



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

April 11, 2003

Mr. Brad Norton
Assistant City Attorney
City of Austin - Law Department
P. O. Box 1546
Austin, Texas 78767-1546

OR2003-2463

Dear Mr. Norton:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 178797.

The City of Austin (the "city") received a request for all documents relating to, prepared by and/or used by the city in connection with the Austin Police Department "Meet and Confer Agreement." You claim that the requested information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample information.¹

Initially, we note that some of the submitted documents are subject to section 552.022 of the Government Code. Section 552.022 makes certain information public, unless it is expressly confidential under other law. One category of public information under section 552.022 includes working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate.

¹We 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.

See Gov't Code § 552.022(a)(5). Sections 552.107 and 552.111 are discretionary exceptions under the Public Information Act (the "Act") and do not constitute "other law" for purposes of section 552.022.² Therefore, the submitted documents that are subject to section 552.022(a)(5), which we have marked, may not be withheld under section 552.107 or 552.111.

Although section 552.107(1) does not protect information that is subject to disclosure under section 552.022, the attorney-client privilege is also found in Rule 503 of the Texas Rules of Evidence, which you raise. The Texas Supreme Court held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Thus, we will determine whether the information that is subject to section 552.022(a)(5) is confidential under Rule 503.

Rule 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or
- (E) among lawyers and their representatives representing the same client.

²Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. See, e.g., Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 592 at 8 (1991). Discretionary exceptions therefore do not constitute "other law" that makes information confidential.

Tex. R. Evid. 503(b)(1). A communication is “confidential” if 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. *See* Tex. R. Evid. 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must 1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; 2) identify the parties involved in the communication; and 3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the document containing privileged information is confidential under Rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ); *see also* Tex. R. Evid. 511 (waiver of privilege by voluntary disclosure).

After reviewing your arguments and the documents submitted to this office, we conclude that the documents subject to section 552.022(a)(5) do not constitute confidential communications made for the purpose of facilitating the rendition of professional legal services to the client. Thus, these documents, which we have marked, may not be withheld under Rule 503 of the Texas Rules of Evidence. Thus, the documents are public under section 552.022(a)(5).

We now address your claimed exceptions for the remaining information. Section 552.107(1) of the Government Code protects information coming 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. 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. 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 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 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)(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. *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 several of the submitted documents, which you have marked, are communications between the city’s outside counsel, the city attorney, city council, and certain city officials, made for the purposes of rendering legal advice and professional legal services. After carefully reviewing your arguments and the submitted information, we conclude that most of the documents you have marked as excepted from disclosure under section 552.107 may be withheld under that section. However, in some cases, the information you wish to withhold does not constitute a communication for purposes of section 552.107. Accordingly, we have marked the information you may *not* withhold pursuant to section 552.107 of the Government Code.

Next, we address your argument that some of the submitted information is excepted from disclosure under the deliberative process aspect of 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.” 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. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). An agency’s policymaking functions 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 at 5-6 (1993). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; Open Records Decision No. 615 at 4-5 (1993). The preliminary draft of a policymaking document that has been released or is intended for

release in final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document. Open Records Decision No. 559 at 2 (1990).

After reviewing the information at issue, we have determined that some, but not all, of the documents you have marked pursuant to section 552.111 reflect advice, recommendations, or opinions regarding the city's policymaking processes. Much of the information you wish to withhold under section 552.111 consists of handwritten notes. For the deliberative process privilege to apply, the information must consist of interagency or intra-agency communications. You do not indicate, nor is it apparent, that these notes were created for any purpose other than the writer's personal use. Thus, you have not made the requisite showing under the deliberative process aspect of section 552.111 that these notes were communicated to anyone as part of the decision-making process. Accordingly, the notes are not interagency or intra-agency memoranda that may be withheld. We have marked the information that may *not* be withheld under section 552.111.

Finally, we note that you seek a determination that some of the information requested is excepted under section 552.101 of the Government Code. Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." However, you have not directed our attention to any law, nor are we aware of any law, under which the information in question is considered to be confidential for purposes of section 552.101. *See, e.g.*, Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). Therefore, none of the submitted information may be withheld under section 552.101 of the Government Code.

To summarize, we conclude that: (1) some of the documents, which we have marked, are public under section 552.022(a)(5) of the Government Code, and must be released; and (2) with the exception of the information we have marked for release, the submitted information may be withheld under sections 552.107 and 552.111 of the Government Code.

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 Dep't of Pub. 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,



Sarah I. Swanson
Assistant Attorney General
Open Records Division

SIS/lmt

Ref: ID# 178797

Enc. Submitted documents

c: Ms. Ann del Llano
602 West Seventh St, Ste 100
Austin, Texas 78701
(w/o enclosures)