



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 15, 2006

Ms. Wendy E. Ogden  
Assistant City Attorney  
City of Corpus Christi  
P.O. Box 9277  
Corpus Christi, Texas 78469-9277

OR2006-13554

Dear Ms. Ogden:

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# 263539.

The City of Corpus Christi (the "city") received a request for five categories of information related to city plans for wastewater handling and a new wastewater plant. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.105, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.<sup>1</sup> We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

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<sup>1</sup> We note that the arguments set forth in the city's brief for Exhibits B, C, D, and E do not match the labeling of the exhibits in the submitted information. For example, you submit no arguments for an Exhibit A but have submitted information labeled "Exhibit A - Documents excepted under 552.107." You also state in your brief that the information in Exhibit E is excepted under section 552.105, however there is no Exhibit E in the submitted information and Exhibit D is labeled "Exhibit D - Documents excepted under section 552.105." In order to reconcile the discrepancy, this office applied the arguments under 552.107 of the Government Code to the submitted information labeled Exhibit A. We applied the arguments under section 552.101 to the information in Exhibit B. We addressed the arguments under section 552.111 to the information labeled Exhibit C. We addressed the arguments under section 552.105 to the information labeled Exhibit D. The text of our ruling corresponds to the exhibits as marked in the submitted information rather than the exhibits as they are laid out in the city's brief. This has been noted on the labels for the submitted exhibits.

Initially, we note that the city has submitted arguments and supporting evidence regarding the timeliness of its submissions to this office. *See* Gov't Code § 552.301 (prescribing the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure). We have also received comments from the requestor in relation to those arguments. These arguments stem from problems with the city's mail service causing other requests for rulings by the city to not be timely. However, upon review of the post marks affixed to the city's submissions in this case, we find that all submissions by the city have met the procedural requirements of the Act. *See Id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Thus, the timeliness of the city's submissions in relation to this request are not at issue.

You claim that the submitted information is excepted from public disclosure under section 552.103 of the Government Code. Section 552.103 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), (c). The city 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 is pending or reasonably anticipated on the date the governmental body received the request, 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). The city must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See id.* Concrete evidence to

support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that, if an individual publicly threatens to bring suit against a governmental body but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

In this instance, you state that the Hillcrest Neighborhood Association the ("association") opposes the proposed relocation of a wastewater plant. You also assert that the requestor has made oral statements to a city employee regarding the association's willingness to oppose the plans and the association's preparation for possible litigation including hiring a litigation attorney and gathering a litigation fund. The requestor asserts that it has not communicated any demands or notices regarding litigation to the city in writing, and further states that its intention is to avoid litigation. The statements which you assert were made by the requestor, if assumed to be true, can be, at most, taken as a public threat of litigation. You have failed to submit any additional arguments showing that any party, including the requestor and the association, has taken objective steps toward filing litigation. As stated above, the public threat of suit, without objective steps toward filing suit, is not sufficient to show that litigation is reasonably anticipated. *See* Open Records Decision No. 331 (1982). Therefore, the city has failed to demonstrate the applicability of section 552.103 to the submitted information, and we conclude that the city may not withhold the submitted information under that exception.

Next, we address your arguments for withholding the individual exhibits. You have marked Exhibit A as 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 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 state that Exhibit A consists of communications between the city and its legal counsel including outside counsel and consultants hired by outside counsel. You further explain these communications are confidential, were not intended to be disclosed to third parties, and were made in rendering professional legal services. Based on your representations and our review, we find that you have demonstrated the attorney-client privilege in this instance. Therefore, the city may withhold Exhibit A under section 552.107 of the Government Code.

Next, we address your arguments stating that Exhibit B is excepted from disclosure under section 552.101 in conjunction with rule 192.3 of the Texas Rules of Civil Procedure. Section 552.101 excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This office has expressly determined that civil discovery privileges do not fall under section 552.101 because they are not constitutional law, statutory law, or judicial decisions. *See Open Records Decision No. 647 at 2* (1996). Accordingly, you may not withhold any information under rule 192.3 of the Texas Rules of Civil Procedure in conjunction with section 552.101. Further, this office generally will not address the applicability of discovery rules to information submitted to our office by a governmental body. *See Open Records Decision No. 416* (1984) (finding that even if evidentiary rule specified that certain information may not be publicly released during trial, it would have no effect on disclosability under Act). However, in *In re City of Georgetown* the Texas Supreme Court ruled that the Texas Rules of Civil Procedure and the Texas Rules of Evidence make confidential information that falls within one of the categories of information that are made expressly public under section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001); *see also* Gov’t Code § 552.022 (enumerating

eighteen categories of information not excepted from required disclosure unless expressly confidential under other law). Thus, in accordance with *In re Georgetown*, this office will only address the applicability the Texas Rules of Civil Procedure and the Texas Rules of Evidence to information that falls under one of the categories of information in section 552.022. In this instance, just two of the documents submitted in Exhibit B, the "Phase I Environmental Site Assessment" and the "Consulting Agreement," fall into one of the categories of information made expressly public by section 552.022 of the Government Code. *See* Gov't Code §§ 552.022(a)(1)(stating that "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body" is public information except as provided by section 552.108 or under other law), .022(a)(3) (stating that "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body" is public information). Thus, we will address your arguments under rule 192.3 only for these two documents. The remaining documents in Exhibit B do not fall within one of the eighteen categories of information subject to section 552.022. Accordingly, the remaining information in Exhibit B may not be withheld under rule 192.3.

We note, however, that a small portion of the information in Exhibit B is protected under section 552.101 in conjunction with common-law privacy. Common-law privacy protects information that is 1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and 2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). This office has found that some kinds of medical information or information indicating disabilities or specific illnesses is excepted from public disclosure under common-law privacy. *See* Open Records Decision No. 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). We have marked the medical information in Exhibit B that must be withheld under common-law privacy.

As previously noted, Exhibit B contains a completed report titled "Phase I Environmental Site Assessment," and a contract titled "Consulting Agreement." You state that this information is excepted from disclosure under rule 192.3(e) of the Texas Rules of Civil Procedure. Under Rule 192.3(e), a party to litigation is not required to disclose the identity, mental impressions, and opinions of consulting experts whose mental impressions or opinions have not been reviewed by a testifying expert. *See* Tex. R. Civ. P. 192.3(e). A "consulting expert" is defined as "an expert who has been consulted, retained, or specially employed by a party in anticipation of litigation or in preparation for trial, but who is not a testifying expert." *Id.* You assert that the information at issue was prepared by consultants hired by the city's outside counsel. However, you have failed to submit any arguments establishing that the consultants were hired in anticipation of litigation or in preparation for trial. Accordingly, you failed to demonstrate the applicability of rule 192.3 to the Environmental Assessment Report or the Consulting Agreement. Thus, the city must release these documents to the requestor.

Next, you state that Exhibit C is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 of the Government Code 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. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 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 *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, and opinions reflecting the policymaking processes of the governmental body. *See* Open Records Decision No. 615 at 5. Section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See id.* But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982). This office also has concluded that a preliminary draft of a 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.

In this instance, you state that the information in Exhibit C was created by city staff, outside legal counsel, and consultants hired by outside counsel. You generally assert that this information consists of advice, opinions, and recommendations of city staff, outside legal counsel, and consultants regarding the site selection and relocation of a wastewater treatment plant. Upon review, we have marked the information in Exhibit C 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 is not facts or written observations of facts and events. Thus, the remaining information is not excepted under section 552.111.

Next you state that the information marked as Exhibit D is excepted from disclosure under section 552.105. Initially we note that a majority of the information in Exhibit D consists of completed reports and information used to estimate the expenditure of public funds by a governmental body. As stated supra, section 552.022(a)(1) provides, among other things,

that completed reports are expressly public except as provided by section 552.108 or under other law. Section 552.022(a)(5) makes “all working papers, research material, and information used to estimate the need for or expenditure of public or other funds or taxes by a governmental body” public on completion of the estimate unless they are made expressly confidential by other law. *See* Gov’t Code § § 552.022(a)(1), (a)(5). Section 552.105 is a discretionary exception under the Act that does not constitute “other law” for purposes of section 552.022. *See* Open Records Decision No. 564 (1990) (governmental body may waive statutory predecessor to section 552.105). Thus, section 552.105 is not applicable to the reports and completed expenditure estimates.

Finally, we will address your argument under section 552.105 of the Government Code for the remaining information in Exhibit D. Section 552.105 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. 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).

In this instance, both the city and the requestor, acknowledge that the city council openly announced that the city will move forward with the purchase of the Flint Hills property as a site for the wastewater treatment plant. Because the city has publicly announced its decision to purchase the Flint Hills property, we find that you have failed to establish how the release of the remaining documents in Exhibit D “will harm the city’s negotiation position with respect to the acquisition of the properties in question.” Accordingly, you may not withhold the remaining information in Exhibit D under section 552.105 of the Government Code.

We note that some of the information which must be released in Exhibits B and D is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, you may withhold the attorney-client communications contained in Exhibit A under section 552.107 of the Government Code, and the marked internal communications in Exhibit C under the deliberative process privilege encompassed by section 552.111. You must withhold the information marked in Exhibit B under section 552.101 in conjunction with common-law privacy. The remaining submitted information must be released; however, any copyrighted information may only be released in accordance with copyright law.

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).

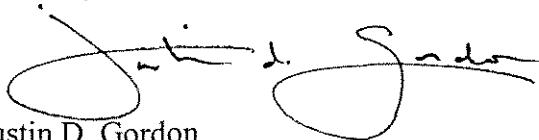
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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 loop at the end.

Justin D. Gordon  
Assistant Attorney General  
Open Records Division

JDG/sdk

Ref: ID# 263539

Enc. Submitted documents

c: Mr. Errol A. Summerlin  
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(w/o enclosures)