



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 13, 2012

Ms. Tiffany N. Evans  
Assistant City Attorney  
City of Houston  
P.O. Box 368  
Houston, Texas 77001-0368

OR2012-10886

Dear Ms. Evans:

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# 459610 (GC No. 19611).

The City of Houston (the "city") received a request for information "relating in any way to the creation or operation of an economic development program for the Westchase area under Chapter 380 of the Texas Local Government Code." You claim that the submitted information is excepted from disclosure under sections 552.111 and 552.131 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 a portion of the submitted information, which we have marked, is not responsive to the request because it does not pertain to "the creation or operation of an economic development program for the Westchase area[.]" This ruling does not address the

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<sup>1</sup>We assume 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 those records contain substantially different types of information than those submitted to this office.

public availability of non-responsive information, and the city need not release this information in response to this request.

Section 552.111 of the Government Code excepts from public disclosure “[a]n 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).

We note section 552.111 can encompass a governmental body’s communications with a third-party, including a consultant or other party with which the governmental body shares a common deliberative process or 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). In order 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 that 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 information you have marked under section 552.111 reflects the opinions, advice, and recommendations of city employees regarding policy issues related to the economic development negotiations between the city and Westchase District. Based upon your representations and our review of the information at issue, we agree that the information we have marked is excepted from disclosure under section 552.111 of the Government Code and the city may withhold this information from disclosure on that basis.<sup>2</sup> However, we find the remaining information at issue consists of communications between city employees and representatives of Westchase District. We note the communications with Westchase District relate to contract negotiations between the city and Westchase District. Because the city and Westchase District were negotiating a contract, their interests were adverse. Thus, the city and Westchase District did not share a privity of interest or common deliberative process with regard to this information. Consequently, the remaining information at issue is not excepted under the deliberative process privilege and may not be withheld under section 552.111 of the Government Code.

Section 552.131 of the Government Code provides, in part, 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.

(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].

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<sup>2</sup>As our ruling is dispositive for this information, we need not address your remaining argument against its disclosure.

Gov't Code § 552.131(a)-(b). You assert the remaining information consists of economic development negotiations involving the city and Westchase District. You state no decision has been made on incentives which may be offered to this business prospect. We note, however, that Westchase District is a governmental agency and political subdivision under Texas law, located in Harris County. *See* Tex. Spec. Dist. Code § 3802.002. Therefore, after reviewing the remaining responsive information, we find you have not demonstrated how the remaining responsive information consists of information about a financial or other incentive being offered to a business prospect for purposes of section 552.131. Consequently, none of the remaining responsive information may be withheld under section 552.131(b).

We note the remaining responsive information contains information subject to section 552.137 of the Government Code, which provides that "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its public disclosure.<sup>3</sup> Gov't Code § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). The e-mail addresses we have marked are not of the type specifically excluded by section 552.137(c). Accordingly, the e-mail addresses we have marked must be withheld under section 552.137 of the Government Code, unless the owners affirmatively consent to their disclosure.<sup>4</sup>

In summary, the city may withhold the information we have marked under section 552.111 of the Government Code. The e-mail addresses we have marked must be withheld under section 552.137 of the Government Code, unless the owners affirmatively consent to their disclosure. As no further exceptions to disclosure are raised, 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](http://www.oag.state.tx.us/open/index_orl.php),

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<sup>3</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>4</sup>We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold certain 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.

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,

A handwritten signature in black ink that reads "Sean Opperman". The signature is written in a cursive, flowing style.

Sean Opperman  
Assistant Attorney General  
Open Records Division

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SO/som

Ref: ID# 459610

Enc. Submitted documents

c: Requestor  
(w/o enclosures)