



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 12, 2007

Mr. Warren Spencer
Assistant City Attorney III
City of Plano
P. O. Box 860358
Plano, Texas 75086

OR2007-04120

Dear Mr. Spencer:

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# 274599.

The City of Plano (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 inform us that you will release some information, but claim that the remaining information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You assert section 552.103 of the Government Code excepts from disclosure all the submitted information. Section 552.103, the litigation exception, provides in relevant part 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 that the request for information is received, 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 section 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 indicate that the case was 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, 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. (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 that the city may withhold under section 552.103. However, the city has failed to demonstrate how the remaining information relates to the pending litigation, and it may not be withheld under section 552.103.

In reaching this conclusion, we assume that the opposing party in the pending litigation has not seen or had access to any of the information in question. 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). 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).

You claim that some of the remaining information is protected from public disclosure based on the attorney-client privilege. Section 552.107(1) of the Government Code 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 state that the information you seek to withhold on the basis of section 552.107 “constitute legal matters between Plano city staff and the Plano city attorney[.]” Based on

your representations and our review of the submitted material, we agree that the information we have marked may be withheld under section 552.107 of the Government Code.

You also raise section 552.111 of the Government Code. Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” 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) (Section 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 state that the information at issue constitutes “communications and recommendations concerning the actions of the [coalition’s] members . . . with regard to the hearings on the coal plants” and assert that “[d]isclosing these opinions and comments before conclusion of the hearing(s) would severely hamper the deliberative policymaking process.” We note that section 552.111 is applicable to communications between or among governmental entities that share a privity of interest or common deliberative process. *See* Open Records Decision No. 561 at (1990) (addressing statutory predecessor). Based on your representations, we have marked information that the city may withhold under section 552.111. However, we find that the city has failed to establish the applicability of section 552.111 to any of the remaining information, and therefore none of it may be withheld on this basis.

We note that some of the remaining information may be subject to section 552.117 of the Government Code.¹ Section 552.117(a)(1) excepts from disclosure the home address, home telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the city may only withhold information under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the employee whose information is at issue timely elected to keep his personal information confidential, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The city may not withhold this information under section 552.117(a)(1) if the employee did not make a timely election to keep his information confidential.

Finally, we 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.

In summary, we have marked the information that the city may withhold under sections 552.103, 552.107, and 552.111 of the Government Code. If the employee timely elected to keep his personal information confidential, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code. We have marked the information that the city must withhold pursuant to section 552.137 of the Government Code. The remaining information must be released.

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

¹The 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).

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).

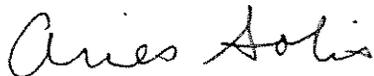
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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



Aries Solis
Assistant Attorney General
Open Records Division

AS/eb

Ref: ID# 274599

Enc. Submitted documents

c: Mr. Patrick W. Lee
Vinson & Elkins, LLP
2301 Via Fortuna, Suite 100
Austin, Texas 78746
(w/o enclosures)