



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 14, 2020

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

OR2020-25832

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# 849561 (COA Req. Nos. 20-1414 and 20-1576).

The City of Abilene (the "city") received a request for six categories of information pertaining to specified communications and accounting statements.¹ The city claims some of the submitted information is excepted from disclosure under sections 552.101, 552.104, 552.107, 552.111, and 552.131 of the Government Code. We have considered the exceptions the city claims and reviewed the submitted representative sample of information.²

We note the submitted information contains an agenda of a public meeting of the city council. Agendas of a governmental body's public meetings are specifically made public

¹ The city states, and provides documentation showing, it 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 overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

² 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.

under the Open Meetings Act, chapter 551 of the Government Code. *See* Gov't Code §§ 551.041 (governmental body shall give written notice of date, hour, place, and subject of each meeting), .043 (notice of meeting of governmental body must be posted in place readily accessible to general public for at least 72 hours before scheduled time of meeting). As a general rule, the exceptions to disclosure found in the Act do not apply to information other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the submitted agenda of the public meeting must be released pursuant to section 551.022 of the Government Code.

Section 552.104(a) of the Government Code excepts from disclosure information that a governmental body demonstrates, if released, would “harm its interests by providing an advantage to a competitor or bidder in a particular ongoing competitive situation or in a particular competitive situation where the governmental body establishes the situation at issue is set to reoccur or there is a specific and demonstrable intent to enter into the competitive situation again in the future.” Gov't Code § 552.104(a). The “test under section 552.104 is whether knowing another bidder's [or competitor's information] would be an advantage, not whether it would be a decisive advantage.” *Boeing Co. v. Paxton*, 466 S.W.3d 831, 841 (Tex. 2015). After review of the information at issue and consideration of the arguments, we find the city has failed to demonstrate the applicability of section 552.104 to the remaining information. Thus, we conclude the city may not withhold the remaining information under section 552.104(a) of the Government Code.

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 that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “to facilitate 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 only to 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 only to a *confidential* communication, *id.*, meaning it was “not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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).

The city states some of the remaining information consists of communications involving city attorneys, employees, and agents that were made in furtherance of the rendition of professional legal services to the city. The city states these communications were intended to be, and have remained, confidential. Based on the city's representations and our review, we find the city has demonstrated the applicability of the attorney-client privilege to some of the information at issue. Accordingly, the city may generally withhold the information we marked under section 552.107(1) of the Government Code. However, we note one of these privileged e-mail strings include e-mails sent to or received from non-privileged parties. Furthermore, if these e-mails are removed from the e-mail string and stand alone, they are responsive to the request for information. Therefore, to the extent the city maintains these non-privileged e-mails, which we marked, separate and apart from the otherwise privileged e-mail string in which they appear, the city may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code. Further, we find the remaining information at issue has been sent to or received from individuals the city has not demonstrated are privileged parties. Therefore, we conclude the city has failed to demonstrate this information consists of privileged attorney-client communications. Accordingly, the city may not withhold any of the remaining information at issue under section 552.107.

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.

The city states some of the remaining information consists of internal communications between various city employees, officials, and a party with which it shares a privity of interest regarding policymaking matters of the city. Based on the city's representation and our review of the information at issue, we find the city has demonstrated portions of the remaining information consist of advice, opinions, or recommendations on the policymaking matters of the city. Thus, the city may withhold the information we marked under section 552.111 of the Government Code. However, we find the remaining information at issue is general administrative and purely factual information, does not pertain to policymaking, or was sent to or received from individuals with whom the city has not demonstrated it shares a privity of interest or common deliberative process. Thus, we find the city has failed to show the remaining information at issue consists of internal communications containing advice, opinions, or recommendations on the policymaking matters of the city. Accordingly, the city may not withhold any of the remaining information at issue under section 552.111.

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) excepts from disclosure only “trade secret[s] of [a] business prospect” and “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.” *Id.* § 552.131(a). We note section 552.131(a) does not protect the interests of a governmental body regarding the release of information pertaining to economic development negotiations. Thus, we do not address the city’s claim under section 552.131(a) for the information at issue. Further, we have not received arguments from any third party explaining the information contains the third party’s trade secrets or its commercial or financial information. *See* Gov’t Code § 552.305(d)(2)(B). Because no third party has demonstrated the information at issue qualifies as a trade secret or release of the information at issue would result in substantial competitive harm, we conclude none of the information at issue may be withheld pursuant to section 552.131(a).

Section 552.131(b) protects information about a financial or other incentive that is being offered to a business prospect by a governmental body or another person. *See id.* § 552.131(b). Section 552.131(b) protects the interests of governmental bodies, not third parties. The city claims 552.131(b) is applicable to the information at issue. However, we find the city has failed to demonstrate any portion of the information at issue reveals financial or other incentives the city is offering to a business prospect. Thus, we conclude the city may not withhold any of the information at issue under section 552.131(b) 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).³ *See* Gov’t Code § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, the general e-mail address of a business, an Internet website address, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address of a vendor who seeks to contract with a governmental body, an e-mail address that a governmental entity maintains for one of its officials or employees, or an e-mail address provided to a governmental body on a letterhead. *See id.* § 552.137(c). Accordingly, the

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).

city must withhold the e-mail addresses of members of the public in the remaining information under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

The city claims some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the city must release the submitted agenda of the public meeting pursuant to section 551.022 of the Government Code. The city may generally withhold the information we marked under section 552.107(1) of the Government Code; however, if the non-privileged e-mails, which we marked, are maintained by the city separate and apart from the otherwise privileged e-mail string in which they appear, then the city may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code. The city may withhold the information we marked under section 552.111 of the Government Code. The city must withhold the e-mail addresses of members of the public in the remaining information under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. The city must release the remaining information; however, any information that is subject to copyright may be released only in accordance with copyright law.

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Gerald A. Arismendez
Assistant Attorney General
Open Records Division

GAA/jm

Ref: ID# 849561

Enc. Submitted documents

c: Requestor
(w/o enclosures)