



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 15, 2011

Ms. Allison Bastian
Assistant City Attorney
City of Brownsville
P.O. Box 911
Brownsville, Texas 78520

OR2011-13349

Dear Ms. Bastian:

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# 430108.

The City of Brownsville (the "city") received two requests for several categories of information pertaining to agreements, correspondence and communications by and between named individuals and specified airlines and companies.¹ You state some of the requested information does not exist.² You also state you will release some of the requested information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.104, 552.107 and 552.111 of the Government Code.³ You also

¹We note the city sought and received clarification of the first request for information. *See* Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if a large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

²The Act does not require a governmental body to release information that did not exist when it received a request or to create information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

³Although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Furthermore, although you assert the attorney-client privilege under rule 503, section 552.107 of the Government Code is the proper exception to raise for your attorney-client privilege claim in this instance. *See generally* ORD 676.

inform us the submitted information may implicate the interests of Pan American Airways Inc. ("Pan Am"). You inform us Pan Am was notified of the requests for information and of its rights to submit arguments to this office as to why its requested information should not be released. *See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exceptions to disclosure under certain circumstances). We have considered your arguments and reviewed the submitted information.

Initially, we note you have marked a portion of the submitted information as not responsive to the present requests for information. This decision does not address the public availability of the nonresponsive information, and the city need not release it.

Next, we note some of the submitted e-mails may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2011-09904 (2011), and some other e-mails may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2011-09206 (2011). To the extent these e-mails were the subjects of our previous rulings, the city may withhold or release the information at issue in accordance with those rulings, provided there have been no changes in the law, facts, and circumstances on which the previous rulings were based. To the extent the submitted information is not the subject of the previous rulings, the city may not rely upon the previous rulings and we will consider your arguments against disclosure of this information. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 6-7 (2001) (listing elements of first type of previous determination).

Next, we note 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 be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Pan Am has not submitted to this office reasons explaining why its information should not be released. Therefore, Pan Am has provided us with no basis to conclude that it has protected proprietary interests in any of the submitted information. *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), 542 at 3. Therefore, the city may not withhold any portion of the submitted information on the basis of any proprietary interest Pan Am may have in the information.

Section 552.104 of the Government Code excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. This exception protects a governmental body's interests in connection with competitive bidding and in certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). 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 contend that the city has specific marketplace interests in some of the responsive information because the city’s airport is a competitor in the marketplace with regard to passenger and cargo air services to various destinations in Mexico. You state some of the responsive information relates to contract negotiations among the city, Aeromexico Airlines, Pan Am, and China Cargo to provide various cargo and passenger air services, including to destinations in Mexico. You state that at the time of the requests, no contracts had been executed for any of the services at issue. You further assert that release of the information at issue could provide a competitive advantage to other competing airports by revealing information which would allow competitors to gain insight into inner business workings and negotiations. Based on these representations and our review, we find you have demonstrated the city has specific marketplace interests and may be considered a “competitor” for purposes of section 552.104. Further, we find you have demonstrated release of some of the responsive information would cause specific harm to the city’s marketplace interests. Accordingly, the city may withhold the responsive information we have marked under section 552.104.⁴ However, the remaining information you have marked under section 552.104 pertains to negotiations and projects with entities you have not described or identified. Despite your general assertion, we conclude the information at issue does not reflect the city is engaging in any particular competitive bidding situation and you have not sufficiently explained the applicability of section 552.104 to each piece of information you seek to withhold under this exception. *See Open Records Decision No. 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 was entirely too speculative to withhold information under predecessor statute). Accordingly, we conclude that the city may not withhold any of the remaining information under section 552.104 of the Government Code.

Next, we will address your argument under section 552.107 of the Government Code. Section 552.107(1) protects information coming within the attorney-client privilege. *Id.* § 552.107(1). 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. *Open Records Decision No. 676 at 6-7 (2002).* First,

⁴As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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. 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. *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 a 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 to only communications between or among clients, client representatives, lawyers, and lawyer representatives. 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 to only 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. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). 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 the information you have marked consists of communications between city attorneys and employees that were made for the purpose of facilitating the rendition of professional legal services to the city. You also state the confidentiality of the communications has been maintained. Based on these representations and our review, we agree the information we have marked may be withheld under section 552.107(1).⁵

You claim the information you have marked in the remaining information is excepted under 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. Section 552.111 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*

⁵As our ruling for this information is dispositive, we need not address your remaining argument against its disclosure.

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 section 552.111 exempts 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). Moreover, 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, opinions, or recommendations 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 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), 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). 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. We note 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 the e-mails, draft attachments, and attachments regarding negotiations with third parties you have marked contain advice, opinion, and recommendations relating to various city policies and possible business deals. Upon review, we conclude some of the information at issue consists of advice, opinions, and recommendations that implicate the city's policymaking processes. The city may withhold that information, which we have marked, under section 552.111 of the Government Code. We find the rest of the information at issue is factual and does not consist of policy-related advice, opinions, or recommendations. Additionally, some of the remaining communications have been sent to a third party you have not identified. You have not demonstrated a privity of interest or common deliberative process exists between either of these individuals and the city. We also note the other submitted draft documents pertain to contract negotiations between the city and a third party. Because the city and the third party were negotiating a contract, their interests were adverse. Thus, we conclude the city and this company did not share a privity of interest or common deliberative process, and the draft documents at issue are not subject to section 552.111. Thus, the remaining information you have marked may not be withheld under section 552.111 of the Government Code.

We note the remaining information in this instance contains information subject to section 552.137 of the Government Code.⁶ 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, or an e-mail address a governmental entity maintains for one of its officials or employees. We also note the requestor has a right to his own e-mail address under section 552.137(b). *Id.* § 552.137(b). The e-mail addresses we have marked are not a type specifically excluded by section 552.137(c). Accordingly, the city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their disclosure.⁷

In summary, the city may withhold or release any information that was the subject of prior rulings in accordance with those rulings, provided there have not been changes in the law,

⁶The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁷We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including the 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.

facts, and circumstances on which the previous rulings were based. The city may withhold the information we have marked under sections 552.104, 552.107, and 552.111 of the Government Code. The city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their disclosure. The remaining responsive 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.

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,



Paige Lay
Assistant Attorney General
Open Records Division

PL/akg

Ref: ID# 430108

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

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