Assistant City Attorney  
City of Dallas  
1500 Marilla Street, Room 7DN  
Dallas, Texas 75201

OR2006-00854

Dear Mr. Bostic:

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# 240765.

The City of Dallas (the "city") received a request for five categories of e-mails sent and received "from October 8, 2005 to October 24, 2005." You claim that some of the requested information is excepted from disclosure under sections 552.107, 552.111, and 552.131 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information, some of which consists of representative sample information.<sup>1</sup> We have also considered comments submitted by the requestor's attorney. See Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

By letter dated December 16, 2005, the city informed this office that it no longer seeks to withhold the information submitted in Exhibit E, and "has decided to release the information." Therefore, this ruling will not address your arguments regarding that information.

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<sup>1</sup>We assume that 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.

You contend that the information in Exhibits B and C is excepted under section 552.131 of the Government Code. This section excepts from disclosure information relating to economic development negotiations involving a governmental body and business prospect that the governmental body seeks to have locate, stay, or expand in or near the governmental body's territory. *See* Gov't Code § 552.131(a). Section 552.131 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].

(c) After an agreement is made with the business prospect, this section does not except from [required public disclosure] 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(b),(c). You argue that information in Exhibit B relating to financial or other incentives offered to Bristol Munger Properties, L.L.C. ("Munger"), in connection with the corporate headquarters of Hunt Consolidated, Inc., is protected under this provision. You state that while the "City Council has authorized a tax abatement agreement with Munger, the agreement has not yet been **finalized** between the City and Munger regarding these economic development incentives." (Emphasis in original.) You further claim that the information in Exhibit C "concern[s] another economic development project . . . for which an agreement has not been finalized." Upon review, we agree that a portion of the information at issue relates to financial or other incentives being offered to a business prospect. Therefore, we conclude that the city may withhold the information we have marked in Exhibit B pursuant to section 552.131(b). However, you have failed to demonstrate that any of the remaining information is about a financial or other incentive being offered by the city, or by another person, to any particular business prospect with whom an agreement has yet to be reached. Accordingly, none of the remaining information may be withheld under section 552.131. We note that the applicability of section 552.131 ends once the city finalizes an agreement with the business prospect. *See* Gov't Code § 552.131(c).

You claim that the remaining information in Exhibits B and C falls within the deliberative process privilege incorporated into section 552.111 of the Government Code. Section 552.111 excepts from public disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." The purpose of

this exception is to protect advice, opinion, and recommendations 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, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615 (1993), 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 that section 552.111 excepts only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* Open Records Decision No. 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. The 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. *See* Open Records Decision No. 615 at 5. If, however, the 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 may also be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

This office also has concluded that 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.

In this instance, you state that the information at issue relates to economic development projects and involves a number of policy issues and decisions. Based upon your representations and our review of the information, we find that some of the information you seek to withhold under section 552.111 consists of advice, opinions, and recommendation regarding policymaking. The city may withhold such information under section 552.111. We have marked the information accordingly. The remaining information in Exhibits B and C does not consist of advice, opinions, and recommendation regarding policymaking, and the city may not withhold it under section 552.111. As you raise no other exception to disclosure of this information, it must be released.

Next, you claim that the information in Exhibit D is excepted from disclosure under section 552.107(1) of the Government Code, 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 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 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).

The city asserts that the submitted records in Exhibit D are confidential communications between a city attorney, outside counsel for the city, and city representatives made for the purpose of rendering professional legal advice. Based on this representation and our review of the information at issue, we agree that the city may withhold the records in Exhibit D as privileged attorney-client communications under section 552.107.

Finally, we note that some of the remaining information may be excepted from public disclosure under section 552.117 of the Government Code. Section 552.117(a)(1) of the Government Code excepts from disclosure the current and former home addresses and

telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Gov't Code § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). For those employees who timely elected to keep their personal information confidential, pursuant to section 552.117 the city must withhold the employees' home addresses and telephone numbers, social security numbers, and any information that reveals whether these employees have family members. The district may not withhold this information under section 552.117(a)(1) for those employees who did not make a timely election to keep the information confidential. We have marked the types of information that the city must withhold if section 552.117(a)(1) is applicable.

In summary, the city may withhold the information we have marked in Exhibit B pursuant to section 552.131(b). We have marked the information that may be withheld under sections 552.107 and 552.111 of the Government Code. We have also marked the types of information that the city must withhold if section 552.117(a)(1) is applicable. 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/sdk

Ref: ID# 240765

Enc. Submitted documents

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