



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

May 31, 1996

Mr. Richard J. Ybarra  
Assistant Attorney General  
Office of the Attorney General  
P.O. Box 12548  
Austin, Texas 78711-2548

OR96-0848

Dear Mr. Ybarra:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 39935.

The Office of the Attorney General (the "OAG") received a request for:

1. The contingent fee contract with the outside attorneys relating to the tobacco litigation;
2. All prior drafts of the contingent fee contract relating to the tobacco litigation.
3. All letters, documents, and correspondence with any attorney and/or law firm concerning possible representation of the State of Texas in the tobacco litigation;
4. Telephone records relating to contracts with any of the law firms and/or lawyers ultimately selected by you to pursue the tobacco litigation on behalf of the State of Texas.

You state that the OAG has released the contingent fee contract responsive to request number 1. You also state that the OAG has no information responsive to request number 3. You claim that the remainder of the requested information is excepted from disclosure under sections 552.111 and 552.103 of the Government Code. You have submitted

representative samples of the requested information for which you assert an exception.<sup>1</sup> We have considered the exceptions you claimed and have reviewed the sample documents.

Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 (1993) at 5-6. Section 552.111 excepts from required public disclosure a preliminary draft of a letter or document related to policymaking matters, since drafts represent the advice, opinion, and recommendation of the drafter as to the form and content of the final document. Open Records Decision No. 559 (1990). We have reviewed the draft documents at issue and conclude that they relate to the policymaking processes of the governmental body. Therefore, the draft documents responsive to request number 2 may be withheld from disclosure under section 552.111.

Finally, you claim that the information responsive to request number 4 is excepted from disclosure under section 552.103. Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The OAG has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The OAG must meet both prongs of this test for information to be excepted under section 552.103(a).

You have established the first prong of the section 552.103 test by submitting a copy of the complaint in the tobacco litigation. However, we do not believe that the OAG has shown the relatedness of the telephone bills sought in request number 4 to the subject matter of the litigation. These phone bills show only the date telephone calls were made to or from an attorney in the litigation, the number called, the originating telephone number, and the duration of the calls. We believe that this information is similar to information on a legal fee bill. Unless attorney's fees are at issue in the litigation, under

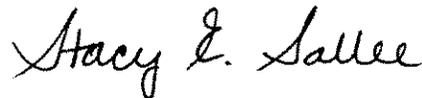
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<sup>1</sup>In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open 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 552.103, this office allows governmental bodies to except only the descriptions of work performed in fee bills. The lawyer performing the work, the amount of time spent, and the fees incurred are not protected under section 552.103. Therefore, the OAG may not withhold the telephone bills responsive to request number 4 from disclosure under section 552.103.

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 should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee  
Assistant Attorney General  
Open Records Division

SES/ch

Ref.: ID# 39935

Enclosures: Submitted documents

cc: Mr. Joe K. Longley  
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(w/o enclosures)

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