



ATTORNEY GENERAL OF TEXAS

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October 5, 2009

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OR2009-13983

Dear Ms. Kunau and Mr. Rodriguez:

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# 357226 (COSA File No. 09-0881).

The City of San Antonio (the "city") received a request for five categories of information related to hotels, including information related to operating agreements, tax abatements, subsidies, and minimum requirements. You state that the city has released some responsive information to the requestor. You claim that portions of the submitted information are excepted from disclosure under sections 552.106, 552.107, and 552.111 of the Government Code.¹ You also explain that the submitted information may contain third parties' proprietary information subject to exception under the Act. Accordingly, you have notified the following third parties of this request for information and of their right to submit arguments to this office as to why the submitted information should not be released: Hotel Investments, L.P., c/o Marathon Real Estate Opportunity Fund, L.L.C.; Paul, Hastings,

¹Although you also raise the attorney-client privilege under rule 503 of the Texas Rules of Evidence, we note that section 552.107 is the proper exception to raise for your attorney-client privilege claim in this instance. See Open Records Decision No. 676 (1988).

Janofsky & Walker, L.L.P.; FaulknerUSA, Inc.; Andrews Kurth, L.L.P.; Choate and Associates; First American Title Insurance Co., National Commercial Services; Grand Hyatt San Antonio, L.L.C., c/o Hyatt Corporation; Kirkland & Ellis, L.L.P.; Barclays Capital Real Estate Finance, Inc.; and Dechert, L.L.P. 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 your arguments and reviewed the submitted information.

Initially, we note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. See Gov't Code § 552.305(d)(2)(B). As of the date of this decision, we have not received correspondence from any of the parties you notified. Thus, none of these private parties has demonstrated that it has a protected proprietary interest in any of the submitted information. See *id.* § 552.110(a)-(b); 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 (1990). Accordingly, the city may not withhold any portion of the submitted information on the basis of the proprietary interests of any of the notified third parties.

We next note that portions of the submitted information relate to the receipt or expenditure of public or other funds by the city. Thus, this information, which we have marked, is subject to section 552.022(a)(3) of the Government Code, which provides:

[T]he following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). Accordingly, the city may withhold the information we have marked under section 552.022(a)(3) only if it is "expressly confidential under other law[.]" Although you raise sections 552.106 and 552.111 of the Government Code, these sections are discretionary exceptions to disclosure that protect a governmental body's interests and which may be waived. See Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under Gov't Code § 552.111 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.106 and 552.111 are not "other law" that make information confidential for the purposes of section 552.022. Therefore, the

city may not withhold information we have marked under section 552.022(a)(3) under sections 552.106 or 552.111. As you raise no other exceptions against disclosure of this information, the city must release the information we have marked under section 552.022(a)(3) of the Government Code.

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 pet.). 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 under section 552.107(1) consists of confidential communications protected by the attorney-client privilege. You have identified the parties to these communications as: city attorneys; city employees and officials; the city’s outside counsel; the city’s outside financial advisors; and staff and attorneys for third parties, including hotel operators, investors, engineering and architectural consultants, and bond

insurers. You indicate that these communications were made in furtherance of the rendition of professional legal 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(1). Thus, the city may generally withhold that information, which we have marked, under section 552.107(1). We note, however, that some of the e-mail strings contain individual non-privileged e-mails that consist of communications with non-privileged parties or parties whose relationship with the city you have failed to specify. 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). We also conclude that the city may not withhold any of the remaining information you have marked under section 552.107(1) on the basis of this exception, as this information consists of communications with parties other than clients, client representatives, lawyers, and lawyer representatives for the city.

You assert that portions of the remaining responsive information are 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 submitted information is protected by the deliberative process privilege and excepted from disclosure under section 552.111. Upon review of your arguments and the submitted information, we agree that the city may withhold the information we have marked under section 552.111. However, you acknowledge that the remaining information you have marked under this exception was shared during contract negotiations with third parties. Thus, you have not demonstrated how the city shares a privity of interest or common deliberative process with these third parties. Therefore, we conclude that the city may not withhold any of the remaining information under section 552.111 of the Government Code.

We next address your argument under section 552.106 of the Government Code. Section 552.106 excepts from disclosure "[a] draft or working paper involved in the preparation of proposed legislation[.]" Gov't Code § 552.106(a). The purpose of section 552.106 is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body. *See* Open Records Decision No. 615 at 2 (1993). Therefore, section 552.106 is applicable only to the policy judgments, recommendations, and proposals of persons who are involved in the preparation of proposed legislation and who have an official responsibility to provide such information

to members of the legislative body. *See id.* at 1; *see also* Open Records Decision No. 429 at 5 (1985) (statutory predecessor to section 552.106 not applicable to information relating to governmental entity's efforts to persuade other governmental entities to enact particular ordinances). In this instance, you assert that the remaining information you have marked under section 552.106 "demonstrate[s] the deliberative process of the [c]ity as it moves towards enacting legislation in the form of municipal ordinances." However, you have not explained, nor does the submitted information make clear, how the information you have marked under section 552.106 consists of policy judgments, recommendations, and proposals related to proposed municipal ordinances. Therefore, the city may not withhold any of the remaining information at issue under section 552.106 of the Government Code.

Section 552.136(b) of the Government Code states that "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential."² Gov't Code § 552.136(b). This office has determined that insurance policy numbers are access device numbers for purposes of section 552.136. *See id.* § 552.136(a) (defining "access device"). Therefore, the city must withhold the information we have marked under section 552.136(b).

Section 552.137 of the Government Code states that "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its public disclosure. *Id.* § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See* Act of May 15, 2001, 77th Leg., R.S., ch. 356, § 1, 2001 Tex. Gen. Laws 651, 651-52, *amended by* Act of May 27, 2009, 81st Leg., R.S., ch. 962, § 7, 2009 Tex. Sess. Law Serv. 2555, 2557 (Vernon) (to be codified as an amendment to Gov't Code § 552.137(c)). Section 552.137(c)(1) states that section 552.137(a) does not apply to an e-mail address "provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent" and subsection (c)(2) states that subsection (a) does not apply to an e-mail address "provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent[.]" Gov't Code § 552.137(c)(1), (2). You do not indicate that the city has received consent to release any of the e-mail addresses contained within the submitted information. Therefore, the city must withhold e-mail addresses of members of the public, except to the extent any such addresses belong to persons who have a contractual relationship with the city or who are seeking to contract with the city.

Finally, we note that some of the remaining information at issue appears to be protected by copyright. A governmental body must allow inspection of copyrighted materials unless an

²The Office of the Attorney General will raise a 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).

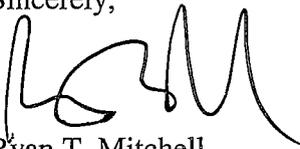
exception applies to the information, but a custodian of public records must comply with copyright law and is not required to furnish copies of records that are copyrighted. *See* Attorney General Opinion JM-672 (1987). Thus, if a member of the public wishes to make copies of copyrighted materials, the 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 may withhold the information we have marked under sections 552.107(1) and 552.111 of the Government Code and must withhold the information we have marked under section 552.136 of the Government Code. The city also must withhold e-mail addresses of members of the public, except to the extent any such addresses belong to persons who have a contractual relationship with the city or who are seeking to contract with the city. The city must release the remainder of the submitted information in accordance with copyright law.

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, toll free, at (888) 672-6787.

Sincerely,



Ryan T. Mitchell
Assistant Attorney General
Open Records Division

RTM/rl

Ref: ID# 357226

Enc. Submitted documents

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