



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 11, 2007

Mr. Bradford E. Bullock
Assistant City Attorney
City of Boerne
Law Offices of William M. McKamie, PC
13750 San Pedro, Suite 640
San Antonio, Texas 78232

OR2007-05725

Dear Mr. Bullock:

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# 277109.

The City of Boerne (the "city"), which you represent, received a request for information pertaining to a wastewater treatment plant relocation. You state that some of the responsive information will be released to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.104, 552.105, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the submitted information contains completed appraisal reports and a contract that are subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless the information is excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law. Gov't Code § 552.022(a)(1). Section 552.022(a)(3) provides for the disclosure of "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]" *Id.* § 552.022(a)(3). Sections 552.105 and 552.111 of the Government Code are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See id.*

§ 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 564 (1990) (statutory predecessor to Gov't Code § 552.105 subject to waiver), 470 at 7 (1987) (statutory predecessor to Gov't Code § 552.111 subject to waiver). Because these sections are not other law that makes information confidential for the purposes of section 552.022, the city may not withhold the information at issue under section 552.105 or section 552.111. Accordingly, the information we have marked under section 552.022 must be released to the requestor. However, because section 552.022 does not apply to information that is excepted from disclosure under section 552.104, we will address your argument under section 552.104 for information contained in Exhibit E. *See* Gov't Code § 552.104(b).

Section 552.104 excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." *Id.* § 552.104. This exception protects a governmental body's interests in connection with competitive bidding and in certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). Moreover, section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). In this instance, you assert that the city is acting as a competitor in the marketplace. This office has held that a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the "competitive advantage" aspect of this exception if it can satisfy two criteria. First, the governmental body must demonstrate that it has specific marketplace interests. *See* Open Records Decision No. 593 at 3 (1991). Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *Id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body's legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body's demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *Id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

You assert that the city has specific marketplace interests in the information at issue. You state that "[s]hould this information be released, the city's competitive bargaining position with the various landowners will be prejudiced and the city would be specifically harmed by losing the advantage of confidential negotiations." We find, however, that you have failed to demonstrate that the process of evaluating specific parcels of land for a new wastewater

treatment plant constitutes a competitive marketplace interest for the purposes of section 552.104. Accordingly, we find that you have failed to demonstrate the applicability of section 552.104 to both the information subject to section 552.022 of the Government Code and the remaining information in Exhibit E. Consequently, no portion of Exhibit E may be withheld on this basis.

We now turn to the remaining information not subject to section 552.022. As part of the Texas Homeland Security Act, sections 418.176 through 418.182 were added to chapter 418 of the Government Code. These provisions make certain information related to terrorism confidential. You assert that Exhibit H is confidential under section 418.181 of the Government Code, which provides:

Those documents or portions of documents in the possession of a governmental entity are confidential if they identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism.

Gov't Code § 418.181. The fact that information may relate to a governmental body's security concerns does *not* make the information *per se* confidential under the Texas Homeland Security Act. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the Texas Homeland Security Act must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

In this instance, you explain that Exhibit H contains "technical details" of "water lines, sewer lines, [and] underground electric lines[.]" You also state that the information at issue reveals the "detailed schematics of the exact placement of sewer lines [and] lift stations[.]" You argue that the release of the submitted information would "expose potential vulnerabilities of the system by showing a potential terrorist where the most damage could be inflicted by disrupting service to mains as opposed to smaller tributaries." Based on your representations and our review, we conclude that the city has adequately explained how the information at issue falls within the scope of section 418.181 of the Government Code.

Therefore, Exhibit H must be withheld from disclosure under section 552.101 of the Government Code.

You seek to withhold the remaining information under section 552.105 of the Government Code. Section 552.105 excepts from 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. Section 552.105 is designed to protect a governmental body's planning and negotiating position with respect to particular transactions. *See* Open Records Decision No. 564 at 2 (1990). This exception protects information relating to the location, appraisals, and purchase price of property only until the transaction is either completed or aborted. *See* Open Records Decision Nos. 357 at 3 (1982), 310 at 2 (1982). 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.'" Open Records Decision No. 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 negotiation position in 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* Open Records Decision No. 564 (1990).

You state that portions of the remaining information relate to the location of real property to be acquired for a public purpose. You also state that the city "has not finalized its decision as to which specific parcel it will purchase for the new plant." We understand you to assert that disclosure of the information in question could affect the city's potential future plans for the identified property. Based on your representations and our review of the information in question, we conclude that the city may withhold Exhibit G in its entirety under section 552.105 of the Government Code.

The city seeks to withhold a portion of Exhibit E 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.” Gov’t Code § 552.111. 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.* *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.). 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. Open Records Decision No. 615 at 5-6 (1993). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; Open Records Decision No. 615 at 4-5. 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).

Upon review, we agree that some of the information you seek to withhold under section 552.111 in Exhibit E consists of advice, opinions, and recommendation regarding policymaking. The city may withhold such information, which we have marked, under section 552.111. However, the remaining information in Exhibit E does not consist of advice, opinions, and recommendation regarding policymaking, and the city may not withhold it under section 552.111.

We note that the information being released 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. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* 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. See Open Records Decision No. 550 (1990).

In summary, the city must release the information we have marked under section 552.022 of the Government Code. The city must withhold Exhibit H under section 552.101 of the Government Code in conjunction with the Texas Homeland Security Act. The city may withhold the following: (1) Exhibit G under section 552.105 of the Government Code; and (2) the information we have marked in Exhibit E under section 552.111 of the Government Code. The remaining information must be released to the requestor, but all copyrighted information must be released in accordance with copyright law.

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

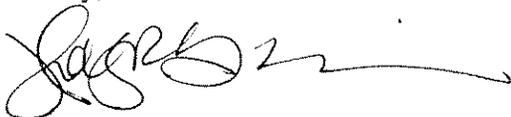
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body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,



Holly R. Davis
Assistant Attorney General
Open Records Division

HRD/eeg

Ref: ID# 277109

Enc. Submitted documents

c: Mr. Mike Morton
Director
Friends of the Cibolo Wilderness
P.O. Box 9
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(w/o enclosures)