



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 1, 2013

Mr. David V. Overcash
Counsel for the Town of Fairview
Wolfe, Tidwell & McCoy, LLP
2591 Dallas Parkway, Suite 205
Frisco, Texas 75034

OR2013-11225

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# 491738 (Town File No. C10001PIR2013408-01).

The Town of Fairview (the "town"), which you represent, received a request for documents provided to or created by the town's Economic Development Corporation and Community Development Corporation relating to Noah's Operations Fairview TX, LLC ("Noah"), including meeting minutes; information pertaining to communications between three named town employees, a named individual, and any Noah representative or entity related to Noah; and information pertaining to payments made to or received from Noah or any related entity.¹ You state the town has released some of the requested information. You claim some of the submitted information is excepted from disclosure under sections 552.106, 552.107, 552.111 and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

¹We note the town received clarification regarding this request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *see 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).

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). 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. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that 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. 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. *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 a 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 to only communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). 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 to only a confidential communication, *id.*, 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. *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 that 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 assert the information you have marked constitutes or documents communications between town employees and officials, outside legal counsel for the town, and contractors hired by the town that were made for the purpose of facilitating the rendition of professional legal services to the town. You also state the communications at issue were intended to be confidential and have remained confidential. Upon review, we find you have demonstrated most of the information you have marked constitutes or documents privileged attorney-client communications. However, the information we have marked does not consist of communications with an attorney or was disclosed to parties you have not established are privileged parties. Thus, this information, which we have marked for release, may not be withheld under section 552.107(1). However, the town may generally withhold the

remaining information you have marked under section 552.107(1) of the Government Code. We note, however, some of this information 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 town separate and apart from the otherwise privileged e-mail strings in which they appear, then the town may not withhold these non-privileged e-mails under section 552.107(1) 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, orig. proceeding); 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, orig. proceeding). 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. ORD 615 at 5; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). 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). However, 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. ORD 615 at 5-6; *see also Dallas Morning News*, 22 S.W.3d at 364 (section 552.111 not applicable to personnel-related communications that did not involve policymaking).

Further, section 552.111 does not generally except from disclosure facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 157; 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 Nos. 631 at 2 (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body's consultants). 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.

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 some of the information you have marked consists of communications between town employees and officials, outside legal counsel for the town, and contractors hired by the town. You state these communications pertain to policy issues of the town. You also state some of the information you have marked consists of draft documents. However, you do not state whether the draft documents will be released to the public in their final form. Thus, if the draft documents we have marked will be released in their final forms, the town may withhold them in their entirety under section 552.111. However, if the draft documents will not be released in their final forms, the town may not withhold them in their entireties on the basis of section 552.111. In this instance, we find the information we have marked consists of advice, opinions, and recommendations pertaining to the policymaking matters of the town. Accordingly, if the draft documents will not be released in their final form, the town may withhold the information we have marked within the draft documents under section 552.111. Further, we conclude the town may withhold the additional information we have marked under section 552.111 of the Government Code. However, the remaining information at issue either consists of factual information, consists of internal administrative matters that do not rise to the level of policymaking, or was communicated with parties you have not identified as sharing a privity of interest or common deliberative process with the town. Therefore, we conclude you have failed to demonstrate the remaining information at issue constitutes internal communications containing advice, recommendations, or opinions

reflecting the policymaking processes of the town. Consequently, the town may not withhold any of the remaining information under section 552.111 of the Government Code.

Section 552.106 of the Government Code excepts from disclosure “[a] draft or working paper involved in the preparation of proposed legislation[.]” Gov’t Code § 552.106(a). Section 552.106 of the Government Code resembles section 552.111 in that both exceptions protect advice, opinion, and recommendation on policy matters in order to encourage frank discussion during the policymaking process. *See* Open Records Decision No. 460 at 2 (1987). However, section 552.106 applies specifically to the legislative process and is narrower than section 552.111. *Id.* Therefore, section 552.106 is applicable only to the policy judgments, recommendations, and proposals of persons who are involved in the preparation of proposed legislation and who have an official responsibility to provide such information to members of the legislative body. *Id.* Section 552.106 does not protect purely factual information from public disclosure. *See id.*; *see also* Open Records Decision No. 344 at 3-4 (1982) (for purposes of statutory predecessor, factual information prepared by State Property Tax Board did not reflect policy judgments, recommendations, or proposals concerning drafting of legislation). Upon review of your arguments, we find you have not demonstrated how any of the remaining information at issue constitutes advice, opinion, analysis, or recommendations for purposes of section 552.106. Accordingly, the town may not withhold any of the remaining information under section 552.106 of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, emergency contact information, 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.² *See* Gov’t Code § 552.117(a); Open Records Decision No. 622 (1994). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *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 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. We have marked the personal information of a town employee and town official. If the employee and official whose personal information is at issue timely elected to keep their information confidential pursuant to section 552.024, the town must withhold the information we have marked under section 552.117(a)(1). The town may not withhold this information under section 552.117(a)(1) if the employee or official did not timely elect to keep their information confidential pursuant to section 552.024.

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).

Section 552.136 of the Government Code provides as follows:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. Upon review, we find the account information and insurance policy numbers we have marked consist of access device numbers subject to section 552.136. Accordingly, the town must withhold the information we have marked under section 552.136 of the Government Code. However, you have failed to explain how the remaining information you have marked consists of access device numbers for the purposes of section 552.136. Thus, the town may not withhold any of the remaining information under section 552.136 of the Government Code.

We note some of the remaining information consists of personal e-mail addresses subject to section 552.137 of the Government Code. Section 552.137 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 id.* § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, or an e-mail address maintained by a governmental entity for one of its officials or employees. We have marked a representative sample of e-mail addresses of members of the public that the town must withhold under section 552.137 of the Government Code, unless the owners of the addresses affirmatively consent to their release.

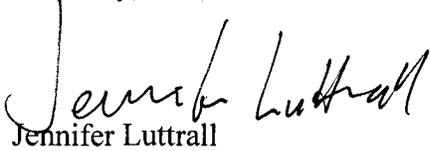
In summary, except for the information we have marked for release, the town may generally withhold the information you have marked under section 552.107(1) of the Government Code; however, to the extent the non-privileged communications we have marked exist separate and apart from the otherwise privileged e-mail strings in which they appear, they may not be withheld under section 552.107(1) of the Government Code. If the draft

documents we have marked will be released in their final forms, the town may withhold them in their entirety under section 552.111 of the Government Code. The town may withhold the remaining information we have marked under section 552.111 of the Government Code. If the employee and official whose personal information is at issue timely elected to keep their information confidential pursuant to section 552.024 of the Government Code, the town must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The town must withhold the information we have marked under section 552.136 of the Government Code. The town must withhold the e-mail addresses of members of the public, a representative sample of which we have marked, under section 552.137 of the Government Code, unless the owners of the addresses affirmatively consent to their release. 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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/som

Ref: ID# 491738

Enc. Submitted documents

c: Requestor
(w/o enclosures)