



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 16, 2012

Ms. LeAnne Lundy
For Houston Housing Authority
Rogers, Morris, & Grover, L.L.P.
5718 Westheimer Road, Suite 1200
Houston, Texas 77057

OR2012-10932

Dear Ms. Lundy:

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# 458838.

The Houston Housing Authority (the "authority"), which you represent, received a request for the following: 1) all e-mails sent to or from a named individual during a specified time period; 2) the internet browsing history for the same named individual for a specified time period; and 3) the named individual's Outlook calendar for a specified time period. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.105, 552.111, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

The district states it sought but did not receive a response to its request for clarification. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). We note a governmental body has a duty to make a good-faith effort to relate a request for information to information the governmental body holds. Open Records Decision No. 561 (1990). In this case, as you have submitted information responsive to the request for which you sought clarification and have raised exceptions to disclosure for this information, we will address the applicability of the claimed exceptions to this 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. Section 552.105 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 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 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 Exhibit B relates to the authority's planning and negotiating positions regarding the purchase of real property. You state the authority has made no public announcement regarding the purchase of the properties at issue. You argue disclosure of the information at issue could adversely affect the authority's planning and negotiation position with regard to potential property purchases. Based on your representations and our review, we conclude the authority may withhold Exhibit B under section 552.105 of the Government Code.

Section 552.111 of the Government Code excepts from 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. This exception 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 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. 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. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); 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 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.

Section 552.111 also can encompass communications between a governmental body and a third-party, including a consultant or other party with a privity of interest. See ORD 561 at 9 (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 Exhibits C and D constitute correspondence between authority employees and authority council members relating to policymaking. Further, you indicate portions of the

submitted information consist of draft documents. However, you do not state whether the submitted draft documents, which we have marked, will be released to the public in their final form. Thus, to the extent the marked draft documents will be released to the public in their final form, the authority may withhold the marked draft documents in their entirety under section 552.111 of the Government Code. If the submitted draft documents will not be released to the public in their final form, then the authority may not withhold them in their entirety under section 552.111 of the Government Code. Additionally, we find portions of the submitted communications in Exhibit D consist of advice, opinions, and recommendations related to policymaking. Accordingly, the authority may withhold the information we have marked in the submitted correspondence under section 552.111 of the Government Code. However, we find the remaining information at issue consists of either administrative and personnel matters or information that is purely factual in nature. Therefore, you have failed to demonstrate how the deliberative process privilege applies to the remaining information at issue. Consequently, the authority may not withhold any of the remaining information at issue under section 552.111 of the Government Code.

You seek to withhold a computer password. Section 552.139 of the Government Code provides that information is excepted from required public disclosure “if it is information that relates to computer network security, to restricted information under Section 2059.055, or to the design, operation, or defense of a computer network.”¹ *Id.* § 552.139(a). Upon review, we find the computer password we have marked in Exhibit E must be withheld under section 552.139 of the Government Code.²

In summary, the authority may withhold Exhibit B under section 552.105 of the Government Code. To the extent the marked draft documents will be released to the public in their final form, the authority may withhold the marked draft documents in their entirety, as well as the additional information we have marked in the submitted correspondence, under section 552.111 of the Government Code. If the submitted draft documents will not be released to the public in their final form, then the authority may not withhold them in their entirety under section 552.111 of the Government Code. The authority must withhold the computer password we have marked under section 552.139 of the Government Code. 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.

¹The 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).

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

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,

A handwritten signature in black ink, appearing to read 'VB', with a long horizontal flourish extending to the right.

Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/dls

Ref: ID# 458838

Enc. Submitted documents

c: Requestor
(w/o enclosures)