



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 1, 2006

Mr. Nathan C. Barrow
Assistant City Attorney
Fort Worth Texas
1000 Throckmorton Street
Fort Worth, Texas 76102

OR2006-14150

Dear Mr. Barrow:

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# 265828.

The City of Fort Worth (the "city") received a request for information related to the Sierra Vista Development. You claim that the submitted information is excepted from disclosure under sections 552.106, 552.107, 552.111, 552.136, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You state that Exhibits C and D are excepted from required public disclosure under section 552.107. 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 a capacity other than that of attorney). Third, the privilege applies only to communications

between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). 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).

In this case, you state that Exhibits C and D consist of communications made for the purpose of facilitating the rendition of professional legal services. You explain that the communications were between clients, client representatives, lawyers, and lawyer representatives identified by the city, and you have indicated that they were to be kept confidential among the intended parties. Finally, you state that the communications have remained confidential. Thus, you may withhold Exhibits C and D under section 552.107(1) of the Government Code. We also note that copies of the communications found in Exhibits C and D are also found in Exhibit E. You may also withhold the marked duplicate documents in Exhibit E under section 552.107.

Next you state that Exhibits E, F, and G are excepted from required public disclosure under sections 552.106 and 552.111 of the Government Code. Section 552.111 excepts from public disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. The purpose of this exception is to protect advice, opinion, and recommendation in the decisional process and to 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 *Tex. Dep’t 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 615 at 5. We note that this section 552.111 protects communications with outside third parties to the extent that the governmental body shares a privity of interest or common deliberative process with the third party. Open Records Decision Nos. 464 (1987), 429 (1985); *see also Wu v. Nat’l Endowment of the Humanities*, 460 F.2d 1030 (5th Cir. 1972). Section 552.111, however, does not

protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* Open Records Decision 615 at 5.

This office has also concluded that a preliminary draft of a policymaking document that is intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

Section 552.106 of the Government Code excepts from disclosure “[a] draft or working paper involved in the preparation of proposed legislation” and “[a]n internal bill analysis or working paper prepared by the governor’s office for the purpose of evaluating proposed legislation.” Gov’t Code § 552.106. Section 552.106 ordinarily applies only to persons with a responsibility to prepare information and proposals for a legislative body. Open Records Decision No. 460 (1987). Similar to section 552.111, the purpose of section 552.106 is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body, and therefore, like section 552.111, it does not except from disclosure purely factual information. *Id.* at 2.

You assert that the documents submitted at Exhibits E and F consist of preliminary drafts of a policymaking documents which have been or will be made available to the requestor in their final form. After reviewing the submitted information, we agree that the majority of Exhibits E and F consist of preliminary drafts that represent the advice, opinions, and recommendations of city staff and third-party staff hired by the city regarding the Sierra Vista project. However, we find that the e-mail communications attached to the drafts do not constitute preliminary drafts of a policy making document. Further, upon review, we find that portions of the e-mail communications consist of purely factual information that is not excepted under section 552.106 or section 552.111. Accordingly, you may only withhold the marked portions of the e-mail communications along with the preliminary drafts we have marked under section 552.111. The remaining information in Exhibits E and F must be released.

You also generally assert that the information in Exhibit G consists of advice, opinions, and recommendations of city staff and outside third-party staff that constitute policy making decisions related to the Sierra Vista project. Based upon your representations and our review, we have marked the information in Exhibit G that consists of advice, opinions, and recommendations that may be withheld under section 552.111 of the Government Code. However, the city has failed to demonstrate that the remaining information does not constitute facts or written observations of facts and events. Thus, the remaining information

in Exhibit G is not excepted under section 552.106 and section 552.111, and it must be released.

Next, you claim that the information you have marked in Exhibit H is excepted from disclosure under section 552.137 of the Government Code. This provision excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov’t Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee’s work e-mail address because such an address is not that of the employee as a “member of the public,” but is instead the address of the individual as a government employee. In addition, section 552.137 does not apply to a business’s general e-mail or website address. You do not inform us that the persons whose e-mail addresses are at issue have consented to the release of their e-mail addresses. The e-mail addresses you have marked do not appear to be of a type specifically excluded by section 552.137(c). Therefore, the city must withhold the e-mail addresses you have marked in accordance with section 552.137.

We note that a portion of Exhibit H may be subject to section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the home address, home telephone number, social security numbers, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the city may only withhold information under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the employee timely elected to keep her personal information confidential, the city must withhold the information we have marked under section 552.117(a)(1). The city may not withhold this information under section 552.117(a)(1) if the employee did not make a timely election to keep the information confidential.

Next, you claim that the information marked in Exhibit I is excepted from disclosure under section 552.136. Section 552.136 of the Government Code states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136. Based upon your representations and our review, we agree that the majority of information you have marked in Exhibit I constitutes access device numbers. However, we note that a check number is not an access device number for purposes of section 552.136 and we have marked such numbers for release. The city must withhold the remaining access device numbers that you have marked pursuant to section 552.136.

In summary, you may withhold Exhibits C and D under section 552.107. You may withhold the marked portions of Exhibits E, F, and G under section 552.111. You must withhold the marked portions of Exhibits H under section 552.137, and with the exception of the marked check numbers, you must withhold the access device numbers in Exhibit I under section 552.136. To the extent that the employee at issue made a timely election under section 552.024 of the Government Code, you must withhold the information marked in Exhibit H under section 552.117. You must release the remaining information.

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).

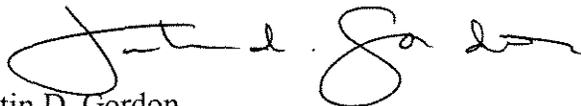
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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, appearing to read "Justin D. Gordon". The signature is fluid and cursive, with a large initial "J" and "G".

Justin D. Gordon
Assistant Attorney General
Open Records Division

JDG/sdk

Ref: ID# 265828

Enc. Submitted documents

c: Mr. Mike Lee
Fort Worth Star-Telegram
400 West 7th Street
Forth Worth, Texas 76110
(w/o enclosures)