



ATTORNEY GENERAL OF TEXAS
G R E G A B B O T T

April 3, 2007

Mr. Ken Johnson
Assistant City Attorney
City of Waco
P.O. Box 2570
Waco, Texas 76702-2570

OR2007-03710

Dear Mr. Johnson:

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# 274795.

The City of Waco (the "city") received a request for information relating to the Texas Clean Air Cities Coalition (the "coalition"), the city's interest in or consideration of any proposals to build coal-fired powerplants in Texas, or the environmental permitting process for any such proposals. You state you will release some information, but claim that the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code and Texas Rule of Civil Procedure 192.5.¹ We have considered the exceptions you claim and reviewed the submitted information.

We first note that some of the submitted information is subject to required public disclosure under section 552.022 of the Government Code. Section 552.022(a)(1) provides for the disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a government body[.]" Gov't Code § 552.022(a)(1). Section 552.022(a)(3) provides for the disclosure of "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]" *Id.* § 552.022(a)(3).

¹Although you raise the work product privilege under section 552.101 of the Government Code, we note that section 552.101 does not encompass discovery privileges. *See* Open Records Decision No. 676 at 1-3 (2002).

Section 552.022(a)(16) provides for the disclosure of “information that is in a bill for attorney’s fees and that is not privileged under the attorney-client privilege.” *Id.* § 552.022(a)(16). Some of the information in Exhibit 10, which we have marked, and all of the information in Exhibits 12 and 14 are subject to section 552.022 and must be released, unless it is expressly confidential under other law or unless the information encompassed by section 552.022(a)(1) is excepted from disclosure under section 552.108 of the Government Code.²

The city raises sections 552.103, 552.107, and 552.111 for the submitted information that is subject to section 552.022. Sections 552.103, 552.107, and 552.111 are discretionary exceptions to disclosure that protect the governmental body’s interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under Gov’t Code § 552.111 may be waived), 676 at 10-11 (2002) (attorney-client privilege under Gov’t Code § 552.107(1) may be waived), 665 at 2 n.5 (discretionary exceptions generally). As such, sections 552.103, 552.107, and 552.111 are not other law that makes information confidential for the purposes of section 552.022. Therefore, the city may not withhold any of the submitted information that is subject to section 552.022 under sections 552.103, 552.107, or 552.111.

You claim that Exhibit 14 is excepted from disclosure under Texas Rule of Civil Procedure 192.5, or alternatively, under section 552.107 of the Government Code. As previously discussed, however, section 552.107 is a discretionary exception to disclosure that protects a governmental body’s interests and may be waived. However, the Texas Supreme Court has held that the Texas Rules of Evidence and the Texas Rules of Civil Procedure are “other law” within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The attorney-client privilege also is found at Texas Rule of Evidence 503. Accordingly, we will consider your assertion of this privilege under rule 503 with respect to the attorney fee bills in Exhibit 14 and the contract in Exhibit 12. We will also address your assertion of the attorney work product privilege under rule 192.5. With respect to the remaining information in Exhibits 10, 11, 13, and 15, we will address your claims under sections 552.103, 552.107, and 552.111.

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

²We note that the city does not claim an exception to disclosure under section 552.108.

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or
- (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if 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).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ). Based on your representations and our review of the submitted information, we find that Exhibit 12, and the information we have marked in Exhibit 14 may be withheld on the basis of the attorney-client privilege under Texas Rule of Evidence 503.

You also assert that Exhibit 14 is excepted from disclosure under Texas Rule of Civil Procedure 192.5, which encompasses the attorney work product privilege. For purposes of section 552.022 of the Government Code, information is confidential under rule 192.5 only to the extent that the information implicates the core work product aspect of the work product privilege. *See* Open Records Decision No. 677 at 9-10 (2002). Rule 192.5 defines core work product as the work product of an attorney or an attorney's representative, developed in anticipation of litigation or for trial, that contains the mental impressions, opinions, conclusions, or legal theories of the attorney or the attorney's representative. *See*

TEX. R. CIV. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product from disclosure under rule 192.5, a governmental body must demonstrate that the material was (1) created for trial or in anticipation of litigation and (2) consists of the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *Id.*

The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that (1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and (2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See Nat'l Tank v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204. The second part of the work product test requires the governmental body to show that the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney's or an attorney's representative. *See* TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both parts of the work product test is confidential under rule 192.5, provided that the information does not fall within the scope of the exceptions to the privilege enumerated in rule 192.5(c). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ). You assert that Exhibit 14 contains "documentation reflecting the actual work performed by the [c]ity's retained attorney in the TXU litigation and to prepare for such litigation." We understand you to state that the attorney work product privilege has not been waived. Based on your representations and our review of the information at issue, we have marked the information in Exhibit 14 that the city may withhold as core attorney work product under Texas Rule of Civil Procedure 192.5.

We now address your claim that the information submitted in Exhibit 10 is excepted from disclosure under section 552.103 of the Government Code. This section 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 governmental body 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 for information, 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 governmental body must meet both prongs of this test for information to be excepted under 552.103(a).

You inform us that the city is a member of the coalition, which you state is a non-profit unincorporated association of local governmental entities. You also state that the coalition is a party to a contested administrative proceeding before the Texas Commission on Environmental Quality concerning a request by TXU for a permit to build coal-fired powerplants. You also inform us that the city is involved in litigation with TXU “on an individual basis over the matter of the Lake Creek Steam Electric Station and the Tradinghouse Steam Electric Station.” You indicate that these two cases were pending when the city received this request for information. We note that a contested case under the Texas Administrative Procedure Act (the “APA”), chapter 2001 of the Government Code, constitutes “litigation” for purposes of section 552.103(a). *See* Open Records Decision No. 588 (1991). Having considered your arguments, we conclude that the city was a party to pending litigation, as a member of the coalition and on an individual basis, when the city received this request for information. *See Cox v. Thee Evergreen Church*, 836 S.W.2d 167, 169 (Tex. 1992) (“Historically, unincorporated associations were not considered separate legal entities and had no existence apart from their individual members.”); *Libhart v. Copeland*, 949 S.W.2d 783, 792 (Tex. App.—Waco 1992, no pet. h.) (same); *see also* Bus. Org. Code § 252.007(b). We also conclude that some of the information that you seek to withhold under section 552.103 is related to the litigation. *See* Open Records Decision Nos. 551 at 5 (1990) (attorney general will determine whether governmental body has reasonably established that information at issue is related to litigation), 511 at 2 (1988) (information “relates” to litigation under section 552.103 if its release would impair governmental body's litigation interests). We have marked the information in Exhibit 10 that the city may withhold under section 552.103. However, the city has failed to demonstrate how the remaining information in Exhibit 10 relates to the pending litigation, and it may not be withheld under section 552.103.

We note, however, that the opposing party in the anticipated litigation appears to have already had access to some of the information in Exhibit 10. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that is related to litigation through discovery procedures. *See* Open

Records Decision No. 551 at 4-5 (1990). If the opposing party has seen or had access to information that is related to pending litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, to the extent that the opposing party has already seen or had access to the information in Exhibit 10, the city may not now withhold any such information under section 552.103. To the extent that the opposing party has not seen or had access to the information we have marked in Exhibit 10, it is excepted from disclosure at this time under section 552.103. We also note that the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We next address your claim that Exhibits 11 and 13 are excepted from disclosure under section 552.107(1) of the Government Code, which protects information that comes 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. *See* 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. *See* 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. *See 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 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. *See* 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. *See 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 seek to withhold Exhibits 11 and 13 under section 552.107(1). You state that the information at issue consists of communications that were made in furtherance of the rendition of legal services. You state that the parties to the communications in question include attorneys for and client representatives of the city, as well as a representative from a state agency. Based on your representations and our review of the information at issue, we conclude that the city may withhold Exhibit 11 under section 552.107(1). *See also* TEX. R. EVID. 503(b)(1)(C) (client has privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for purpose of facilitating rendition of professional legal services to lawyer or representative of lawyer representing another party in pending action and *concerning a matter of common interest therein*) (emphasis added); TEX. R. DISCIPLINARY CONDUCT 1.05(c)(1) (lawyer may reveal confidential information when lawyer has been expressly authorized to do so in order to carry out representation); *In re Auclair*, 961 F.2d 65, 69 (5th Cir. 1992) (citing *Hodges, Grant & Kaufmann v. United States Government*, 768 F.2d 719, 721 (5th Cir. 1985)) (attorney-client privilege is not waived if privileged communication is shared with third person who has common legal interest with respect to subject matter of communication); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76 (if two or more clients with common interest in litigated or nonlitigated matter and represented by separate lawyers agree to exchange information concerning the matter, communication of any such information that otherwise qualifies as privileged under §§ 68-72 and that relates to the matter is privileged as against third persons, and any such client may invoke privilege unless it has been waived by client that made communication). You have not demonstrated, however, that the remaining information at issue satisfies the requirements of the attorney-client privilege for the purposes of this exception. *See* TEX. R. EVID. 503; Open Records Decision No. 676 at 6-11 (2002). Among other things, you have not identified the parties to the communications at issue as being clients, client representatives, lawyers, or lawyer representatives to whom the attorney-client privilege would apply. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). We therefore conclude that the city may not withhold any of the remaining information under section 552.107.

You next assert that Exhibit 15 is excepted from disclosure under section 552.111 of the Government Code. This section 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.” 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 that reflect the policymaking

processes of the governmental body. *See* Open Records Decision No. 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also* *City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (Gov't Code § 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995). Moreover, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* Open Records Decision No. 615 at 5. 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).

You assert that the information in Exhibit 15 relates to policymaking matters regarding the city and the coalition. Upon review, we conclude that you have not demonstrated that the information in Exhibit 15 consists of advice, recommendations, or opinions that reflect the policy making processes of the city. Therefore, the city may not withhold any of the information in Exhibit 15 under section 552.111 of the Government Code.

We note that some of the remaining submitted information is protected under section 552.136 of the Government Code.³ Section 552.136 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. Accordingly, the city must withhold the account number we have marked pursuant to section 552.136.

We also note that some of the e-mail addresses in the remaining information are excepted from disclosure under section 552.137 of the Government Code. Section 552.137 excepts from disclosure certain personal e-mail addresses of members of the public that are provided for the purpose of communicating electronically with a governmental body, unless the owner of the e-mail address has affirmatively consented to its public disclosure. *See* Gov't Code § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). Likewise, section 552.137 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. We have marked e-mail addresses that the city must withhold under section 552.137, unless the owner of the e-mail address has affirmatively consented to its disclosure.

³The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Finally, you assert that some of the submitted information 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 protected by copyright. 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 materials protected by copyright, 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, the city may withhold Exhibit 12 and the information we have marked pursuant to Texas Rule of Evidence 503, as well as the information we have marked under Texas Rule of Civil Procedure 192.5 and sections 552.103 and 552.107 of the Government Code. The city must withhold the account number we have marked pursuant to section 552.136 of the Government Code and the e-mail addresses we have marked under section 552.137 of the Government Code. The remaining information must be released to the requestor in accordance with applicable 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).

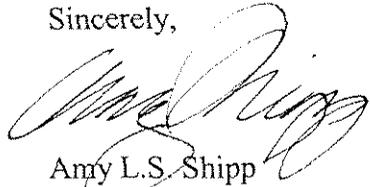
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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



Amy L.S. Shipp
Assistant Attorney General
Open Records Division

ALS/sdk

Ref: ID# 274795

Enc. Submitted documents

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