



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 12, 2005

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

OR2005-09257

Dear Mr. Norton:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 234008.

The City of Austin (the "city") received a request for information pertaining to its Austin Clean Water Program ("ACWP"). You sought clarification of the request from the requestor, and you have submitted a copy of the requestor's written response. *See* Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used). You state that the city will provide much of the requested information. However, you claim that the submitted information is excepted from disclosure under sections 552.104, 552.105, 552.107, 552.111 and 552.116 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.<sup>1</sup>

Section 552.105 excepts from disclosure information relating to:

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<sup>1</sup>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.

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Gov't Code § 552.105. Section 552.105 was designed to protect a governmental body's planning and negotiating position with respect to particular transactions. Open Records Decision No. 564 at 2 (1990). This exception protects information relating to the location, appraisals, and purchase price of property only until the transaction is either completed or aborted. Open Records Decision Nos. 357 at 3 (1982), 310 at 2 (1982). A governmental body may withhold information "which, if released, would impair or tend to impair [its] 'planning and negotiating position in regard to particular transactions.'" See ORD 357 at 3 (quoting Open Records Decision No. 222 (1979)). The question of whether specific information, if publicly released, would impair a governmental body's planning and negotiation position in regard to particular transactions is a question of fact. Accordingly, this office will accept a governmental body's good faith determination in this regard, unless the contrary is clearly shown as a matter of law. See Open Records Decision No. 564 (1990).

The city states that the portions of the submitted documents that it has marked are related to "ongoing ACWP land acquisition." You further indicate that release of the information you have marked would impair the city's planning and negotiation position in regard to the ongoing transaction. Based on our review of your arguments and the submitted information, we find that section 552.105 is applicable in this instance. Accordingly, we conclude that the information you have marked may be withheld pursuant to section 552.105 of the Government Code.

Next, you argue that a portion of the submitted information, which you have marked, is excepted from disclosure under section 552.107 of the Government Code. 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 Tex. 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. 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 state that a portion of the submitted information, which you have marked, consists of confidential communications between city employees and city attorneys, and that these communications were made in furtherance of the rendition of professional legal services to the city. Upon review of your arguments and this information, we conclude that it is protected by the attorney-client privilege, and thus may be withheld under section 552.107(1) of the Government Code.

Section 552.116 of the Government Code provides as follows:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, or a joint board operating under Section 22.074, Transportation Code, is excepted from the requirements of Section 552.021. If information in an audit working paper is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 by this section.

(b) In this section:

(1) “Audit” means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, or a

resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) 'Audit working paper' includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116, as amended by Act of May 17, 2005, 79th Leg., R.S., H.B. 1285, §§ 1-2 (effective May 27, 2005). A governmental body that invokes section 552.116 must demonstrate that the audit working papers are from an audit authorized or required by statute by identifying the applicable statute. A statute is defined as a law passed by a legislative body at the federal, state, county, or city level of government. See BLACK'S LAW DICTIONARY 1420 (7<sup>th</sup> ed. 1999), BLACK'S LAW DICTIONARY 1410 (6<sup>th</sup> ed. 1990). A municipal charter, which is "a legislative enactment conferring the governmental powers of the state upon its local agencies," falls under this definition of a "statute." *Id.* at 1017.

You state that the information you have marked was compiled and prepared by three city offices charged with auditing the city's financial affairs. You state that section 17 of Article VII of the Charter of the City of Austin established the position of city auditor and imparts to it the "responsibility to conduct, or cause to be conducted, financial, performance, investigative, and other audits following government auditing standards as promulgated by the Comptroller General of the United States." You also state that "there are two other audit divisions in the city which have responsive information that fits within the audit working papers exception of section 552.116." These audit divisions are the Corporate Financial Audit (Internal Audit) and the Austin Water Utility Internal Audit units. You inform us that the Corporate Financial Audit (Internal Audit) unit was established pursuant to section 2 of Article VII of the Charter of the City of Austin, while the Austin Water Utility Audit unit was established pursuant to a budget ordinance grounded in section 1 of Article V of the Charter of the City of Austin. You also inform us that the authority of the city auditor to conduct audits is further authorized by chapter 2-3 of the Austin City Code, while the authority of the Corporate Financial Audit (Internal Audit) and Austin Water Utility Internal Audit units to conduct audits is derived from section 2 of Article VII and section 2 of Article V of the Charter of the City of Austin, respectively. We understand you to represent that the audits at issue were initiated by the office of the city auditor under the authority granted by chapter 2-3-5 of the Austin City Code and by the Corporate Financial Audit (Internal Audit) and Austin Water Utility Audit units under the authority granted by the Charter of the City of Austin. Based on our review of your representations and the information at issue, we find you have sufficiently demonstrated that this information was prepared or maintained by the city's auditors in conducting audits authorized or required by the charter or an ordinance of

a municipality. See Gov't Code § 552.116(a), (b)(1), (b)(2). Accordingly, the city may withhold the information you have marked under section 552.116 of the Government Code. As our ruling on this issue is dispositive, we need not address your remaining arguments.

In summary, the city may withhold the information you have marked under sections 552.105, 552.107, and 552.116 of the Government Code. The remaining submitted 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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 that reads "L. Joseph James". The signature is written in a cursive style with a large initial "L" and a long, sweeping underline.

L. Joseph James  
Assistant Attorney General  
Open Records Division

LJJ/seg

Ref: ID# 234008

Enc. Submitted documents

c: Ms. Sarah Coppola  
Austin American-Statesman  
305 South Congress  
Austin, Texas 78704  
(w/o enclosures)