



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

January 26, 2010

Mr. George E. Hyde  
Denton, Navarro, Rocha & Bernal  
2517 North Main Avenue  
San Antonio, Texas 78212

OR2010-01232

Dear Mr. Hyde:

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# 368110.

The City of Windcrest (the "city"), which you represent, received a request for e-mail communications between the mayor of the city and elected members of the city council during a specified time period. You claim the submitted information is excepted from disclosure under sections 552.103, 552.104, 552.107, 552.109, 552.111, 552.131, and 552.137 of the Government Code.<sup>1</sup> Additionally, you provide documentation showing you have notified certain individuals of their right to submit comments to this office why the submitted information should not be released.<sup>2</sup> *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from the requestor. *See id.*

Initially, we note a portion of the submitted information is not responsive to the instant request for information because it was created after the date 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 department is not required to release that information in response to the request.

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<sup>1</sup>Although you raise Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, in this instance, this information is properly addressed under sections 552.107 and 552.111. Further, although you raise section 552.022 of the Government Code, that provision is not an exception to disclosure. Rather, section 552.022 enumerates categories of information that are not excepted from disclosure unless they are expressly confidential under other law. *See* Gov't Code § 552.022.

<sup>2</sup>As of the date of this letter, this office has not received comments from any third party explaining why any of the submitted information should not be released.

You argue a portion of the submitted information, which you have marked, is excepted from disclosure under section 552.103 of the Government Code. Section 552.103 provides in part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate litigation is reasonably anticipated, the governmental body must furnish concrete evidence litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.<sup>3</sup> Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined if an individual publicly threatens to bring suit against a governmental body, but does not actually

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<sup>3</sup>In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

In this instance, you explain a lawsuit was filed against a developer regarding a project that is ongoing within the city. You state the city anticipates litigation because the plaintiffs in the lawsuit provided notice to the city that it did not include the city in initial pleadings, but reserved the right to amend its pleadings to bring claims against the city at a later date. As noted above, a threat of litigation without any objective steps toward filing suit is not sufficient to establish anticipated litigation. You have not provided this office with evidence any objective steps had been taken toward filing a lawsuit against the city prior to the date the city received the request for information. *See* Gov't Code § 552.301(e); Open Records Decision No. 331 (1982). Therefore, we find you have not established litigation was reasonably anticipated on the date the city received the request for information, and the city may not withhold any portion of the information at issue under section 552.103 of the Government Code.

Next, you claim a portion of 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(a). 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). 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).

You generally argue release of the information at issue would give an unfair advantage to a competitor or bidder. However, you have not provided any arguments explaining how the release of this information would cause a specific threat of actual or potential harm in a particular competitive situation. *See* ORD 592. Thus, we conclude you have failed to establish the applicability of section 552.104 to the information at issue, and the information may not be withheld on that basis.

You also argue a portion of the submitted information is subject to section 552.107 of the Government Code. Section 552.107(1) 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 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 pet). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain 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 the information at issue consists of communications involving city attorneys and council members that were made in connection with the rendition of legal services to the city. You state these communications were confidential, and you do not indicate the city has waived the confidentiality of the information at issue. 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. Accordingly, the city may withhold the information we have marked under section 552.107 of the Government Code. However, you have failed to identify several of the parties to the remainder of the communications at issue. Accordingly, we find you have failed to demonstrate the applicability of the attorney-client privilege to these communications. Thus, the city may not withhold the remaining information at issue under section 552.107.

Next, you claim the remaining information is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intra-agency 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 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). Additionally, section 552.111 does not generally exempt from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5.

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* Open Records Decision No. 561 at 9 (1990) (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 explain the communications at issue were generated by elected officials who serve a legislative role in local government and by outside consultants acting on behalf of the city. You state the communications consist of advice, opinion or recommendations on policymaking matters of the city. Upon review, we find a portion of the remaining information, which we have marked, consists of advice, opinions, and recommendations reflecting the policymaking processes of the city. Accordingly, the city may withhold the information we have marked under section 552.111. However, portions of the remaining information were shared with individuals with whom you have not demonstrated the city shares a privity of interest, or is general administrative or purely factual information. Thus, we find you have failed to show how any portion of the remaining information consists of advice, opinions, or recommendations on the policymaking matters of the city. Accordingly, no portion of the remaining information may be withheld based on the deliberative process privilege of section 552.111.

Section 552.111 also encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including

the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5. A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. TEX. R. CIV. P. 192.5; ORD 677 at 6-8. In order for this office to conclude the information was made or developed in anticipation of litigation, we must be satisfied

a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

*Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7.

You generally claim portions of the remaining information disclose attorney work product. However, you make no arguments to support this position. Further, you do not state, and we are unable to determine, any portion of the information at issue was created for trial or in anticipation for litigation. Accordingly, the city may not withhold any of the remaining information under the work product privilege of section 552.111 of the Government Code.

Next, you raise section 552.131 of the Government Code for portions of the remaining information. 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 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 your arguments under section 552.131(a). Further, we have not received arguments from any third party explaining how the remaining information contains the third party's trade secrets or its commercial or financial information. *See* Gov't Code § 552.305(d)(2)(B). Because no third party has demonstrated the information at issue qualifies as a trade secret or release of the information at issue would result in substantial competitive harm, we conclude 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. You state the information at issue relates to a business decision by the city and its management. You also state the information has been the subject of negotiations for redevelopment by an involved party. However, upon review, we find you have not demonstrated the submitted information reveals financial or other incentives that are being offered to a business prospect. Thus, we conclude the city may not withhold the submitted information under section 552.131(b).

You claim the submitted information is subject to section 552.109 of the Government Code. Section 552.109 excepts from public disclosure "[p]rivate correspondence or communications of an elected office holder relating to matters the disclosure of which would constitute an invasion of privacy[.]" *Id.* § 552.109. This office has held the test to be applied to information under section 552.109 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Government Code.

In *Industrial Foundation*, the Texas Supreme Court held that information is protected by common-law privacy if it: (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person; and (2) is not of legitimate

concern to the public. *See id.* 540 S.W.2d at 685. The types of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *See id.* 540 S.W.2d at 683. This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally protected by common-law privacy. *See* Open Records Decision Nos. 600 (1992) (employee's designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). Additionally, this office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (information pertaining to illness from severe emotional and job-related stress protected by common-law privacy), 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities protected from disclosure). Upon review, we find a portion of the submitted information is highly intimate or embarrassing and of no legitimate public interest. Accordingly, the city must withhold the information we have marked under section 552.109 of the Government Code. However, we find none of the remaining information is highly intimate or embarrassing and of no legitimate public interest. Thus, no portion of the remaining information may be withheld on the basis of section 552.109.

You claim the e-mail addresses you have marked are excepted from public disclosure under section 552.137 of the Government Code. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). We note section 552.137 is not applicable to an institutional e-mail address, an Internet website address, the general e-mail address of a business, or an e-mail address that a governmental entity maintains for one of its officials or employees. Therefore, the city must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners have affirmatively consented to their public disclosure or subsection (c) applies.<sup>4</sup>

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<sup>4</sup>We note one of the e-mail addresses at issue belongs to the requestor. Therefore, pursuant to section 552.137(b), the city may not withhold the requestor's e-mail address under section 552.137(a). *See id.* § 552.137(b).

We note portions of the submitted information may be subject to section 552.117 of the Government Code.<sup>5</sup> Section 552.117(a)(1) excepts from disclosure the home address, home telephone number, social security number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024. *See id.* § 552.117(a)(1). We note section 552.117 is also applicable to personal cellular telephone numbers and home facsimile numbers, provided the cellular telephone service and facsimile number is not paid for by a governmental body. *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). You do not explain whether the officials whose information is at issue have timely elected to keep their personal information confidential. Therefore, to the extent the officials at issue timely elected to keep their personal information confidential, the city must withhold the personal information we have marked under section 552.117(a)(1); however, the city may only withhold the marked personal cellular telephone and home facsimile numbers if the numbers are not paid for by the city. Conversely, to the extent the involved officials did not make timely elections under section 552.024, the city may not withhold any portion of the marked information under section 552.117(a)(1).

In summary, the city may withhold the information we have marked under section 552.107(1) of the Government Code. The city may withhold the information we have marked under section 552.111 of the Government Code. The city must withhold the information we have marked under section 552.109 of the Government Code. The city must withhold the information we have marked under section 552.137 of the Government Code, unless the individuals whose information is at issue has elected release of the information or subsection (c) applies.<sup>6</sup> To the extent the officials at issue timely elected confidentiality for their personal information, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code; however, the city may only withhold the marked cellular telephone and facsimile numbers if they were not paid for by the city. The remaining information must be released.

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.

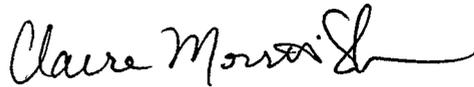
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<sup>5</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

<sup>6</sup>We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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,



Claire V. Morris Sloan  
Assistant Attorney General  
Open Records Division

CVMS/jb

Ref: ID# 368110

Enc. Submitted documents

c: Requestor  
(w/o enclosures)