



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 4, 2010

Mr. Tyler F. Wallach  
Assistant City Attorney  
City of Fort Worth  
1000 Throckmorton Street, 3rd Floor  
Fort Worth, Texas 76102

OR2010-11744

Dear Mr. Wallach:

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# 390053 (City of Fort Worth Request No. W000640).

The City of Fort Worth (the "city") received a request for five categories of information pertaining to the Mary's Creek Basin Water Recycling Center Project (the "project"). You state the city will release some of the requested information to the requestor. You claim the remaining requested information is excepted from disclosure under sections 552.101, 552.105, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, we note you have marked portions of the submitted information as being non-responsive to the request for information. This decision does not address the public availability of the non-responsive information, and that information need not be released.

Next, we note that the market study submitted as Exhibit D constitutes a completed report subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[,]" unless the information is expressly confidential under

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<sup>1</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and, therefore, does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

other law or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). You seek to withhold Exhibit D under section 552.105 of the Government Code. However, section 552.105 is discretionary in nature and does not constitute "other law" for purposes of section 552.022. *See* Open Records Decision Nos. 665 at 2 n.5 (discretionary exceptions generally), 564 (1990) (statutory predecessor to 552.105 subject to waiver). Thus, Exhibit D may not be withheld under section 552.105 of the Government Code. As no other exception to disclosure of this information has been raised, we conclude that Exhibit D must be released.

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. Section 552.101 encompasses information that is made confidential by other statutes. You claim Exhibit F is excepted from disclosure under section 552.101 in conjunction with section 418.181 of the Government Code. Sections 418.176 through 418.182 were added to chapter 418 of the Government Code as part of the Texas Homeland Security Act (the "HSA"). Section 418.181 provides:

Those documents or portions of documents in the possession of a governmental entity are confidential if they identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism.

Gov't Code § 418.181. The fact that information may relate to a governmental body's security measures does not make the information *per se* confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation of a statute's key terms is not sufficient to demonstrate the applicability of the claimed provision. As with any exception to disclosure, a claim under section 418.181 must be accompanied by an adequate explanation of how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You state Exhibit F shows significant details of the city's only wastewater treatment facility. You assert, and we agree, that the city's wastewater treatment facility is part of the city's critical infrastructure for purposes of section 418.181. *See generally id.* § 421.001 (defining "critical infrastructure" to include all public or private assets, systems, and functions vital to security, governance, public health and safety, economy, or morale of state or nation). You state release of the information at issue could potentially provide a terrorist with the ability to determine where the greatest damage to water lines is; thus, you argue this would create a public health issue by cutting off water to the city. Based on your representations and our review of the information at issue, we find the information in Exhibit F would identify details of particular vulnerabilities of critical infrastructure to an act of terrorism. Therefore, the city must withhold Exhibit F under section 552.101 in conjunction with section 418.181 of the Government Code.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information that (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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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. *Id.* at 683. This office has also found that the some kinds of medical information or information indicating disabilities or specific illnesses is excepted from required public disclosure. See Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we find the information we have marked in Exhibit E is highly intimate or embarrassing and not of legitimate public concern. Therefore, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we note portions of the remaining information you have marked do not pertain to any identified individual. Thus, this information does not implicate any individual's privacy interest. Furthermore, you have failed to demonstrate how the remaining information you have marked is highly intimate or embarrassing and not of legitimate public concern; therefore, the remaining information is not confidential under common-law privacy, and the city may not withhold it under section 552.101 on that basis.

You assert Exhibit C and portions of Exhibit E 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 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. 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* 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 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 (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* ORD 561 at 9.

You state the information at issue reveals advice, opinions, and recommendations pertaining to various city policymaking matters. You also state the information at issue includes communications between the city and third party consultants pertaining to policymaking in which the parties share a privity of interest or common deliberative process. Further, you state some of the information consists of draft documents prepared by city staff or third party consultants that necessarily reflect the advice, opinion, and recommendations of the drafter. You state these drafts have been released to the public or are intended for release to the public in their final forms. Based on your representations and our review of the information at issue, we find you have established the deliberative process privilege is applicable to a portion of the information, which we have marked. Therefore, the city may withhold the information we have marked under section 552.111 of the Government Code. However, we find portions of the remaining information at issue consist of either general administrative

information that does not relate to policymaking or information that is purely factual in nature. Further, we find portions of the remaining information were communicated with third parties, and you have failed to demonstrate how the city shares a privity of interest or common deliberative process with these individuals. Thus, you have failed to demonstrate, and the information does not reflect on its face, that this information reveals advice, opinions, or recommendations that pertain to policymaking. Accordingly, we find none of the remaining information at issue is excepted from disclosure under section 552.111, and it may not be withheld on that basis.

You state you have marked e-mail addresses of members of the public for redaction under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).<sup>2</sup> 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). Gov't Code § 552.137(a)-(c). This exception is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. We note some of the e-mail addresses you have marked are government or institutional e-mail addresses that are not excepted from disclosure under section 552.137. Furthermore, you have also marked the names of the owners of some of the e-mail addresses under section 552.137. However, this information does not constitute an e-mail address for purposes of section 552.137. As such, we note the city is not authorized to withhold these types of information pursuant to Open Records Decision No. 684. Thus, this information, which we have marked for release, may not be withheld under section 552.137 of the Government Code. We note the remaining information includes additional e-mail addresses subject to section 552.137. Thus, with the exception of the information we have marked for release, the city must withhold the e-mail addresses you have marked and the additional e-mail addresses we have marked under section 552.137, unless the city receives consent for their release.

We note that some of the remaining information appears to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1978). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). 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.

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<sup>2</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 an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

In summary, the city must withhold Exhibit F under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code. The city must withhold the information we have marked in Exhibit E under section 552.101 of the Government Code in conjunction with common-law privacy. The city may withhold the information we have marked under section 552.111 of the Government Code. With the exception of the information we have marked for release, the city must withhold the e-mail addresses you have marked and the additional e-mail addresses we have marked under section 552.137 of the Government Code, unless the city receives consent for their release. The remaining information must be released to the requestor, but any information that is protected by copyright may only be released 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](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,



Adam Leiber  
Assistant Attorney General  
Open Records Division

ACL/tp

Ref: ID# 390053

Enc. Submitted documents

c: Requestor  
(w/o enclosures)