



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 2, 2004

Ms. Maleshia B. Farmer
Assistant City Attorney
City of Fort Worth
1000 Throckmorton Street
Fort Worth, Texas 76101

OR2004-9331

Dear Ms. Farmer:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 212254.

The City of Fort Worth (the "city") received a request for three categories of information regarding employee grievances and disciplinary actions in the city marshal's department. You state that the city will release some of the requested information. You claim that the remaining information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information made confidential by other statutes, including section 1703.306(b) of the Occupations Code. Section 1703.306(b) provides that "[a] governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information." Occ. Code § 1703.306(b). Thus, the city must withhold the information in Exhibit C under section 552.101 in conjunction with section 1703.306(b) of the Occupations Code.

You assert that the information in Exhibits F and G is excepted from disclosure under section 552.103 of the Government Code, which provides 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.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103. A governmental body 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 was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *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 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under 552.103(a). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

You provide documents that indicate that two of the marshals referenced in Exhibits F and G have filed complaints with the Equal Employment Opportunity Commission ("EEOC"). This office has concluded that litigation is reasonably anticipated where the prospective opposing party has filed an EEOC complaint. See Open Records Decision No. 336 (1982). The documents you provide indicate that two EEOC complaints were filed after the city's receipt of this present request; therefore, you failed to show that litigation relating to these complaints was reasonably anticipated on the date the city received this request.

The documents you provide indicate that a marshal who lodged an EEOC complaint against the city filed his original EEOC complaint with both the EEOC and the Civil Rights Division of the Texas Workforce Commission ("TWC") prior to the date the city received the present request.¹ The EEOC generally defers jurisdiction to the TWC over complaints alleging employment discrimination. The TWC operates as a federal deferral agency under section

¹ We note that the Texas Commission on Human Rights has been abolished and that its duties are now performed by the Civil Rights Division of the Texas Workforce Commission. See Act of May 28, 2003, 78th Leg., R.S., ch. 302, § 1, 2003 Tex. Gen. Laws 1279.

706(c) of title VII, 42 U.S.C. § 2000e-5. You inform us that this marshal's complaint is still pending with the TWC. Based on your representations and our review of the submitted documents, we find that the city reasonably anticipated litigation relating to this marshal's complaint on the date it received the present request. We also find that portions of the information in Exhibits F and G relate to the anticipated litigation. We therefore conclude that the city may withhold this information, which we have marked, pursuant to section 552.103.

You also inform us and provide documents showing that, prior to the city's receipt of this request, another marshal referenced in Exhibits F and G filed suit against the city for an employment-related claim. Having considered your representations and the submitted petition, we find that you have established that litigation was pending on the date the city received this request. Furthermore, having reviewed your arguments and the submitted information, we find that portions of the information in Exhibits F and G relate to the pending litigation for purposes of section 552.103. We have marked the information in Exhibits F and G that is related to the pending litigation and thus may be withheld under section 552.103.

We note, however, that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We note that some of the documents in Exhibits F and G that are not excepted from disclosure under section 552.103 contain information that is confidential under section 552.117 of the Government Code. Section 552.117(a)(2) excepts from disclosure the present and former home addresses and telephone numbers, social security number, and family member information of a peace officer regardless of whether the officer requests confidentiality for that information under section 552.024 or 552.1175 of the Government Code.² Thus, the city must withhold the peace officer's home address we have marked under section 552.117.

² "Peace officer" is defined by article 2.12 of the Code of Criminal Procedure.

We also note that some documents in Exhibit G that are not excepted from disclosure under section 552.103 contain an e-mail address that is confidential under section 552.137 of the Government Code.³ Section 552.137 provides as follows:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Gov't Code § 552.137. Under section 552.137, a governmental body must withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See id.* § 552.137(b). You do not inform us that the individual whose personal e-mail address we have marked has

³ This office will raise a mandatory exception like section 552.137 on behalf of a governmental body but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

affirmatively consented to the release of the e-mail address. Therefore, the city must withhold the marked e-mail address under section 552.137.

We next address your section 552.111 claims as it applies to the remaining information in Exhibit G and the information in Exhibit H. 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. ORD 615 at 5-6. 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; ORD 615 at 4-5. After review of your arguments and the submitted information, we conclude you have not established that any of the information at issue in Exhibits G and H constitutes an internal communication consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the city. Instead, the information at issue relates to administrative or personnel matters that do not rise to the level of policymaking issues. Therefore, none of the information at issue in Exhibits G and H may be withheld from disclosure under section 552.111.

Finally, we address your section 552.107 claim as it applies to Exhibit I. Section 552.107(1) of the Government Code excepts from disclosure information protected by 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). 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 seeking to establish that a communication is protected by the attorney-client privilege must inform this office of the identity and capacity of each individual involved in the communication. Finally, the attorney-client privilege applies only to a communication that is confidential. *Id.* 503(b)(1). A confidential communication is a communication that 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 the definition of a confidential communication 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).

In this instance, while you claim that Exhibit I is excepted from disclosure under section 552.107, you have neither identified the parties to the communications nor have you established that the communications were made pursuant to the rendition of professional legal services to the city. Furthermore, you have neither established that the communications at issue were intended to be confidential nor that the confidentiality of the information has been maintained. Upon review of the information provided, we find you have not met your burden of demonstrating the elements of the attorney-client privilege for the information in Exhibit I. Consequently, we determine that the city may not withhold any of the information in Exhibit I under section 552.107(1).

In summary, we conclude the following: (1) Exhibit C must be withheld under section 552.101 of the Government Code in conjunction with section 1703.306(b) of the Occupations Code; (2) you may withhold from disclosure the marked information in Exhibits F and G under section 552.103 of the Government Code; (3) you must withhold the marked peace officer’s home address in Exhibits F and G under section 552.117 of the Government Code; and (4) you must withhold the marked e-mail address in Exhibit G under section 552.137 of the Government Code. The remaining information must be released to the requestor.

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,



Caroline E. Cho
Assistant Attorney General
Open Records Division

CEC/sdk

Ref: ID# 212254

Enc. Submitted documents

c: Mr. Mike Lee
Fort Worth Star-Telegram
400 West Seventh Street
Fort Worth, Texas 76102
(w/o enclosures)