



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 22, 2009

Ms. Katherine R. Fite
Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2009-08533

Dear Ms. Fite:

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# 345763.

The Office of the Governor (the "governor") received a request for information related to a grant awarded to the Texas A&M University System ("TAMU") for the National Center for Therapeutics Manufacturing. You state that the governor has released some of the requested information to the requestor. You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.104, 552.107, 552.110, 552.111, and 552.131 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that other statutes make confidential. Section 490.057 of the Government Code addresses the confidentiality of certain information pertaining to the Emerging Technology Fund (the "fund"). Section 490.057 provides as follows:

¹Although you also generally raise the remaining exceptions under the Act, you have provided no arguments regarding the applicability of these sections. Since you have not submitted arguments concerning these exceptions, we assume that you no longer urge them. See Gov't Code §§ 552.301(b), (e), .302.

Information collected by the governor's office, the [Texas Emerging Technology Advisory C]ommittee, or the committee's advisory panels concerning the identity, background, finance, marketing plans, trade secrets, or other commercially or academically sensitive information of an individual or entity being considered for an award from the fund is confidential unless the individual or entity consents to disclosure of the information.

Id. § 490.057. The governor asserts that, because TAMU has not consented to disclosure of the submitted information, "all company documents" related to the fund must be withheld. Upon review, however, we find the governor has failed to demonstrate that the information at issue concerns the identity, background, finance, marketing plans, trade secrets, or other commercially or academically sensitive information of an entity considered for an award from the fund. Therefore, the submitted information is not confidential under section 490.057 of the Government Code and may not be withheld from public disclosure under section 552.101 of the Government Code.

The governor raises section 552.104 of the Government Code, which excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." *Id.* § 552.104(a). The protections of section 552.104 serve two purposes. One purpose is to protect the interests of a governmental body by preventing one competitor or bidder from gaining an unfair advantage over others in the context of a pending competitive bidding process. *See* Open Records Decision No. 541 (1990). The other purpose is to protect the legitimate marketplace interests of a governmental body when acting as a competitor in the marketplace. *See* Open Records Decision No. 593 (1991). In both instances, the governmental body must demonstrate actual or potential harm to its interests in a particular competitive situation. *See* Open Records Decision Nos. 593 at 2, 463 (1987), 453 at 3 (1986). A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104. *See* ORD 593 at 2.

In this case, we find you have not established that the governor has specific marketplace interests with respect to information pertaining to the award of grants from the fund. We therefore conclude that the information at issue is not excepted under section 552.104 on that basis. Furthermore, we note that at the time the governor received the present request, TAMU had already been selected and had received funds from the fund. Thus, we find that there was not a competitive situation pertinent to the records at issue occurring at the time of the request, and we determine that the governor may not withhold any of the information at issue under section 552.104 of the Government Code.

Although the governor argues that the submitted 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. Thus, we do not address the governor's arguments under section 552.110. We note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice

under section 552.305(d) of the Government Code to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received any arguments from TAMU. We thus have no basis for concluding that any portion of the submitted information constitutes TAMU's proprietary information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the governor may not withhold any of the submitted information based on the proprietary interests of TAMU.

The governor also raises section 552.131 of the Government Code. Section 552.131 relates to economic development information and provides in part:

(a) Information is excepted from [required public disclosure] 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 [required public disclosure].

Gov't Code § 552.131(a)-(b). Section 552.131(a) excepts from disclosure only "trade secret[s] of [a] business prospect" and "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." *Id.* This aspect of section 552.131 is co-extensive with section 552.110 of the Government Code. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999). We note that section 552.131(a) does not protect the interests of a governmental body regarding the release of information pertaining to economic development negotiations. Thus, we do not address the governor's arguments under section 552.131(a). Further, we have not received any arguments from TAMU explaining that the submitted information contains TAMU's

trade secrets or its commercial or financial information. *See* Gov't Code § 552.305(d)(2)(B). Because TAMU has not demonstrated that the information at issue qualifies as a trade secret or that release of the information at issue would result in substantial competitive harm, we conclude that none of the information at issue may be withheld pursuant to section 552.131(a).

Section 552.131(b) protects information about a financial or other incentive that is being offered to a business prospect by a governmental body or another person. *See id.* § 552.131(b). Section 552.131(b) protects the interests of governmental bodies, not third parties. We note, however, that the applicability of section 552.131 ends once the governmental body completes an agreement with the business prospect. *Id.* § 552.131(c). Because the governor had completed a grant agreement with TAMU when the governor received the present request, the governor may not withhold any of the submitted information pursuant to section 552.131(b) of the Government Code.

You next assert that the submitted information in Exhibit C is excepted under section 552.107 of the Government Code. Section 552.107(1) 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 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). 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.*, 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).

You state that the information contained in Exhibit C consists of attorney-client communications that were made in furtherance of the rendition of professional legal services to the governor. You have identified the parties to the communications. You state that the communications were intended to be confidential, and you do not indicate that their confidentiality has been waived. Based on your representations and our review of the information at issue, we agree that some of the information in Exhibit C, which we have marked, constitutes privileged attorney-client communications that the governor may withhold under section 552.107.² However, you have failed to demonstrate how the remaining information in Exhibit C consists of communications between privileged parties made for the purpose of facilitating the rendition of professional legal services to the client. Accordingly, the remaining information in Exhibit C may not be withheld under section 552.107.

You assert that the remaining submitted information is excepted under section 552.111 of the Government Code, which 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. This exception encompasses the deliberative process 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, no writ); *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 that 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

²As we are able to make this determination, we do not address your remaining argument to withhold this information.

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* 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 encompass communications between a governmental body and a third party. *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). When determining if an interagency memorandum is excepted under section 552.111, we must also consider whether the agencies between which the memorandum is passed share a privity of interest or common deliberative process with regard to the policy matter at issue. *See* ORD 561 at 9. For section 552.111 to apply in such instances, the governmental body must identify the third party and explain the nature of its relationship with the governmental body.

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.

Based on your representations and our review of the information at issue, we find that you have established that the deliberative process privilege is applicable to some of the information for which you claim this exception. Therefore, the governor may withhold the information we have marked under section 552.111. However, you have failed to demonstrate, and the information does not reflect on its face, that the remaining information for which you claim this exception consists of advice, recommendations, or opinions that pertain to policymaking, or that a privity of interest exists among all parties. Accordingly, the governor may not withhold any of the remaining information under the deliberative process privilege of section 552.111.

In summary, the governor may withhold the information we have marked under sections 552.107 and 552.111 of the Government Code. The remaining submitted information must be released to the requestor.

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.

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.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 345763

Enc. Submitted documents

c: Requestor
(w/o enclosures)