



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 16, 2013

Mr. David V. Overcash
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OR2013-08159

Dear Mr. Overcash:

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# 487530 (Town's File No. C10001PIR20130225-01).

The Town of Fairview (the "town"), which you represent, received a request for eighteen categories of information related to certain financial obligations and economic development plans of the town. You state the town has released or will release some information to the requestor. You claim the remaining requested information is excepted from disclosure under sections 552.107, 552.111, and 552.131 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information, a portion of which consists of a representative sample.¹

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

¹We assume the "representative sample" of records 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 that submitted to this office.

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body; [and]

...

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate[.]

Gov't Code § 552.022(a)(3), (5). The submitted information contains amendments to an economic development agreement that are subject to section 552.022(a)(3) and budget information that is subject to section 552.022(a)(5). Although you raise sections 552.107(1), 552.111, and 552.131(b) of the Government Code, these sections are discretionary exceptions that protect a governmental body's interests and do not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 6 (2002) (attorney-client privilege under section 552.107 may be waived), 470 at 7 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver), 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the town may not withhold the information subject to section 552.022 under sections 552.107(1), 552.111, or 552.131(b). However, we note the Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider your assertions of the attorney-client privilege under rule 503 of the Texas Rules of Evidence for a portion of the information subject to section 552.022.

Rule 503 of the Texas Rules of Evidence encompasses the attorney-client privilege and provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is “confidential” if 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). Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

Although you assert the attorney-client privilege for the amendments to the economic development agreement, upon review, we find these communications are with non-privileged parties. Thus, you have failed to demonstrate the applicability of the attorney-client privilege to the amendments and the town may not withhold this information under rule 503 of the Texas Rules of Evidence.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. Gov’t Code § 552.107. The elements of the privilege under section 552.107(1) are the same as those discussed for rule 503. 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. *See* ORD 676 at 6-7. 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 some of the information consists of confidential communications between town staff and outside legal counsel for the purpose of facilitating the rendition of legal services. You state these communications were intended to be confidential, and have remained confidential. Based on your representations and our review, we find the town has demonstrated the applicability of the attorney-client privilege to the information at issue, which we have marked and, therefore, may withhold this information under section 552.107 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); see also 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 only those internal communications that consist of advice, opinions, recommendations 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. See *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).

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 *id.* 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 some of the remaining information at issue reflects the internal communications, discussions, analyses, and recommendations of town staff, officials, and financial advisors regarding policymaking issues of the town. You explain this information pertains to hypothetical scenario projections, valuation estimates, and budget approximations. Based on your representations and our review, we conclude the town may withhold some of the information at issue, which we have marked, under section 552.111 of

the Government Code. However, we note some of the remaining information constitutes communications with third parties regarding contract negotiations. Because the town and these parties were negotiating a contract, their interests were adverse. Thus, the town and the third parties did not share a privity of interest or common deliberative process with regard to this information. Additionally, we find the remaining discussions between only town staff, financial advisors, and officials do not consist of advice, opinion, or recommendations, but rather consist of general administrative and purely factual information, or the communications do not pertain to policymaking. Thus, we find you have not demonstrated how these remaining communications consist of advice, opinions, or recommendations pertaining to policymaking matters of the town. Consequently, the remaining information is not excepted under the deliberative process privilege, and the town may not withhold it under section 552.111 of the Government Code.

Next, you raise section 552.131 of the Government Code. Section 552.131 relates to economic development information and provides in part:

(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].

Gov't Code § 552.131(a)-(b). 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. *See id.* § 552.131(b). In March of 2006, the town entered into a long-term infrastructure reimbursement agreement with the Herring Group. You state the town is now considering a 'buyout' of the reimbursement agreement currently in place, which would speed capital recovery that would not otherwise be reimbursed to the Herring Group for a period of more than 20 years. Upon review, we find you have not demonstrated how the information at issue reveals financial or other incentives that are being offered to a business prospect. Thus, we conclude the town may not withhold any of the information at issue under section 552.131(b) of the Government Code.

We note the remaining information contains a town employee's cellular telephone number.² Section 552.117 of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former 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. Information may not be withheld under section 552.117(a)(1) on behalf of an individual who is not a current or former employee who timely requested confidentiality under section 552.024. We note section 552.117 also encompasses a personal cellular telephone number, unless the cellular telephone service is paid for by a governmental body. *See* Open Records Decision No. 506 at 5-7 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Therefore, to the extent the employee whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the town must withhold the employee's cellular telephone number under section 552.117(a)(1) if the employee pays for the cellular telephone service with personal funds. Conversely, to the extent the individual at issue did not make a timely election under section 552.024 or the cellular telephone service is not paid for with personal funds, the town may not withhold the cellular telephone number at issue under section 552.117(a)(1) of the Government Code.

We further note a portion 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). Gov't Code § 552.137(a)-(c). The e-mail addresses we have marked are not a type specifically excluded by section 552.137(c). Accordingly, the town must withhold these e-mail addresses under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release under section 552.137(b).³

In summary, the town: (1) may withhold the information we have marked under section 552.107(1) of the Government Code; (2) may withhold the information we have

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

³Open 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 a decision under the Act.

marked under section 552.111 of the Government Code; (3) must withhold the cellular telephone number we have marked under section 552.117(a)(1) of the Government Code to the extent it pertains to a current or former employee who timely requested confidentiality under section 552.024 and the cellular telephone service is paid for with personal funds; and (4) must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners have affirmatively consented 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,



Eamon D. Briggs
Assistant Attorney General
Open Records Division

EDB/som

Ref: ID# 487530

Enc. Submitted documents

c: Requestor
(w/o enclosures)