



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 17, 2013

Ms. LeAnn M. Quinn
City Secretary
City of Cedar Park
450 Cypress Creek Road
Cedar Park, Texas 78613

OR2013-10260

Dear Ms. Quinn:

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# 490499 (Cedar Park PIR #13-436).

The City of Cedar Park (the "city") received a request for all records created or received during a specified time period related to the potential development of a Schlitterbahn water park in or near the city.¹ You state the city will release some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.110, 552.111, 552.117, 552.131, and 552.137 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

¹We note the city sought and received clarification of the information requested. See Gov't Code § 552.222 (providing 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).

²Although you raise section 552.024 of the Government Code as an exception to disclosure, we understand you to claim section 552.117 of the Government Code, as this is the proper exception for the substance of your argument. Section 552.024 authorizes a governmental body to withhold information subject to section 552.117 without requesting a decision from this office if the current or former employee or official chooses not to allow public access to the information. See Gov't Code § 552.024(c).

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses section 551.071 of the Government Code, which permits a governmental body to consult with its attorney in a closed meeting. *Id.* § 551.071. You assert the information in Exhibit G is confidential under section 551.071 of the Government Code. However, this provision does not make information confidential for purposes of section 552.101 of the Government Code. *See* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Thus, the city may not withhold any of the information in Exhibit G under section 552.101 in conjunction with section 551.071 of the Government Code.

Section 552.131 of the Government Code 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(a) only 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. We, therefore, conclude the city may not withhold any of the submitted information under section 552.131(a).

Section 552.131(b) of the Government Code protects information about a financial or other incentive that is being offered to a business prospect by a governmental body or another

person. You assert the information at issue contains information “pertaining to economic development negotiations in relation to the development of a water park resort the [c]ity seeks to locate within the [c]ity limits.” Upon review, we find the information we have marked consists of information about a financial or other incentive being offered to a business prospect. Thus, the city may withhold the information we have marked under section 552.131(b). However, you have failed to demonstrate any of the remaining information consists of information about a financial or other incentive being offered to a business prospect. Consequently, no portion of the remaining information may be withheld under section 552.131(b).

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. 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* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate 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. *See* 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. *See In re Tex. 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 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. *See* TEX. R. EVID. 503(b)(1)(A)-(E). 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.* 503(b)(1), 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. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain 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).

You claim the information in Exhibit I is protected by section 552.107(1) of the Government Code. You state the information in Exhibit I consists of communications involving city attorneys and city staff. You indicate the communications were made for the purpose of facilitating the rendition of professional legal services to the city and these communications have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information we have marked. Thus, the city may generally withhold the information we have marked under section 552.107(1) of the Government Code. We note, however, one of the e-mail strings includes e-mails received from or sent to non-privileged parties. Furthermore, if the e-mails received from or sent to non-privileged parties are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, if these non-privileged e-mails, which we have marked, are maintained by the city separate and apart from the otherwise privileged e-mail strings in which they appear, then the city may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code. Further, some of the communications are with individuals you have not demonstrated are privileged parties. Thus, we find you have not demonstrated the remaining information reveals privileged attorney-client communications for the purposes of section 552.107(1). Thus, the remaining information in Exhibit I may not be withheld on that basis.

Next, you argue the information in Exhibit H is excepted from disclosure under section 552.110 of the Government Code. We note, however, section 552.110 is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we will not consider the city's arguments under section 552.110 on the basis of the city's interests.

You assert the remaining information in Exhibit I is excepted from disclosure under section 552.111. Section 552.111 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 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 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.

You state the remaining information in Exhibit I consists of advice, opinions, and recommendations relating to the city's policy. You also state Exhibit I contains draft documents. You indicate the draft documents will be released to the public in final form. Upon review, however, we find the remaining information in Exhibit I was received from third parties who you have failed to demonstrate share a privity of interest or common deliberative process with the city. Thus, we find you have failed to demonstrate any portion of the remaining information in Exhibit I is excepted under section 552.111. Accordingly, no portion of the remaining information may be withheld under section 552.111 of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See Gov't Code § 552.117(a)(1)*. 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 be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official 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. You inform us the individual at issue timely requested the information be kept confidential under section 552.024. Therefore, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code. However, you have failed to demonstrate the remaining information you have marked is subject to section 552.117. Thus, the city may not withhold the remaining information you have marked under section 552.117.

Section 552.137 of the Government Code 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)*. We note subsection 552.137(c) provides subsection 552.137(a) does not apply to an e-mail address provided to a governmental body by a person who has or seeks a contractual relationship with the governmental body or by the contractor's agent. *Id.* § 552.137(c)(1)-(2). Upon review, you have failed to demonstrate the remaining information you have marked is subject to section 552.137. Thus, the remaining information you have marked may not be withheld under section 552.137.

In summary, the city may withhold the information we have marked under section 552.131 of the Government Code. The city may generally withhold the information we have marked in Exhibit I under section 552.107(1) of the Government Code. However, if the non-privileged e-mails we have marked are maintained by the city separate and apart from the otherwise privileged e-mail strings in which they appear, then the city may not withhold the non-privileged e-mails under section 552.107(1) of the Government Code. The city must withhold the information we have marked under section 552.117(a)(1) 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.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



David L. Wheelus
Assistant Attorney General
Open Records Division

DLW/dls

Ref: ID# 490499

Enc. Submitted documents

c: Requestor
(w/o enclosures)