



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 15, 2007

Mr. Nathan Barrow
Assistant City Attorney
Office of the City Attorney
City of Fort Worth
1000 Throckmorton St
Fort Worth Texas 76102

OR2007-02904

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# 273450.

The City of Fort Worth (the "city") received a request for the following information: 1) all e-mails sent and received by the requestor during the forty-five days prior to the request, 2) all e-mail folders on the server and local drive, "including desktop and PST files," and 3) all documents on the requestor's computer's hard drive. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.104, 552.105, 552.106, 552.107, 552.111, 552.116, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

You claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code, which provides in part:

¹We 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.

(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 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). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documents sufficient to establish that this exception is applicable in a particular situation. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of the governmental body's receipt of the request for information, and (2) the information at issue is related to the pending or anticipated litigation. *See 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). A governmental body must establish both elements of this test in order for information to be excepted under section 552.103.

To demonstrate that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *See* Open Records Decision No. 452 at 4. 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; *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).

You claim that the submitted information is excepted from disclosure under section 552.103 because the requestor filed a wrongful termination claim and "was attempting to initiate her administrative remedies and was preparing for potential litigation with the [c]ity." However, we note you have not demonstrated that, at the time of the request, the requestor had taken

concrete steps towards litigation. *See id.* Thus, we find that you have failed to establish that the city reasonably anticipated litigation when it received the request for information. Accordingly, we conclude that none of the submitted information may be withheld under section 552.103 of the Government Code.

You claim that Exhibit E is excepted from disclosure under section 552.104 of the Government Code, which excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104. The purpose of section 552.104 is to protect a governmental body’s interests in competitive bidding situations. *See Open Records Decision No. 592 (1991)*. Moreover, section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. *Open Records Decision No. 541 at 4 (1990)*. Section 552.104 does not except information relating to competitive bidding situations once a contract has been awarded. *Open Records Decision Nos. 306 (1982), 184 (1978)*.

The city informs this office that it is “actively negotiating a contract” relating to a computer communications system for the city’s emergency communications. You inform us that the city has not yet entered into a contract. Furthermore, you argue that the release of the information at issue to the requestor would impair the city’s ability to continue to negotiate this contract by revealing its position and its requirements. Based on the submitted arguments and our review, we conclude that the city may withhold Exhibit E under section 552.104 of the Government Code.

You claim that Exhibit G is excepted from disclosure under 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. Section 552.105 is designed to protect a governmental body’s planning and negotiating position with respect to particular transactions. *See 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. *See 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.’” *Open Records Decision No. 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).

You state that Exhibit G relates to the location of real or personal property that the city intends to purchase. You indicate that this information has not been released to the public. Based on your representations and our review of the information at issue, we conclude that the city may withhold Exhibit G under section 552.105 of the Government Code.

You claim that Exhibit H is excepted from disclosure under section 552.106 of the Government Code, which 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, it does not except from disclosure purely factual information. *Id.* at 2.

You indicate that the information at issue consists of drafts, working papers, and communications prepared by or exchanged between city departments and the city council. We understand you to assert that this information consists of advice, opinion, and recommendations that reflect deliberative or policymaking processes. After reviewing the information at issue, we agree that the information at issue consists of communications and preliminary drafts that represent the advice, opinions, and recommendations of city personnel. Accordingly, the city may withhold Exhibit H under section 552.106 of the Government Code.

You claim that Exhibit K is excepted from disclosure under section 552.107 of the Government Code, which protects information within the attorney-client privilege. *See* Gov't Code § 552.107(1). 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). 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 K consists of communications between and among city attorneys that were made for the purpose of rendering legal services to the city. You indicate that these communications were intended to be confidential, and that confidentiality has been maintained. Based on your representations and our review of the information at issue, we agree that a portion of Exhibit K, which we have marked, is protected by the attorney-client privilege and may be withheld under section 552.107 of the Government Code. The remainder of Exhibit K, however, documents communications to individuals who you have not identified as clients, client representatives, lawyers, or lawyer representatives. Thus, you have failed to demonstrate that this information documents privileged attorney-client communications. Therefore, the remaining information is not excepted under this section.

You claim that Exhibit F is excepted from disclosure under section 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. 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*, 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.* However, 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).

Section 552.111 can also encompass communications between a governmental body and a third party consultant. *See* Open Records Decision Nos. 631 at 2 (1995) (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body's consultants). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See* Open Records Decision No. 561 at 9 (1990).

In this instance, you state that the information in Exhibit F consists of communications that contain advice, opinions, and recommendations of city staff regarding city policy issues. We note that some of the information at issue was shared with third parties. You have not demonstrated how the city shares a privity of interest or common deliberative process with these third parties. In addition, we find that some of the information at issue is factual or written observations of factual information and events. Accordingly, we have marked the information in Exhibit F that consists of advice, opinions, and recommendations that may be withheld under section 552.111 of the Government Code. The remaining information is not excepted under this section.

You claim that Exhibit D is confidential under section 552.116 of the Government Code, which 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. You state that the documents in Exhibit D were prepared in conducting an audit of the books of account, records, and transactions of all administrative departments of the city. You further explain that the investigations are authorized by Chapter X of the Charter of the City of Fort Worth. Based on your arguments and our review, we agree that Exhibit D consists of audit working papers that the city may withhold under section 552.116 of the Government Code.

You claim that portions of the submitted information are excepted from disclosure under section 552.117 of the Government Code. Specifically, section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1); *see also* Open Records Decision No. 670 (2001) (extending section 552.117(a)(1) exception to personal cellular phone number and personal pager number of employee who elects to withhold home phone number in accordance with section 552.024). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, to the extent the information we have marked pertains to the home telephone, personal cellular telephone, or personal pager number of current or former city employees who made timely elections for confidentiality under section 552.024, the city must withhold such information pursuant to section 552.117(a)(1) of the Government Code.

You claim that portions of the submitted information are excepted from disclosure under section 552.137 of the Government Code, which provides:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Gov't Code § 552.137. Under section 552.137, a governmental body must withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See id.* § 552.137(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under section 552.137. Likewise, this section is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. Therefore, the city must withhold any personal e-mail addresses under section 552.137, unless the owner of a particular e-mail address has affirmatively consented to its public disclosure. However, to the extent that any of the personal e-mail addresses belong to employees of entities with which the city has contractual relationships, or fall under any of the other exceptions listed under subsection 552.137(c), the e-mail addresses may not be withheld under section 552.137.

In summary, the city may withhold the following: (1) Exhibit E under section 552.104 of the Government Code, (2) Exhibit G under section 552.105 of the Government Code, (3) Exhibit H under section 552.106 of the Government Code, (4) the information we have marked in Exhibit K under section 552.107 of the Government Code, (5) the information we have marked in Exhibit F under section 552.111 of the Government Code, and (6) Exhibit D under section 552.116 of the Government Code. To the extent the information we have

marked pertains to the home telephone, personal cellular telephone, or personal pager number of current or former city employees who made timely elections for confidentiality under section 552.024 of the Government Code, the city must withhold such information pursuant to section 552.117(a)(1) of the Government Code. The city must withhold any personal e-mail addresses under section 552.137 of the Government Code, unless the owner of a particular e-mail address has affirmatively consented to its public disclosure. The remaining information must be released to the requestor. As our ruling is dispositive, we need not address your remaining arguments against disclosure.

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,



Jaime L. Flores
Assistant Attorney General
Open Records Division

JLF/jb

Ref: ID# 273450

Enc. Submitted documents

c: Ms. Linda J. Shilling
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(w/o enclosures)