



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 18, 2014

Mr. Ray Rodriguez
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR2013-21140A

Dear Mr. Rodriguez:

This office issued Open Records Letter No. 2013-21140 (2013) on December 5, 2013. We have examined this ruling and determined Open Records Letter No. 2013-21140 needs additional clarification. Consequently, this decision serves as the clarified ruling and is a substitute for Open Records Letter No. 2013-21140. *See generally* Gov't Code § 552.011 (providing Office of the Attorney General may issue a decision to maintain uniformity in application, operation, and interpretation of the Public Information Act (the "Act")).

The City of San Antonio (the "city") received a request for all documentation from the city manager's office that included a specified word for the months of June, 2013, July, 2013, and August, 2013. You claim portions of the submitted information are excepted from disclosure under sections 552.105, 552.106, 552.111, and 552.131 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information may be the subject of pending litigation before the Texas Supreme Court in the case of *The Boeing Co. & The Greater Kelly Dev. Auth. v. Abbott*, No. 12-1007 (Tex.). Therefore, to the extent any of the submitted information is at issue in *The Boeing Co. & The Greater Kelly Dev. Auth. v. Abbott*, we do not address the public availability of such information, and will allow the Texas Supreme Court to resolve the issue of whether and to what extent any such information must be released to the public.

¹Although you initially raised sections 552.101, 552.107 and 552.110 of the Government Code, you make no arguments to support these exceptions. Therefore, we assume you have withdrawn your claim these sections apply to the submitted information. *See* Gov't Code § 552.301(e) (governmental body must provide comments stating why exceptions raised should apply to information requested).

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* Open Records Decision Nos. 615 at 5, 137 (1976) (discussing pre-decisional and post-decisional documents). 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 also has 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 recommendations 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 seek to withhold portions of the submitted information, which you have marked, under section 552.111 of the Government Code. You state this information consists of documents and correspondence for internal use to instigate discussions amongst the city staff for the purpose of aiding in creating recommendations to its governing body. You state the communications were made between city employees, as well as between city employees and representatives of the San Antonio Economic Development Foundation and the Port Authority of San Antonio, entities with whom you indicate the city shares a privity of interest. Based on your representations and our review, we find the city may withhold most of the information you have marked under section 552.111 of the Government Code.² However, we find the remaining information you have marked consists of information that is administrative or purely factual in nature. Accordingly, the city may not withhold any portion of the remaining information under section 552.111 of the Government Code.

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. We note this provision is designed to protect a governmental body's planning and negotiating position with regard to particular transactions. *See* Open Records Decision Nos. 564 at 2 (1990), 357 (1982), 310 (1982). Information that is 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 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.'" Open Records Decision Nos. 357 at 3, 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 the portions of the

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

remaining information you have marked relate to ongoing negotiations concerning the location of real property which will be used for a public purpose. However, we find no portion of the remaining information pertains to the location, appraisal, or purchase price of real or personal property for a public purpose. *See* ORD 310 (statutory predecessor to section 552.105 protects information relating to the location, appraisals, and purchase price of property to be purchased by governmental body for public purpose). Accordingly, the city may not withhold any of the remaining information under section 552.105 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 and the submitted information, we find you have not demonstrated how any of the remaining information constitutes advice, opinion, analysis, or recommendations for purposes of section 552.106. Accordingly, the city may not withhold any of the remaining information under section 552.106 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) protects the proprietary interests of third parties that have provided information to governmental bodies, not the interests of governmental bodies themselves. 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. *See* Open Records Decision Nos. 661 at 5-6 (1999), 552 at 5 (1990) (attorney general will accept private person's claim under section 552.110(a) of Government Code if person establishes *prima facie* case for trade secret exception, and no one submits argument that rebuts claim as matter of law). Thus, the city may not withhold any of the remaining information under section 552.131(a) of the Government Code.

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. Gov't Code § 552.131(b). You assert portions of the remaining information, which you have marked, relate to attracting, retaining, and expanding economic development prospects. You state release of the information you have marked may put the city in a disadvantageous position relative to competing municipalities. However, upon review of your representations and the remaining information, we find you have not demonstrated how any of the remaining information consists of information about a financial or other incentive being offered to a business prospect by the city. Consequently, the city may not withhold any of the remaining information under section 552.131(b).

Section 552.137 of the Government Code provides, "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 release or the e-mail address is specifically excluded by subsection (c).³ *Id.* § 552.137(a)-(c). Accordingly, the city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release.⁴

In summary, to the extent any of the submitted information is the subject of pending litigation in the case of *The Boeing Co. & The Greater Kelly Dev. Auth. v. Abbott*, we do not

³The 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).

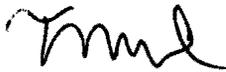
⁴Open Records Decision No. 684 (2009) serves as a previous determination to all governmental bodies permitting them to withhold certain categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without requesting a decision from this office.

address the public availability of such information and will allow the Texas Supreme Court to resolve the issue of whether any such information must be released to the public. With regard to the remaining information, with the exception of the information we have marked for release, the city may withhold the information you have marked under section 552.111 of the Government Code. The city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail 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,



Tim Neal
Assistant Attorney General
Open Records Division

TN/dls

Ref: ID# 520342

c: Requestor