



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 1, 2009

Ms. Helen Valkavich  
Assistant City Attorney  
City of San Antonio  
P.O. Box 839966  
San Antonio, Texas 78283

OR2009-13855

Dear Ms. Valkavich:

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# 355545 (COSA File Nos. 09-0806, 09-0817, 09-0943).

The City of San Antonio (the "city") received three requests for information pertaining to the proposed sale of the properties in Saint Paul Square. You claim that the submitted information is excepted from disclosure under sections 552.104, 552.107, 552.111, and 552.131 of the Government Code. You also state that release of the remaining information may implicate the proprietary interests of SPCA Garage, L.L.C. ("SPCA"). Accordingly, you have notified SPCA of this request 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 have considered the submitted arguments and reviewed the submitted information.

Initially, we note you have redacted portions of the submitted information, which you have marked as not responsive. This ruling does not address the public availability of any information that is not responsive to the request, and the city is not required to release that information in response to the request.

We next 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) to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received any comments from SPCA explaining why the submitted information should not be released. On behalf of SPCA, you assert that the responsive information is excepted under section 552.110 of the Government Code. However, we note section 552.110 is designed to protect the interests of third parties, not the interests of a governmental body. Because we have yet to receive comments from SPCA, we have no basis to conclude that SPCA has a protected proprietary interest in the responsive information; therefore, the city may not withhold any portion of the responsive information on that basis. *See* 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).

Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 at 8 (1991). This office has held 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. *See id.* First, the governmental body must demonstrate it has specific marketplace interests. *See id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *See 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. *See 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 state the responsive information relates to the pending sale of the Saint Paul Properties (the "properties") by the city to a third party. You generally argue that release of this information would give outside parties and current potential buyers a competitive advantage in conducting "transactions with the city." However, you have not provided any arguments explaining how the release of the responsive information would cause a specific threat of actual or potential harm to the city's interests in a specific competitive situation. Thus, we conclude you have failed to establish the applicability of section 552.104 to the responsive information, and none of it may be withheld on that basis.

You also assert that the responsive information is excepted from disclosure pursuant to 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 ORD 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 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).

This office has also 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.

Section 552.111 can also encompass communications between a governmental body and a third party, including a consultant or other party with a privity of interest. *See* ORD 561 at 9 (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). For section 552.111 to apply, the

governmental body must identify the third party and explain the nature of its relationship with the governmental body. 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* ORD 561 at 9.

You state the responsive documents include information and discussion related to recommendations regarding the revitalization and development of the properties, which you contend is "a major policy project." You further state the information at issue includes drafts that reflect commentary, discussion, and thought processes of city personnel concerning the current negotiations. Based upon your representations and our review of the information at issue, we agree that the draft documents and information we have marked are excepted under section 552.111 and may be withheld on that basis. However, the remaining responsive information appears to consist of general administrative information that does not relate to policymaking or information that is purely factual in nature. Further, we note that a portion of the information at issue consists of communications with third parties. We find that you have not established a privity of interest or common deliberative process with these parties. You have failed to demonstrate, and the information at issue does not reflect on its face, that this information consists of advice, recommendations, or opinions that pertain to policymaking. Accordingly, we find that this information is not excepted from disclosure under section 552.111, and it may not be withheld on that basis.

You also raise section 552.131(b) of the Government Code for the remaining responsive information. Section 552.131(b) provides that "[u]nless and until an agreement is made with [a] 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(b). You state that the information at issue is related to ongoing negotiations with a business prospect. You state that an agreement had yet to be reached with the prospect when the city received this request for information. Based on your representations and our review of the information at issue, we have marked information relating to financial and other incentives that the city may withhold under section 552.131(b). We note that the applicability of section 552.131(b) to the marked information ends once the city finalizes an agreement with the business prospect. As you have not demonstrated that the remaining information at issue reveals financial or other incentives that are being offered to the prospect, we conclude that the city may not withhold any other information under section 552.131(b).

You contend that portions of the remaining responsive information are protected from public disclosure under section 552.107(1) of the Government Code, which protects information that comes 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. *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 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 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)-(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 state that some of the remaining responsive information constitutes communications between and amongst city staff, city attorneys, and outside counsel that were made for the purpose of providing legal advice to the city. You have identified most of the parties to the communications. You indicate that these communications were made in confidence and their confidentiality has been maintained. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information we have marked, which the city may withhold under section 552.107 of the Government Code. However, we note that some of the individual e-mails in the submitted e-mail chains at issue consist of communications with non-privileged parties or parties you have not identified, and thus, are not privileged. Thus, to the extent these 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 and must be released to the requestor. Further, we find that none of the remaining information you seek to withhold consists of or documents a privileged attorney-client communication. Accordingly, none of the remaining information may be withheld under section 552.107 of the Government Code.

We note that section 552.117(a)(1) of the Government Code excepts from disclosure the 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 of the Government Code. *See* Gov't Code §§ 552.117(a)(1), .024.<sup>1</sup> Section 552.117 also encompasses a personal cellular telephone number, provided that a governmental body does not pay for the cell phone service. *See* Open Records Decision No. 506 at 5-6 (1988) ( section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The city may only withhold information under section 552.117(a)(1) on behalf of a former or current employee who has made a request for confidentiality under section 552.024 prior to the date on which the request for information was made. Therefore, if the employee whose information is at issue timely elected to keep her personal information confidential under section 552.024, the city must withhold the cellular telephone number we have marked pursuant to section 552.117(a)(1); however, the city may only withhold this cellular telephone number if the employee at issue paid for it with her own funds. If the employee at issue did not make a timely request for confidentiality, the information at issue must be released.

In summary, the city may withhold the information we have marked under section 552.131(b) of the Government Code. The city may withhold the information we have marked under section 552.111 of the Government Code. The city may withhold the information we have marked under sections 552.107 and of the Government Code. However, to the extent the non-privileged e-mails we have marked exist separate and apart from the submitted e-mail strings, they are not excepted from disclosure under section 552.107. If the employee at issue timely elected to keep her personal information confidential under section 552.024, the city must withhold the cellular telephone number we have marked pursuant to section 552.117(a)(1); however, the city may only withhold this cellular telephone number if the employee at issue paid for it with her own funds. If the employee at issue did not make a timely request for confidentiality, the information at issue must be released. The remaining information must be released.

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

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<sup>1</sup>The Office of the Attorney General will a raise mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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,



Christina Alvarado  
Assistant Attorney General  
Open Records Division

CA/rl

Ref: ID# 355545

Enc. Submitted documents

cc: Requestors (3)  
(w/o enclosures)

c: Mr. Jeff Rochelle  
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(w/o enclosures)