ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 30, 2014

Ms. Kelley Messer
Assistant City Attorney
Office of the City Attorney
City of Abilene
P.O. Box 60
Abilene, Texas 79604-0060

OR2014-09254

Dear Ms. Messer:

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# 524317.

The City of Abilene (the "city") received a request for final travel and entertainment expenses submitted for two named individuals over a specified period of time; e-mail correspondence between two named individuals over a specified period of time; two specified contracts; the current balance of the city's economic development fund built up from the half cent sales tax collected on the Development Corporation of Abilene; and the last twenty expenditures from that account. You state you have released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.104, 552.105, 552.107, 552.111, 552.131, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.[1]

[1]We assume that 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 that those records contain substantially different types of information than that submitted to this office.

Section 552.104 of the Government Code excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The purpose of section 552.104 is to protect the purchasing interests of a governmental body in competitive bidding situations where the governmental body wishes to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 (1991). Section 552.104 protects information from disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* Open Records Decision No. 463 (1987). Generally, section 552.104 does not except information pertaining to a completed bidding process for which a contract has been executed. *See* Open Records Decision No. 541 (1990). However, this office has determined in some circumstances section 552.104 may apply to information pertaining to an executed contract where the governmental body solicits bids for the same or similar goods or services on a recurring basis. *See id.* at 5.

You state Exhibit B2 pertains to e-mail discussions involving the request for proposal ("RFP") and request for qualifications ("RFQ") process in the search for a firm to develop a downtown hotel. You informs us the city "put out an RFP, extended the deadline, and did not receive responses." You further inform us that "[d]ue to the information received from some potential development groups, the city has now put out an RFQ in hopes to revise an RFP and distribute to the RFQ finalists." You also state the city's council "has not yet awarded a contract, and there is potential that [the city's council] might reject all of the proposals" and that if the "same project were to be re-issued, the release of this information would put the [c]ity at a disadvantage." Based on your representations, we conclude the city has demonstrated release of the information at issue would harm its interests in a competitive bidding situation. According, the city may withhold Exhibit B2 under section 552.104 of the Government Code until such time as a contract has been executed.[2] *See* Open Records Decision No. 170 at 2 (1977) (release of bids while negotiation of proposed contract is in progress would necessarily result in an advantage to certain bidders at the expense of others and could be detrimental to the public interest in the contract under negotiation).

Section 552.105 excepts from disclosure information relating to the following:

> (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

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

Decision Nos. 564 (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. A governmental body may withhold information that "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 Exhibit B3 pertains to a communication related to the purchase price and location of property the city intends to purchase for development purposes. You inform us there has been no formal announcement or award of a sale contract for the property. Thus, we understand you to argue the release of the information at issue would impair the city's planning and negotiating position with respect to the purchase price and location of the property at issue. We have no indication the city has failed to make such a determination in good faith. Based on your representations and our review, we conclude the city may withhold Exhibit B3 under section 552.105 of the Government Code.

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). 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.*, 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 state the information Exhibit B1 consists of communications between the city's attorneys and employees. You state these communications were made in furtherance of the rendition of professional legal services to the city. You further state these communications have been kept confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the city may withhold Exhibit B1 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, 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 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 that are 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).

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. We note a governmental body does not share a privity of interest with a third party when the governmental body and the third party are involved in contract negotiations, as the parties' interests are adverse.

You state the information at issue in Exhibit B4 consists of communications between the city's employees and hired consultants, including the National Development Council, with which the city has a contractual relationship for its services. You assert the communications at issue consist of advice, opinions, and recommendations related to policymaking matters of the city. Based on your representations and our review, we find the information we have marked consists of advice, opinions, and recommendations pertaining to the city's policymaking matters. Accordingly, the city may withhold the information we have marked under section 552.111 of the Government Code. However, we find a portion of the remaining information contains a communication related to contract negotiations between the city and a third party, and their interests were adverse at the time the communications were made. Therefore, this information may not be withheld under section 552.111 of the Government Code. Furthermore, we find the remaining information consists of general administrative information, factual information, or communications with a party with whom you have not demonstrated the city shares a privity of interest or a common deliberative process. Therefore, we conclude you have failed to demonstrate the remaining information constitutes internal communications containing advice, recommendations, or opinions reflecting the policymaking processes of the city. Consequently, the city may not withhold any of the remaining information under section 552.111 of the Government Code.

We note some of the remaining information is subject to section 552.117(a)(1) of the Government Code.[3] Section 552.117(a)(1) protects from disclosure the home addresses and

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[3]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).

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. Gov't Code § 552.117(a)(1). We note section 552.117 also encompasses a personal pager, fax, or cellular telephone number, if the individual personally pays for the service. *See* Open Records Decision No. 670 at 6 (2001); *see also* Open Records Decision No. 506 at 5-6 (1998) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). 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). Therefore, a governmental body must withhold information under section 552.117 on behalf of current or former officials or employees only if these individuals made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the individual whose information is at issue timely elected to keep his personal information confidential 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 only withhold the cellular telephone number if this service is not paid for by a governmental body. The city may not withhold this information under section 552.117(a)(1) if the individual did not make a timely election to keep his information confidential.

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). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but instead the address of the individual as a government employee. The e-mail addresses at issue do not appear to be of a type specifically excluded by subsection (c). Therefore, the city must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. However, we find the remaining e-mail addresses are subject to section 552.137(c) of the Government Code. Accordingly, the city may not withhold the remaining e-mail addresses under section 552.137 of the Government Code.

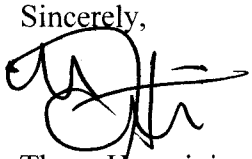
In summary, the city may withhold: (1) Exhibit B2 under section 552.104 of the Government Code; (2) Exhibit B3 under section 552.105 of the Government Code; (3) Exhibit B1 under section 552.107(1) of the Government Code; and (4) the information we have marked under section 552.111 of the Government Code. The city must withhold: (1) the information we have marked under section 552.117(a)(1) of the Government Code if the individual whose information is at issue timely elected confidentiality under section 552.024 of the Government Code, and if the cellular telephone service is paid for with personal funds; and (2) the e-mail addresses we have marked under

section 552.137 of the Government Code, unless the owners have affirmatively consented to their disclosure. The city must release the remaining information.[4]

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,



Thana Hussaini
Assistant Attorney General
Open Records Division

TH/som

Ref: ID# 524317

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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[4]We note the information being released contains the requestor's e-mail address to which she has a right of access. *See* Gov't Code § 552.137(b). However, if the city receives another request for this information from a different requestor, we note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold certain 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 an attorney general decision.