Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 13, 1995

Ms. Lucille Borella
Legal Assistant
Texas Department of Banking
2601 N. Lamar Boulevard
Austin, Texas 78705-4294

OR95-601

Dear Ms. Borella:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 32911.

The Texas Department of Banking (the "department") received a request for a copy of a staff report which was sent to the Commissioner concerning an application for charter of a cemetery. You have submitted to this office for review a marked copy of the staff report. You state that the department has furnished nonconfidential information to the requestor. We assume that by this statement you have furnished to the requestor all unmarked information in the memorandum. You contend, without stating why the various sections apply, that the marked portion of the staff report may be withheld from the requestor based upon one or more of the following sections of the Government Code: 552.103, 552.107, 552.108, 552.111, and 552.305.

Section 552.111 provides that an intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency is excepted from disclosure. The purpose of this section is to protect from public disclosure advise and opinions on policy matters and to encourage frank and open discussion within the agency in connection with its decision-making processes. *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.). The scope of this exception applies only to internal communications consisting of advice, recommendations, or opinions reflecting the policymaking processes of the governmental body at issue. Open Records Decision No. 615 (1993) at 5. Section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of an internal communication. *Id.*

The marked portion of the staff report at issue includes statements made by others to the writer. By these statements, the writer is noting what others told her. The writer is not asserting that her comments are inferences or conclusions drawn from statements made to her or read by her. *See* Open Records Decision No. 405 (1983) at 3. While inferences or conclusions drawn from statements or documents may be withheld as the "opinion" of the writer reporting them, statements containing only information and facts received entirely and directly from another source do not constitute the "opinion" of the writer making them. *Id.* Therefore, regarding the marked portion of the staff report, pursuant to section 552.111, the opinion of the writer may be withheld from disclosure. However, statements made by others to the writer are not excepted under section 552.111. We have marked the documents accordingly.

Section 552.103, commonly referred to as the litigation exception, excepts from disclosure information related to pending litigation or reasonably anticipated litigation. We note nothing in the record before us which indicates that litigation is pending or reasonably anticipated and that the information relates to any litigation. While the question of whether litigation is reasonably anticipated is reviewed on a case-by-case basis, there must exist concrete evidence that litigation is realistically contemplated and is more than mere conjecture. Attorney General Opinion JM-266 (1984) at 4; Open Records Decision Nos. 518 (1989) at 5, 328 (1982). We conclude that you have not met your burden under this exception. *See Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.).

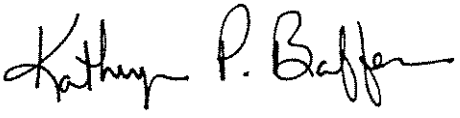
Section 552.107 provides that information is excepted from public disclosure if it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Rules of the State Bar or a court by order has prohibited disclosure of the information. The first portion of this section applies to protect information within the attorney-client privilege while the second portion applies to protect information that a court has ordered to be kept confidential. Under this section, a governmental body generally may withhold only information revealing client confidences or containing legal advice or opinion. Open Records Decision No. 462 (1987). When invoking this exception in its ruling request, the governmental body bears the burden of explaining how the particular information requested constitutes either a client confidence or a communication of legal advice or opinion protected under this section. *See, e.g.*, Open Records Decision No. 589 (1991). You have not shown how this section applies to the staff report. We conclude that you have not met your burden for this exception.

Section 552.108, commonly referred to as the law enforcement exception, provides that a record of a law enforcement agency or prosecutor may be withheld from disclosure if the information relates to a pending criminal case or, if the information were released it would unduly interfere with law enforcement and crime prevention. *See* Attorney General Opinion MW-446 (1982); Open Records Decision No. 366 (1983). We conclude that you have not met your burden under the law enforcement exception.

Section 552.305 provides that a governmental body may withhold information which involves the privacy or property interests of a third party. We find no third party privacy or property interest addressed in the marked portion of the staff report. We conclude that the department has failed in their burden to show an exception under section 552.305.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kathryn P. Baffes
Assistant Attorney General
Open Government Section

KPB/LRD/rho

Ref.: ID# 32911

Enclosures: Marked documents

cc: Mr. Arthur J. Anderson
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(w/o enclosures)