ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 9, 2014

Ms. Erin A. Higginbotham
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Austin, Texas 78745-5320

OR2014-07933

Dear Ms. Higginbotham:

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# 522468 (City Ref. No. W001007-022114).

The City of Pflugerville (the "city"), which you represent, received a request for records relating to Travis County Emergency Services District 2 and financial records pertaining to a specified economic development project for a specified period of time.[1] You state the city will redact motor vehicle record information in accordance with section 552.130(c) of the Government Code.[2] You claim the submitted information is excepted from disclosure under sections 552.107, 552.111, 552.131, and 552.137 of the Government Code. We have

[1]We 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 when a governmental entity, acting in good faith, requests clarification or narrowing of unclear or overbroad request for public information, ten-day period to request attorney general ruling is measured from date request is clarified or narrowed).

[2]Section 552.130(c) of the Government Code allows a governmental body to redact the information described in section 552.130(a) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e).

considered the exceptions you claim and reviewed the submitted representative sample of information.[3]

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* 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 the information at issue constitutes or documents a communication. *Id.* at 7. Second, the governmental body must demonstrate the communication was 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). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* 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 only to a confidential communication, 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." *See 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 the communication has been maintained. Section 552.107(1) generally excepts an entire communication that a governmental body has demonstrated as being 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) (attorney-client privilege extends to entire communication, including facts contained therein).

You claim some of the submitted information consists of communications between counsel for the city and city employees and their representatives, which were made for the purpose of facilitating the rendition of professional legal services to the city. You inform us the

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[3]We 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.

communications have remained confidential and not been disclosed to non-privileged parties. Based on these representations and our review, we conclude the city may withhold the information we have marked under section 552.107(1) of the Government Code.[4]

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, writ ref'd n.r.e.); 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 a 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 may also 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

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

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 claim the remaining information consists of advice, opinion, and recommendations related to the city's policymaking. You inform us the parties involved in the communications are city employees, as well as an individual who has contracted with the city as a consultant to offer opinions on certain matters. Accordingly, we find you have established the individual shares a privity of interest with the city with respect to the information at issue. Upon review, we find the information we have marked consists of advice, opinion, and recommendations on the city's policymaking matters. Therefore, the city may withhold the information we have marked under section 552.111 of the Government Code.[5] However, we find the remaining information consists of general administrative information or information that is purely factual in nature. Therefore, the city may not withhold the remaining information under section 552.111 of the Government Code.

Section 552.131 of the Government Code provides as follows:

> (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.

Gov't Code § 552.131(a). 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. *See generally* Open Records Decision Nos. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm), 552 at 5 (1990) (attorney general will accept private person's claim under section 552.110(a) if person establishes *prima facie* case for trade secret exception, and no

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[5]As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

one submits argument that rebuts claim as matter of law). We therefore conclude that the city may not withhold any of the remaining information under section 552.131(a) of the Government Code.

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). The e-mail address at issue is not of a type excluded by subsection (c). Therefore, the city must withhold the personal e-mail address you have marked under section 552.137 of the Government Code, unless the owner of the e-mail address affirmatively consents to its public disclosure.[6]

We note portions of the remaining information may be subject to section 552.117 of the Government Code.[7] Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. *Id.* § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for the information is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, a governmental body must withhold information under section 552.117(a)(1) on behalf of a current or former official or employee only if the individual made a request for confidentiality under section 552.024 prior to the date on which the request for information was made. Accordingly, if the individual whose information is at issue timely requested confidentiality pursuant to section 552.024, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code. However, the city may not withhold this information under section 552.117(a)(1) if the individual whose information is at issue did not make a timely election to keep the information confidential.

In summary, the city may withhold the information we have marked under section 552.107(1) of the Government Code. The city may also withhold the information we have marked under section 552.111 of the Government Code. The city must withhold the personal e-mail address you have marked under section 552.137 of the Government Code, unless the owner of the e-mail address affirmatively consents to its public disclosure. The

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[6]We note Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

[7]The 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).

city must withhold the information we have marked under section 552.117(a)(1) of the Government Code, if the individual whose information is at issue timely requested confidentiality. The city must release the remaining information.

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,

Miriam A. Khalifa
Assistant Attorney General
Open Records Division

MAK/akg

Ref: ID# 522468

Enc. Submitted documents

c: Requestor
(w/o enclosures)