



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

February 19, 2003

Ms. Patricia E. Carls
Brown & Carls, L.L.P.
106 East 6th Street, Suite 550
Austin, Texas 78701

OR2003-1105

Dear Ms. Carls:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 176729.

The City of Georgetown (the "city"), which you represent, received a request for (1) any order or ordinance approved by the city regarding the regulation of sexually oriented businesses and (2) studies and other materials considered by the city prior to approving its order or ordinance regarding the regulation of sexually oriented businesses. You state that the city has provided the requestor with all of the information that is responsive to item number 1 of the request and will release most of the information that is responsive to item number 2. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code and Texas Rule of Evidence 503. We have considered your arguments and have reviewed the information you submitted.

We first note that you claim the attorney-client privilege under section 552.101 of the Government Code and Texas Rule of Evidence 503. Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." As we recently reaffirmed in Open Records Decision No. 676 (2002), section 552.101 does not encompass the attorney-client privilege. *See* Open Records Decision No. 676 at 2-3 (attorney-client privilege does not qualify as constitutional, statutory, or decisional law that makes information confidential for purposes of Gov't Code § 552.101). The Texas Supreme Court has held that the Texas Rules of Evidence are "other law" that makes information expressly confidential for the purposes of section 552.022 of

the Government Code. *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). However, the information that is at issue here does not come within the scope of section 552.022. Therefore, *City of Georgetown* is not applicable in this instance. Accordingly, the city may not withhold the submitted information under section 552.101 of the Government Code or Texas Rule of Evidence 503.

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 that 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 Texas 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, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). 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.* 503(b)(1), 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, no writ). 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).

You assert that the attorney-client privilege is applicable to the submitted information. You state that this information consists of a former city attorney’s handwritten notes and the former city attorney’s memoranda to the city council and city planning and zoning commission. Based on your representations and our review of the information at issue, we conclude that some of this information is excepted from disclosure under section 552.107.

We have marked that information accordingly. Otherwise, however, it is not clear to this office that any of the remaining information at issue consists of communications between or among clients, client representatives, lawyers, or lawyer representatives. Therefore, the city may not withhold any of the remaining information under section 552.107(1). *See* Open Records Decision No. 676 at 6-11 (2002) (delineating demonstration required of governmental body that claims attorney-client privilege under Gov't Code § 552.107(1)).

You also seek to withhold the remaining information under section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." This exception incorporates the deliberative process privilege. The purpose of this privilege under section 552.111 is to protect advice, opinion, and recommendation in the decisional process and 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, no writ); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615 (1993), 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 that section 552.111 excepts only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* Open Records Decision No. 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. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (personnel-related communications not involving policymaking not excepted from disclosure under section 552.111). 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). Section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* Open Records Decision No. 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 also incorporates the attorney work product privilege. *See* Open Records Decision No. 647 (1996). A governmental body may withhold an attorney's work product under section 552.111 if it demonstrates (1) that the information was created for trial or in anticipation of litigation under the test articulated in *National Tank Company v. Brotherton*, 851 S.W.2d 193 (Tex. 1993), or after litigation is filed, and (2) that the information consists of or tends to reveal an attorney's "mental processes, conclusions, and legal theories." *See* Open Records Decision No. 647 at 5 (1996). The first element of the work product test has two parts. The governmental body must demonstrate (1) that a reasonable person would

have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and (2) that the party resisting discovery 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. *See* Open Records Decision No. 647 at 4. A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *See National Tank Co.*, 851 S.W.2d at 204. The second element of the work product test requires a showing that the information at issue tends to reveal the attorney’s mental processes, conclusions, and legal theories. *See* Open Records Decision No. 647 at 4. The governmental body must demonstrate that the information consists of or tends to reveal the thought processes of an attorney in the civil litigation process. *Id.* The attorney work product privilege generally does not extend to facts obtained by the attorney. *Id.*

You assert that section 552.111 “embodies the deliberative process privilege and other privileges. The advice, opinions, and recommendations on the legal and policy issues related to the subject matter fall within the scope of those privileges.” We conclude, however, that you have not shown that any of the remaining information is excepted from disclosure under section 552.111.

In summary, the city may withhold some of the submitted information under section 552.107(1) of the Government Code. The rest of the submitted information is not excepted from disclosure and must be released.

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 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

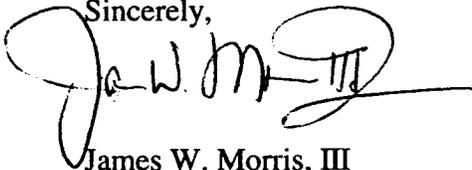
will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure 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).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is stylized and written in a cursive script.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 176729

Enc: Submitted documents

c: Ms. Julie K. Doss
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(w/o enclosures)