



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 5, 2008

Ms. Helen Valkavich  
Assistant City Attorney  
City of San Antonio  
P.O. Box 839966  
San Antonio, Texas 78283-3966

OR2008-12239

Dear Ms. Valkavich:

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# 320872.

The City of San Antonio (the "city") received a request for all records created from March 10, 2008 to the present pertaining to the merger/elimination of the San Antonio Park Police. You claim that the requested information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in part, that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

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<sup>1</sup>We note that in your brief dated July 9, 2008, you withdraw your assertions of sections 552.101, 552.102, 552.103, 552.106 and 552.108 of the Government Code.

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). In this instance, the submitted information contains a completed report, which we have marked, that is subject to section 552.022(a)(1) of the Government Code. Therefore, the city may only withhold this information if it is confidential under "other law." Although you claim this information is excepted under section 552.111 of the Government Code, we note that this section is a discretionary exception to disclosure that a governmental body may waive. *See id.* § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 473 (1987) (governmental body may waive section 552.111). As such, section 552.111 does not make information confidential for purposes of section 552.022. Therefore, the city may not withhold any portion of the marked completed report under section 552.111. We note, however, that the completed report contains information subject to section 552.130 of the Government Code.<sup>2</sup> This section is "other law" for purposes of section 552.022; therefore we will address the applicability of section 552.130 to the completed report.

Section 552.130 excepts from disclosure "information [that] relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state." Gov't Code § 552.130. Accordingly, the city must withhold the Texas motor vehicle record information we have marked within the completed report pursuant to section 552.130 of the Government Code. *See* Transp. Code § 501.002(14)(B) (motor vehicle means a trailer or semitrailer, other than manufactured housing, that has a gross vehicle weight that exceeds 4,000 pounds); *see also id.* § 502.006(b) (municipality may register an all-terrain vehicle for operation on a public beach or highway to maintain public safety and welfare). As you raise no other arguments against the disclosure of the remaining information contained within the completed report, it must be released.

You claim that a portion of the remaining information 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

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<sup>2</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. 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). 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).

In this case, you assert that a portion of the remaining information, which you have marked, consists of communications made for the purpose of facilitating the rendition of professional legal services. You state that the communications were between clients, client representatives, lawyers, and lawyer representatives identified by the city, and that the communications were to be kept confidential among the intended parties. Finally, you state that the city has not waived its privilege with respect to any of the communications at issue. Therefore, the city may withhold the information you have marked under section 552.107.

You seek to withhold the remaining information 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). 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). In *Gilbreath*, the Third Court of Appeals found that the deliberative process privilege aspect of section 552.111 was analogous to Exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5). *See* ORD 615 at 2 (quoting *Gilbreath*, 842 S.W.2d at 412). The court found that subsequent to the passage of the Act by the Texas Legislature, federal court decisions and decisions from this office were interpreting the deliberative process privilege too broadly, straying from the interpretation for Exemption 5 that Congress intended. *See id.* The court held that this privilege “exempts those documents, and only those documents,

normally privileged in the civil discovery context.” *Id.* Therefore, at the direction of the court, this office narrowed the scope and interpretation of the deliberative process privilege, applying the same discovery-based approach applied by federal courts in early interpretations of this privilege. *See id.* at 3. Prior to the passage of the Act, the United States Supreme Court in *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973), determined that the purpose of the privilege was to promote the frank discussion of legal or policy matters within governmental agencies. ORD 615 at 3 (quoting *Mink*, 410 U.S. at 87). In *Ackerly v. Ley*, 420 F.2d 1336, 1341 (D.C. Cir.), cert. denied, 400 U.S. 824 (1970), the court held that the privilege was intended to protect “those internal working papers in which opinions are expressed and policies formulated and recommended.” ORD 615 at 5 (quoting *Ackerly*, 420 F.2d at 1341). In light of these court decisions, this office has determined that section 552.111 excepts from disclosure only the advice, recommendations, and opinions of members of the governmental body at issue that relate to a policymaking matter. *See* ORD 615 at 5. Furthermore, the fact that a document may have been used in the policymaking process does not bring that information within the privilege. Additionally, 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. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking).

This office has also 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.

You contend that the remaining information consists of e-mails and other documents related to discussions of the proposed merger, as well as draft proposals and plans pertaining to the proposed merger and the city’s transition of the park police to the police department. Based on your representations and our review, we find that some of the draft documents and portions of the communications reveal advice, opinions, or recommendations regarding the proposed merger and the transition. Thus, you have established that the deliberative process privilege is applicable to this information, which we have marked, and it may be withheld under section 552.111 of the Government Code. However, upon review of the remaining information, we find that it consists of factual information, and thus, does not reveal the advice, recommendations, and opinions of city staff regarding the proposed merger. *See* ORD 615 at 3-5 (citing to *Mink*, 410 U.S. at 87 and *Ackerly*, 420 F.2d at 1341, which both determined that the deliberative process privilege applies only to information that reveals the

advice, opinions, or recommendations of persons engaged in the preparation of proposed legislation). Therefore, the remaining information may not be withheld under section 552.111 of the Government Code.

In summary, the city must withhold the information we have marked under section 552.130 of the Government Code. The remaining information that is subject to section 552.022(a)(1) must be released. The city may withhold the information you have marked under section 552.107 of the Government Code and the information we have marked under section 552.111 of the Government Code. The remaining information must be released to the requestor.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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).

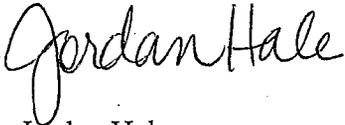
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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 cursive script that reads "Jordan Hale".

Jordan Hale  
Assistant Attorney General  
Open Records Division

JH/jb

Ref: ID# 320872

Enc. Submitted documents

c: Mr. John Haning  
P.O. Box 15442  
San Antonio, Texas 78212  
(w/o enclosures)