



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 23, 2007

Ms. Elaine S. Hengen
Senior Assistant City Attorney
City of El Paso
2 Civic Center Plaza, 9th Floor
El Paso, Texas 79901

OR2007-00749

Dear Ms. Hengen:

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# 269506.

The City of El Paso (the "city") received a request for several categories of information, including the following:

12. "All documents relating to the Preliminary Project Plan ("PPP") for the contemplated Tax Increment Reinvestment Zone ("TIRZ"), including all drafts of the PPP."
13. "All documents relating to the Preliminary Reinvestment Zone Finance Plan ("PRZFP"), including all drafts of the PRZFP."
14. "All documents relating to the whether the Redevelopment District meets the criteria for the establishment of a TRIZ[.]"
- ...
35. "All documents exchanged between [a named individual] and the Office of the City Attorney relating [to] conflicts of interests from June 1, 2005 to the present."
36. "The opinion(s) of the city attorney relating to any conflicts of interest involving any member of the El Paso City Council on any issue from June 1, 2005 to the present."

You state the city does not have information responsive to some other parts of the request.¹ You also state the city will release some of the requested information. You argue the city is not required to respond to an aspect of part 14 of the request. You claim that the submitted information, which you state is responsive to parts 12, 13, 35, and 36 of the request, is excepted from disclosure under sections 552.106 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we address your statement that the city will provide the requestor information responsive to part 14 of the request but that “the [c]ity offers no legal interpretation, judgment and opinion regarding these records, as was sought in the request.” A governmental body has a duty to make a good faith effort to relate a request for information to information that the governmental body holds. *See* Open Records Decision No. 561 at 8-9 (1990); *see also* Open Records Decision Nos. 551 at 2-3 (1990) (laws or ordinances are open records), 221 at 1 (1979) (“official records of the public proceedings of a governmental body are among the most open of records”). However, the Act does not require a governmental body to answer factual questions, conduct legal research, or create new information in responding to a request. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). Thus, the city must release information responsive to part 14 of the request; however, the city need not create any new information to respond to this part of the request.

You claim the information responsive to parts 12 and 13 of the request, submitted as Exhibit B, is excepted from disclosure under section 552.106 of the Government Code. 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). 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, it does not except from disclosure purely factual information. *Id.* at 2. However, a comparison or analysis of factual information prepared to support proposed legislation is within the ambit of section 552.106. *Id.* A proposed budget constitutes a recommendation by its very nature and may be withheld under section 552.106. *Id.* This office has also concluded that the drafts of municipal ordinances and resolutions which reflect policy judgments, recommendations, and proposals are excepted by section 552.106. Open Records Decision No. 248 (1980).

¹The Act does not require a governmental body to disclose information that did not exist at the time the request was received, nor does it require a governmental body to prepare new information in response to a request. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975); *see also* Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 416 at 5 (1984).

You inform us that Exhibit B is a draft of proposed legislation that will be presented to the “[city council] for adoption at a time in the near future.” You inform us “[t]his legislative draft has been and continues to be prepared by outside legal counsel for the [city].” You further inform us that this “outside legal counsel, in consultation with the [city attorney’s office], is still in the process of formulating the recommendations, proposals and related policy judgments regarding possible changes and determining the exact language that will be presented to the [city council] in the plan in [Exhibit B and its enacting ordinance], which has yet to be drafted.” Based on your representations and our review of the information at issue, we conclude the city may withhold Exhibit B under section 552.106 of the Government Code.

You claim the information responsive to parts 34 and 35 of the request, submitted as Exhibits C and D, is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) 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 assert Exhibits C and D “were authored by an [assistant city attorney] hired by and working for the [city] in the course and conduct of providing legal services to the [city]” and constitute confidential “communications made by an attorney with her client or authorized representatives of the client for the purpose of facilitating the rendition of professional legal services.” Based on your representations and our review of the information at issue, we conclude that Exhibits C and D consist of privileged attorney-client communications that the city may withhold under section 552.107 of the Government Code.

In summary, the city must release information responsive to part 14 of the request but need not create new information to respond to this part of the request. The city may withhold Exhibit B under section 552.106 of the Government Code. The city may withhold Exhibits C and D under section 552.107 of the Government Code.

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,



Ramsey A. Abarca
Assistant Attorney General
Open Records Division

RAA/eb

Ref: ID# 269506

Enc. Submitted documents

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(w/o enclosures)