



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 23, 2011

Mr. Orlando Ray Rodriguez
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283

OR2011-13826

Dear 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# 431763 (COSA File No. W002326-071811).

The City of San Antonio (the "city") received a request for communications during a specified period between Freetail Brewing and the office of the mayor or the office of the city manager, or between Alamo Beer and the office of the mayor or the office of the deputy city manager. You claim the submitted information is excepted from disclosure under sections 552.105, 552.106, 552.107, 552.111, and 552.131 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.105 of the Government Code excepts from disclosure information relating to:

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Gov't Code § 552.105. We note this provision is designed to protect a governmental body's planning and negotiating position with regard to particular transactions. *See* Open Records Decision Nos. 564 (1990), 357 (1982), 310 (1982). Information that is excepted from

disclosure under section 552.105 that pertains to such negotiations may be excepted from disclosure so long as the transaction relating to that information is not complete. *See* ORD 310. A governmental body may withhold information “which, if released, would impair or tend to impair [its] ‘planning and negotiating position in regard to particular transactions.’” *Open Records Decision Nos. 357 at 3 (1982), 222 (1979)*. The question of whether specific information, if publicly released, would impair a governmental body’s planning and negotiating position with regard to particular transactions is a question of fact. Accordingly, this office will accept a governmental body’s good-faith determination in this regard, unless the contrary is clearly shown as a matter of law. *See* ORD 564.

You state the portions of the submitted information you have marked under section 552.105 “relate to the ongoing negotiations concerning the location of real property which may be used for public purpose and/or concern the appraisals of real or personal property for a public purpose prior to the award of final contracts for the property.” You represent the city has made a good-faith determination that release of this marked information would impair or tend to impair the city’s planning and negotiating position in regard to the transactions in question. Based on your representations and our review, we conclude the city may withhold the information pertaining to Alamo Beer, which we have marked, under section 552.105 of the Government Code.¹ However, you have not submitted arguments explaining how the release of the information pertaining to Freetail Brewing would impair negotiations regarding the sale or purchase of city property. Thus, you have failed to demonstrate how such information falls within the purview of section 552.105 of the Government Code, and it may not be withheld on that basis.

Section 552.106 of the Government Code excepts from disclosure “[a] draft or working paper involved in the preparation of proposed legislation.” *Gov’t Code § 552.106(a)*. Section 552.106(a) ordinarily applies only to persons with a responsibility to prepare information and proposals for a legislative body. *See Open Records Decision No. 460 at 1 (1987)*. The purpose of this exception is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body; therefore, section 552.106 encompasses only policy judgments, recommendations, and proposals involved in the preparation of proposed legislation and does not except purely factual information from public disclosure. *Id.* at 2. This office has concluded that the drafts of municipal ordinances and resolutions which reflect policy judgments, recommendations, and proposals are excepted by section 552.106. *Open Records Decision No. 248 (1980)*.

You state the information you marked reflects “the deliberative process of the [c]ity as it moves toward enacting legislation in the form of municipal ordinances.” However, the information you seek to withhold on the basis of section 552.106 pertains to the handling of a specific complaint and the business relationships of Freetail Brewing and Alamo Beer with

¹As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

the city. You do not provide any explanation for how this information consists of policy judgments, advice, opinions, or recommendations pertaining to the city's preparation or evaluation of any proposed litigation. We therefore conclude the city may not withhold any of the remaining information under section 552.106 of the Government Code.

Section 552.107 of the Government Code protects information coming within the attorney-client privilege. Gov't Code § 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, 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 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 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 only to communications between or among clients, client representatives, lawyers, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. TEX. R. EVID. 503(b)(1). 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.*, 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, 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).

Upon review, we have marked the portion of the remaining information which is a communication between and among parties identified as privileged within the submitted information. You state this communication was made for the purpose of facilitating the

rendition of legal services to the city. We understand this communication was intended to be and has remained confidential. Consequently, we find the city may withhold the communication we marked under section 552.107(1) of the Government Code.² However, upon review, the remaining information you marked reflects it was communicated with a representative of Freetail Brewing. You have not provided any arguments explaining how Freetail Brewing is privileged with respect to the communications at issue. See Gov't Code § 552.301(e)(1)(A); ORD 676 at 6-7. Thus, because you have not explained how this remaining information satisfies the requirements of the attorney-client privilege, it may not be withheld under section 552.107.

Section 552.111 of the Government Code 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 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).

²As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

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 state the information you have marked under section 552.111 consists of correspondence between city departments working on behalf of the city. You generally state this information consists of the advice, opinion, and recommendations the city uses to aid in its policymaking decisions. Upon review, we find the information we have marked consists of advice, opinion, or recommendations of a city employee regarding a policymaking matter, and the city may withhold this information under section 552.111 of the Government Code.³ However, you have not demonstrated how the remaining information you marked under section 552.111 constitutes advice, opinion, or recommendations regarding city policymaking. Additionally, a portion of this information consists of communications with third parties. You have not identified the third parties at issue or explained the nature of the relationship between the city and those third parties; thus, we find you have failed to establish a privity of interest with those third parties for purposes of section 552.111. Accordingly, the city may not withhold any of the remaining information you have marked under section 552.111 of the Government Code.

Section 552.131 of the Government Code provides as follows:

(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.

³As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

(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) protects the proprietary interests of third parties that have provided information to governmental bodies, not the interests of governmental bodies themselves. In this instance, there has been no demonstration by a third party that any of the information at issue constitutes a trade secret or that release of any of the information at issue would cause a third party substantial competitive harm. *See generally* Open Records Decision Nos. 552 at 5 (1990) (attorney general will accept private person's claim under section 552.110(a) if person establishes *prima facie* case for trade secret exception, and no one submits argument that rebuts claim as matter of law), 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm). We therefore conclude the city may not withhold any of the information at issue under section 552.131(a) of the Government Code.

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. You state the information you marked consists of economic development information the city may use in negotiations. In support of this general statement, you note "the [c]ity is still seeking alternatives to address economic short-comings and to revitalize particular areas of the [c]ity." Although the information you marked identifies Freetail Brewing and Alamo Beer as potential business prospects with the city, this information does not contain any references to financial or other incentives being offered by the city. Therefore, because you have not explained the applicability of section 552.131(b), none of the information at issue may be withheld on that basis. *See* Gov't Code § 552.301(e)(1)(A).

The remaining information includes private e-mail addresses that may be subject to section 552.137 of the Government Code.⁴ 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). The e-mail addresses we marked do not appear to be excepted under subsection (c). Accordingly, unless the owners of these e-mail addresses have consented to

⁴The 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).

their release, the city must withhold the e-mail addresses we marked under section 552.137 of the Government Code.⁵

In summary, the city may withhold the information we marked under section 552.105 of the Government Code. The city may withhold the information we have marked under sections 552.107(1) and 552.111 of the Government Code. The city must withhold the e-mail addresses we marked under section 552.137 of the Government Code unless the owners of these e-mail addresses have consented to their release. 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.

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,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/akg

Ref: ID# 431763

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁵We note Open Records Decision No. 684 (2009) is 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.