



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 14, 2011

Mr. Michael S. Copeland
Utility Attorney
City of Denton
215 East McKinney
Denton, Texas 76201

OR2011-14957

Dear Mr. Copeland:

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# 432574.

The City of Denton (the "city") received a request for (1) documents showing the location or addresses of certain properties; and (2) all reports or correspondence sent or received by seven named individuals regarding a certain project during a specified time.¹ You indicate information related to the first category of the request has been released to the requestor. You claim the remaining requested information is excepted from disclosure pursuant to sections 552.105 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹We note the city sought and received clarification with respect to the second category of information requested. *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).

²We assume that the "representative sample" of information 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.

Initially, we note the city states it made available for public inspection maps of possible routes for the projected electric transmission line. Thus, some of the information at issue may have been previously released to the public. Section 552.007 of the Government Code provides that if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Whether the information at issue was previously released to the public is a question of fact that this office cannot resolve through the open records ruling process. *See* Open Records Decision Nos. 554 (1990), 552 (1990). Under these circumstances, we must rule conditionally. Although you seek to withhold the information at issue under sections 552.105 and 552.111 of the Government Code, those sections do not prohibit the release of information or make it confidential under law. *See* Gov't Code § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 564 (1990) (statutory predecessor to Gov't Code § 552.105 subject to waiver), 470 at 7 (1987) (statutory predecessor to Gov't Code § 552.111 subject to waiver). Thus, to the extent the city has previously released the information at issue, the city has waived its claims under sections 552.105 and 552.111 of the Government Code and may not withhold it on the basis of those exceptions. However, to the extent the information at issue has not been previously released, we will address the city's claims under sections 552.105 and 552.111.

You assert the submitted information is excepted from public disclosure based on the attorney work product privilege. Section 552.111 of the Government Code 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 that 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 that:

(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 state the submitted information consists of communications between the city’s attorneys, staff, representatives, and consultants. You further state the city faces a substantial probability of condemnation litigation regarding properties discussed in the information at issue. However, you also state a route for the proposed electric transmission line has not been selected. We note the submitted information does not concern the acquisition of the discussed properties, but consists of e-mails regarding proposed locations for the electric transmission line, how to present certain information to the public, and the hiring of consultants for this project. In Open Records Decision No. 677, our office held information created in a governmental body’s ordinary course of business may be considered to have been prepared in anticipation of litigation, and thus constitutes attorney work product, if the governmental body explains to this office the primary motivating purpose for the routine practice that gave rise to the information. ORD 677 at 8; *see also Brotherton*, 851 S.W.2d at 206. You have not explained that the city’s primary motivating purpose for the creation of this information was anticipation of litigation. Thus, we find you have not demonstrated the submitted information consists of material prepared or mental impressions developed in anticipation of litigation or for trial. Accordingly, the city may not withhold the submitted information under section 552.111 of the Government Code on the basis of the work-product privilege.

You also state the information is excepted from disclosure under the deliberative privilege process encompassed by 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; *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*, 22 S.W.3d 351 (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 has also 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.

You state the information at issue consists of the advice, opinions, and recommendations of district employees involving policymaking matters. You explain the policymaking matters at issue pertain to capital improvements regarding infrastructure of the city's electric utility, including the relocation of an electric transmission line within the city. Based on your representations, we find the city has demonstrated some of the information at issue consists of advice, opinions, and recommendations pertaining to the policymaking functions of the city. This information, which we have marked, may be withheld under the deliberative process privilege of section 552.111 of the Government Code. We further find you have demonstrated portions of the remaining information at issue, which we have marked, consist of draft documentation pertaining to the policymaking functions of the city. However, you do not explain whether the marked draft documents will be released to the public in their final form. Accordingly, to the extent the marked draft documents will be released to the public in their final form, the city may withhold this information under section 552.111 of the Government Code. Conversely, to the extent the city will not release the marked draft

documents to the public in their final form, the information may not be withheld in its entirety under section 552.111 of the Government Code. However, we find you have failed to show how the remaining information consists of advice, opinions, or recommendations on the policymaking matters of the city. Accordingly, the remaining information may not be withheld under section 552.111 of the Government Code.

You claim some of the remaining information is excepted from public disclosure under section 552.105 of the Government Code. Section 552.105 excepts from disclosure information relating to “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(2). Section 552.105 is designed to protect a governmental body’s planning and negotiating position with respect to particular transactions. Open Records Decision Nos. 564 at 2 (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. But the protection offered by section 552.105 is not limited solely to transactions not yet finalized. This office has concluded that information about specific parcels of land obtained in advance of other parcels to be acquired for the same project could be withheld where release of the information would harm the governmental body’s negotiating position with respect to the remaining parcels. *See* ORD 564 at 2. 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.’” ORD 357 at 3 (quoting Open Records Decision No. 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 some of the remaining information relates to the location and price of real property. You contend release of this information would potentially damage the city’s negotiating position with respect to the future acquisition of real property for the project at issue. We note, however, you state the city “placed a map of [the] alternate routes for the public’s inspection and information on the [city’s] website.” Upon review, we find you have failed to demonstrate the information at issue is excepted from disclosure under section 552.105(1) of the Government Code. Further, the submitted information does not contain pricing information for section 552.105(2) purposes. We therefore conclude the city may not withhold any of the remaining information under section 552.105 of the Government Code.

We note some of the remaining information may be subject to section 552.117 of the Government Code.³ Section 552.117(a)(1) excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former official or employee of a governmental body who timely requests this information be kept confidential under section 552.024. *See* Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)(1)). Additionally, section 552.117 encompasses personal cellular telephone numbers, provided the cellular telephone service is paid for by the employee with his or her own funds. *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 item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Therefore, to the extent the employees whose cellular telephone numbers we marked timely requested confidentiality for this information under section 552.024 and the cellular telephone services are not paid for by the city, the city must withhold this information under section 552.117(a)(1). To the extent these employees did not so elect or the cellular telephone services are paid for by the city, the information we marked may not be withheld under section 552.117(a)(1).

Next, we note some of the remaining information is subject to section 552.137 of the Government Code, which 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* Gov't Code § 552.137(a)-(c). The e-mail addresses at issue are not excluded by subsection (c). Therefore, the city must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.⁴

In summary, to the extent the city has previously released the information at issue, the city must release the information at issue to the requestor. To the extent the information at issue has not been previously released, the city may withhold the information we have marked under section 552.111 of the Government Code, including the draft documents we have

³The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁴This office 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.

marked, to the extent the marked draft documents will be released to the public in their final form. The city must withhold (1) the cellular telephone numbers we have marked under section 552.117(a)(1) of the Government Code, to the extent the employees timely requested confidentiality for this information under section 552.024 and the cellular telephone services are not paid for by the city; and (2) the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. 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,



Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/dls

Ref: ID# 432574

Enc. Submitted documents

c: Requestor
(w/o enclosures)