



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 24, 2006

Ms. Jeanene McIntyre
Assistant City Attorney
City of Arlington
P. O. Box 90231
Arlington, Texas 76004-3231

OR2006-00779

Dear Ms. McIntyre:

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# 240667.

The City of Arlington (the "city") received a request for information "pertaining to the Arlington City Council Executive Session of October 23, 2005[.]" You state that some responsive information has been provided to the requestor. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.104, 552.105, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You inform us that the request encompasses information arising from an executive session of the City Council. The Open Meetings Act ("OMA"), which establishes the general rule that every meeting of every governmental body shall be open to the public, permits closed meetings for certain purposes. A governmental body that conducts a closed meeting must either keep a certified agenda or make a tape recording of the proceeding, except for private attorney consultations. Gov't Code §551.103. The agenda or tape is kept as potential evidence in litigation involving an alleged violation of the OMA. *See* Attorney General Opinion JM-840 (1988). Section 551.104(c) of the Government Code provides that "[t]he certified agenda or tape of a closed meeting is available for public inspection and copying only under a court order issued under Subsection (b)(3)." Section 551.146 penalizes the unlawful disclosure of a certified agenda or tape recording of a lawfully closed meeting as a Class B misdemeanor, and makes the person responsible for disclosure liable for damages to a person injured or damaged by the

disclosure. Thus, such information cannot be released to a member of the public in response to an open records request. *See* Open Records Decision No. 495 (1988). In addition, minutes of a closed meeting are confidential. *See* Open Records Decision No. 60 (1974) (closed meeting minutes are confidential under predecessor to section 551.104); *see also* Open Records Decision Nos. 563 (1990) (minutes of properly held executive session are confidential under OMA); Open Records Decision No. 495 (1988) (information protected under predecessor to section 551.104 cannot be released to member of public in response to open records request). However, records discussed or created in a closed meeting, other than a certified agenda or tape recording, are not made confidential by chapter 551 of the Government Code. *See* Open Records Decision Nos. 605 at 2-3 (1992) (concluding that section 551.074 does not authorize a governmental body to withhold its records of the names of applicants for public employment who were discussed in an executive session), 485 at 9-10 (1987) (investigative report not excepted from disclosure under statutory predecessor to section 552.101 simply by virtue of its having been considered in executive session); *see also* Attorney General Opinion JM-1071 at 3 (1989) (statutory predecessor to section 551.146 did not prohibit members of governmental body or other individuals in attendance at executive session from making public statements about subject matter of executive session); *see also* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express, and confidentiality requirement will not be implied from statutory structure), 649 at 3 (1996) (language of confidentiality provision controls scope of its protection), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to public). You state that portions of the information at issue are the certified agendas of City Council meetings. Based on your representations, we find that the information at issue is confidential under section 551.104(c) of the Government Code, and must be withheld from disclosure under section 552.101 of the Government Code.

You argue that the information in Exhibit B is excepted from disclosure under section 552.107 of the Government Code, which 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 the information in Exhibit B consists of communications between the city and its 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 the information reflects confidential attorney-client communications made in furtherance of the rendition of legal services to the city. Therefore, the city may withhold Exhibit B under section 552.107(1) of the Government Code.

You claim section 552.111 of the Government Code as an exception to disclosure for the information in Exhibit D. 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 deliberative or policymaking processes of the governmental body. Open Records Decision No. 615 at 5-6 (1993). An agency’s policymaking functions, however, 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). Section 552.111 does not, however, except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. 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).

Based upon your representations and our review of the documents at issue, we agree that Exhibit D consists of internal communications containing advice, recommendations and opinions reflecting the deliberative or policymaking processes of the city. Accordingly, you may withhold Exhibit D under section 552.111 of the Government Code.¹

Finally, you claim that Exhibit E-2 is subject to section 552.105 of the Government Code, which excepts from disclosure information relating to

- (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. We note that this provision is designed to protect a governmental body's planning and negotiating position with regard to particular transactions. *See* Open Records Decision Nos. 564 (1990), 357 (1982), 310 (1982). Information that is excepted from disclosure under section 552.105 that pertains to such negotiations may be excepted from disclosure so long as the transaction relating to the negotiations is not complete. *See* Open Records Decision No. 310 (1982). Pursuant to section 552.105, 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.'" Open Records Decision No. 357 at 3 (1982) (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. Thus, 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).

You state that the city is

currently involved in the land acquisition phase of the venue project and is in the process of making offers to purchase land, contracting to purchase land, and when an agreement on value cannot be reached with the owner, . . . conducting special commissioners' hearings to determine the value required to be paid into the registry of the court in order to gain possession of the property. . . . Negotiations with most owners of appraised property have been initiated, and formal contracts for many, but not all, of the appraised propert[ies] have been awarded.

¹We note that the information submitted as Exhibits C and E-1 is identical to the information in Exhibit D. Because we reach this conclusion under section 552.111, we need not consider your remaining arguments against the disclosure of Exhibits C and E-1.

You inform us that the information you have marked in Exhibit E-2 pertains to the appraisal or purchase price of properties that may be purchased by the city. You inform us that release of this information would harm the city's planning and negotiating position regarding these properties. Based on your representations and our review of the submitted information, we find that section 552.105 is applicable in this instance. Accordingly, we conclude that the city may withhold the information you have marked in Exhibit E-2 pursuant to section 552.105 of the Government Code.

To summarize: (1) the certified agendas of city council meetings are confidential under section 551.104(c) of the Government Code, and must be withheld from disclosure under section 552.101 of the Government Code; (2) the city may withhold Exhibit B under section 552.107(1) of the Government Code; (3) Exhibit D may be withheld under section 552.111 of the Government Code; and (4) the city may withhold the information you have marked in Exhibit E-2 pursuant to section 552.105 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/er

Ref: ID# 240667

Enc. Submitted documents

c: Mr. James D. Runzheimer
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(w/o enclosures)