



June 5, 2000

Ms. Katherine Minter Cary  
Assistant Attorney General  
Public Information Coordinator  
Office of the Attorney General  
P.O. Box 12548  
Austin, Texas 78711-2548

OR2000-2206

Dear Ms. Cary:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 135818.

The Office of the Attorney General (the "OAG") received a request for information, as follows:

1. The OAG's "enforcement policy to prevent and remove any encroachments and interferences" on public beaches,
2. A copy of the OAG's enforcement policy promulgated pursuant to section 61.011(c) of the Texas Natural Resources Code, and "any associated internal documents, and evidence of [the OAG] efforts publicizing said plan[.]"
3. A copy of the OAG's "letter to Land Commissioner Dewhurst concerning [the OAG] ruling on the list of 107 houses 100% on public beach,"
4. Any "other evidence submitted [to the OAG] by the [General Land Office] ("GLO"), and associated internal documents[.]"
5. All information "transmitted to [the OAG] concerning possible violations of the Open Beaches Act or any other applicable rules or laws and any associated internal documents[.]"

You explain that the requestor verbally narrowed the scope of the request to “information which pertains to the time period of the John Cornyn administration and the geographical areas of Galveston and Brazoria Counties.”<sup>1</sup> Gov’t Code § 552.222(b) (governmental body may discuss how scope of request might be narrowed if large amount of information requested). You also explain that the OAG has released to the requestor approximately 1,300 pages of responsive information.<sup>2</sup> You have submitted for our review additional documents that are responsive to the request, contained in folders we have marked as “1” through “49.” You assert that this information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you assert and reviewed the submitted information.

We note at the outset that folder 41 contains certain documents which we believe are required to be released pursuant to section 552.022 of the Government Code. Section 552.022(a)(10) states that, unless confidential under other law, “a substantive rule of general applicability adopted or issued by an agency as authorized by law, and a statement of general policy or interpretation of general applicability formulated and adopted by an agency” is not excepted from required public disclosure. The documents at issue consist of certain emergency guidelines promulgated by the Texas General Land Office pursuant to its rule making authority under the Open Beaches Act. *See* Nat. Res. Code § 61.011(d). These documents, which we have marked, are not excepted from disclosure by any of the exceptions you have argued and must be released to the requestor.

We first address your section 552.103 assertion. In relevant part, section 552.103(a) reads as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

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<sup>1</sup>In the written request, the requestor also poses a number of questions of the OAG. We note that the Public Information Act (the “Act”) does not require a governmental body to prepare new information in response to a request, nor does the Act require a governmental body to prepare answers to questions. *See* Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975); *see also* Open Records Decision No. 555 at 1-2 (1990) (considering request for answers to fact questions).

<sup>2</sup>By correspondence dated March 31, 2000, you provided the requestor an estimate of charges for the copies. *See* Gov’t Code § 552.2615 (requiring notice to requestor for requests that will result in the imposition of a charge exceeding \$40, and providing that the request is considered to have been withdrawn if requestor does not timely respond to notice). You have verbally informed this office that the requestor timely responded to the notice, and that the responsive information, other than that submitted for our review, has been released to the requestor.

A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103(a) applies is a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 588 (1991).

As to the first prong, litigation must be pending or reasonably anticipated on the date that the information is requested. Gov't Code § 552.103(c). In this instance, we agree that you have demonstrated that, on the date that the request at issue was received by the OAG, litigation was pending in the case of *State v. Jane S. Ebrom*, No. 99-11345 in the 353rd District Court of Travis County. As to the second prong, we believe that you have made the requisite showing that some of the submitted information relates to the pending litigation for purposes of section 552.103(a). Unless applicable below, we accordingly determine that the records we have marked may be withheld from public disclosure pursuant to section 552.103.

We note that if the opposing party in the litigation has seen or had access to any of the information in these records, there is no section 552.103(a) interest in withholding that information from the requestor. Open Records Decision Nos. 349 (1982), 320 (1982). We have no indication that the opposing party has seen or been given access to any of the information that we have marked as excepted by section 552.103. We accordingly do not address the applicability of other exceptions you have asserted to that information we have marked as excepted from disclosure by section 552.103. We note, however, that the applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You also assert the attorney-client privilege under sections 552.101 and 552.107. Although this office at one time applied the attorney-client privilege under the statutory predecessor to section 552.101, we today believe that the privilege is properly asserted in the context of the Act only under section 552.107(1). *See* Open Records Decision No. 575 at 2 (1990). Section 552.107(1) excepts information from 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 Texas Rules of Evidence or the Texas Disciplinary Rules of Professional Conduct. *See* Gov't Code § 552.107(1). This exception does not apply to all client information held by a governmental body's attorney; rather, it excepts from public disclosure only "privileged information," i.e., communications that are made to the attorney *in confidence* and in furtherance of rendering professional legal services or that reveal the attorney's legal opinion or advice. Open Records Decision Nos. 589 at 1(1991), 574 at 3 (1990), 462 at 9-11(1987). Information gathered by an attorney as a fact-finder, purely factual information, and the factual recounting of events, including the documentation of calls made, meetings attended, and memos sent, are not excepted from disclosure by section 552.107(1). Open Records Decision No. 574 (1990). Section 552.107(1) may except

from disclosure notes in an attorney's client file if they contain confidences of the client or reveal the opinions, advice, or recommendations that have been made or will be made to the client or associated attorneys. *Id.* at 6. We believe you have demonstrated that some of the documents, primarily comprising legal opinion memoranda, are excepted from disclosure by section 552.107(1). We have marked the information that you may withhold pursuant to this provision.

You also assert the attorney work product privilege under sections 552.101 and 552.111. We believe that the privilege is properly asserted under section 552.111, regardless of the status of the litigation for which the information was prepared.<sup>3</sup> *See* Open Records Decision No. 647 (1996). A governmental body may withhold attorney work product from disclosure if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. *Id.* The first prong of the work product test, which requires a governmental body to show that the documents at issue were created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery or release believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *Id.* at 4. With respect to some of the submitted documents, we believe you have demonstrated the applicability of both parts of the first prong of the work product test. As to the second prong of the work product test, we note that the work product privilege does not ordinarily extend to "facts an attorney may acquire." *See* Open Records Decision No. 647 at 4 (1996) (citing *Owens-Corning Fiberglass v. Caldwell*, 818 S.W.2d 749, 750 n.2 (Tex. 1991)); *see also* *Leede Oil & Gas, Inc. v. McCorkle*, 789 S.W.2d 686 (Tex. App.--Houston [1st Dist.] 1990, no writ) (the attorney work product privilege does not protect memoranda prepared by an attorney that contain only a "neutral recital" of facts). However, facts may be excepted from disclosure if they are inextricably intertwined with privileged information. *See, e.g.*, Open Records Decision No. 487 at 4 (1988). We have marked the information at issue that you may withhold as attorney work product.

You also assert the "deliberative process privilege" aspect of section 552.111. This aspect of section 552.111 excepts inter-agency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's policymaking process. Open Records Decision No. 615 at 5 (1993). Its purpose is "to protect from public disclosure advice and opinions *on policy matters* and to encourage

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<sup>3</sup>Open Records Decision No. 647 also states that the attorney work product privilege may be asserted under section 552.103 for information prepared in anticipation of litigation that has not concluded. Because the comments and arguments you have provided indicate that much of the information at issue was prepared in anticipation of litigation that did not occur (*e.g.*, the matter in controversy was resolved prior to suit being filed), we consider the attorney work product assertion under the more inclusive section 552.111.

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.) (emphasis added). However, an agency’s policymaking functions do not encompass internal administrative or personnel matters, as disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 at 5-6 (1993). While the deliberative process privilege aspect of section 552.111 does not ordinarily except factual information from disclosure, this office has found that the privilege protects from required disclosure drafts of documents that have been or will be released to the public, because such drafts necessarily 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). Accordingly, as to those drafts in which you inform this office that a final version has been or will be released, we have marked the entire document as excepted from disclosure under section 552.111.<sup>4</sup> We have otherwise marked as excepted under this aspect of section 552.111 only the specific information that we believe you have demonstrated to consist of advice, opinion, or recommendation on policy matters.

Having considered all of your arguments, we conclude that certain information (which we have marked), contained in the folders numbered 4, 6, 9, 10, 11, 36, 37, 38, 39, 40, 41, and 43, must be released to the requestor. You may withhold the remaining information as provided above.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested

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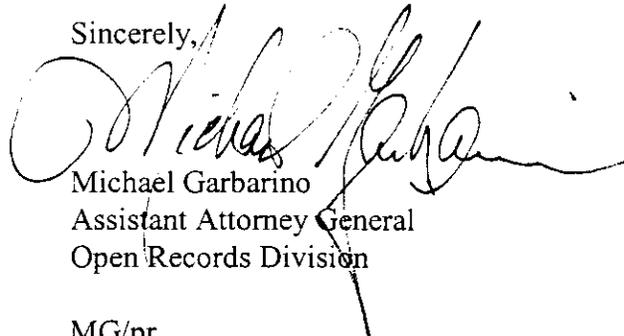
<sup>4</sup>We have marked certain draft documents in folders 14 and 15 which may be withheld in their entirety, provided a final version of the document has been or will be released. If no final version of these documents has been or will be released, you may only withhold from the requestor the specific information that we have marked for redaction.

information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael Garbarino  
Assistant Attorney General  
Open Records Division

MG/pr

Ref: ID# 135818

Encl. Submitted documents

cc: Mr. Ellis Pickett  
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(w/o enclosures)