



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 14, 2009

Ms. Mindy Ward  
City Attorney  
City of San Angelo  
P.O. Box 1751  
San Angelo, Texas 76902

OR2009-12962

Dear Ms. Ward:

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# 357259.

The City of San Angelo (the "city") received a request for information regarding City Farm Solar Energy, L.L.C. ("City Farm"), including its lease and possible use of land located northeast of the city. You claim that some of the requested information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. You also notified the interested third party of this request for information and of its right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We received comments on behalf of City Farm and its parent company, Terra-Gen Power, L.L.C. (collectively, "TGP"). We have considered the submitted arguments and reviewed the submitted information.

We begin by noting that some of the submitted documents are not responsive to the instant request for information, as they were created after the date that the city received the request. This ruling does not address the public availability of any information that is not responsive to the request, and the city need not release that information in response to this request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San

Antonio 1978, writ *dism'd*); Open Records Decision No. 452 at 3 (1986) (governmental body not required to disclose information that did not exist at time request was received).

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege under section 552.107(1), 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. *See* 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. *See* 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. *See 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. *See* 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. *See 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 contend that the information you have marked is protected by the attorney-client privilege. You explain that this information consists of confidential communications between and among the city attorney, city staff, and outside counsel for the city. You indicate that these communications were made in furtherance of the rendition of professional services to the city. Based on your representations and our review of the information at

issue, we find you have demonstrated the applicability of the attorney-client privilege to some of the information you seek to withhold under section 552.107. Thus, the city may generally withhold that information, which we have marked, under section 552.107(1). We note, however, some of the e-mail strings contain individual non-privileged e-mails that consist of communications with a non-privileged party and parties you have failed to identify. We have marked the non-privileged e-mails in the e-mail strings. To the extent that the non-privileged e-mails exist separate and apart from the submitted e-mail strings, we conclude they may not be withheld under section 552.107(1).

You assert that some of the remaining responsive information is excepted from disclosure under the deliberative process privilege encompassed by section 552.111 of the Government Code. *See* Gov't Code § 552.111; *see also* Open Records Decision No. 615 at 2 (1993). Section 552.111 of the Government Code 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." Gov't Code § 552.111. 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* 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. 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).

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.

Further, section 552.111 can encompass communications between a governmental body and a third party consultant. *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), 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). Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See* Open Records Decision No. 561 at 9. We note that a governmental body does not have a privity of interest or common deliberative process with a private party with which the governmental body is engaged in contract negotiations. *See id.* (section 552.111 not applicable to communication with entity with which governmental body has no privity of interest or common deliberative process).

You contend that some of the remaining information, consisting of draft versions of the contract between the city and TGP, is protected by the deliberative process privilege and excepted from disclosure under section 552.111. However, you acknowledge that the information at issue was shared during contract negotiations with the third party. Thus, you have not demonstrated how the city shares a privity of interest or common deliberative process with this third party. Therefore, we conclude that the draft documents may not be withheld under section 552.111 of the Government Code.

We next address TGP's arguments. Initially, TGP asserts that the request for information is overly broad. We note that a governmental body must make a good-faith effort to relate a request to information that is within its possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). In this case, the city has reviewed its records and has determined that the submitted documents are responsive to the request. Accordingly, we will address the applicability of the claimed exceptions to the submitted information.

TGP asserts that the submitted information is excepted from disclosure under section 552.104 of the Government Code, which excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. We note that section 552.104 protects the interests of governmental bodies, not third parties. *See*

Open Records Decision No. 592 (1991). As the city does not raise section 552.104, this section is not applicable to the requested information. *Id.* (Gov't Code § 552.104 may be waived by governmental body). Therefore, the city may not withhold any of TGP's information under section 552.104.

TGP raises section 552.110(b) of the Government Code, which protects “[c]ommercial 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[.]” Gov't Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.*; Open Records Decision No. 661 (1999).

TGP asserts that release of portions of the remaining submitted information would cause it substantial competitive injury.<sup>1</sup> Upon review, we find TGP has only provided conclusory arguments that release of any of the remaining information would cause it substantial competitive harm.<sup>2</sup> *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative), 319 at 3 (1982). Accordingly, we determine none of the remaining submitted information may be withheld under section 552.110(b) of the Government Code.

TGP also raises section 552.131 of the Government Code. Section 552.131 is applicable to economic development information and provides in relevant 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

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<sup>1</sup>We note that TGP seeks to withhold from public disclosure final versions of the lease and agreement that the city did not submit. This ruling does not address information that was not submitted by the city and is limited to the information submitted as responsive by the city. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

<sup>2</sup>We note that this office considers the prices charged in government contract awards to be a matter of strong public interest. *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government).

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.* Thus, the protection provided by section 552.131(a) is co-extensive with that of section 552.110 of the Government Code. Because TGP has not demonstrated that any of the remaining information qualifies as a trade secret for purposes of section 552.110(a) of the Government Code, nor has TGP made the specific factual or evidentiary showing required under section 552.110(b) that release of the remaining information would result in substantial competitive harm, we conclude that none of the remaining information may be withheld pursuant to section 552.131(a). Further, we note that section 552.131(b) is designed to protect the interests of governmental bodies, not third parties. As the city does not assert section 552.131(b) as an exception to disclosure, we conclude that no portion of the remaining information is excepted under section 552.131(b) of the Government Code.

In summary, the city may generally withhold the information we have marked under section 552.107 of the Government Code. To the extent the non-privileged e-mails, which we have marked, exist separate and apart from the submitted e-mail chains, they may not be withheld under section 552.107. The remaining 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](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, toll free, at (888) 672-6787.

Sincerely,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/dls

Ref: ID# 357259

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Mr. Michael Kowal  
General Counsel  
TGP Development, L.L.C.  
565 Fifth Avenue, 27<sup>th</sup> Floor  
New York, New York 10017  
(w/o enclosures)

Ms. Zheila S. Bazleh  
Leggett & Clemons  
2745 Dallas North Parkway, Suite 310  
Plano, Texas 75093  
(w/o enclosures)