



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 10, 2009

Mr. Eloy Padilla
Assistant City Attorney
The City of Del Rio
109 West Broadway Street
Del Rio, Texas 78840

OR2009-03124

Dear Mr. Padilla:

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# 336900.

The City of Del Rio (the "city") received a request for (1) "any and all ordinances, maps, resolutions, orders or other laws pertaining in whole or in part to the annexation, zoning and rezoning" of a specified tract of land and (2) the 2008 request for zoning change submitted by the requestor's client for the rezoning of the same tract of land. You claim that the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that you have not submitted any information responsive to item (2) of the request. If the city maintains information responsive to this part of the request and has not already released such information to the requestor, the city must release that information as soon as possible. *See* Gov't Code § 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply, then it must release information as soon as possible).

We next note that some of the submitted information is not responsive to the present request because it was created after the date of the request. This ruling does not address the public availability of this information, which we have marked, and the city is not required to release the marked information in response to the request.

We next address your argument under section 552.107 of the Government Code, which excepts from disclosure information that comes within the attorney-client privilege. See Gov't Code § 552.107(1). A governmental body asserting the attorney-client privilege bears the burden of providing the necessary facts to demonstrate the elements of the privilege. See *Open Records Decision No. 676 at 6-7 (2002)*. First, the governmental body must demonstrate that the information at issue constitutes or documents a communication. See *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); *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). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. See 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, meaning such communication 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. Finally, we note that section 552.107(1) generally excepts an entire communication that is 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 instance, you state that the information you have marked as Exhibits C and D consists of communications among city attorneys and city employees, all of whom you have identified. You also state that these communications were made in furtherance of the rendition of legal services to the city, and you inform this office that these communications have remained confidential. Based on your representations and our review, we agree that the information in Exhibits C and D constitutes privileged attorney-client communications. Accordingly, the city may withhold this information under section 552.107(1) of the Government Code. However, we note that some of the individual e-mails and attachments in the submitted e-mail chains consist of communications with a non-privileged party. Thus, to the extent that these non-privileged e-mails and attachments, which we have marked, exist separate and apart from the submitted e-mail chains, they must be released to the requestor.

You next assert that the information you have marked as Exhibit E is excepted from disclosure by section 552.111 of the Government Code, which 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.” Section 552.111 encompasses the attorney work product privilege found in Rule 192.5 of the Texas Rules of Civil Procedure. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as:

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party’s representatives or among a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX.R.CIV.P. 192.5. A governmental body seeking to withhold information under section 552.111 bears the burden of demonstrating that the information at issue was created or developed for trial or in anticipation of litigation by or for a party or a party’s representative. *See id.*; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that:

a) 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 b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

See Nat’l Tank Co. 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; ORD 677 at 7.

You state that the city “believes that these requests [are] in anticipation of possible litigation” because the requestor has retained counsel to request these records. Upon review of Exhibit E, we conclude that you have not established that this information was created for trial or in anticipation of litigation. Thus, the city may not withhold Exhibit E under the attorney work product exception of section 552.111 of the Government Code.

Section 552.111 also 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, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 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. 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). Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* ORD 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). We also note that section 552.111 encompasses external communications with a third party with which a governmental body shares a privity of interest or a common deliberative process with respect to the policy matter at issue. *See* Open Records Decision No. 561 at 9 (1990) (addressing statutory predecessor).

Upon review, we find that portions of the submitted information consist of advice, recommendations, opinions, and other material reflecting the city's policymaking processes. The city may withhold this information, which we have marked, under the deliberative process exception of section 552.111.

In summary, the city: (1) need not release the portion of Exhibit D that we have marked as non-responsive, (2) may withhold Exhibit C and the remainder of Exhibit D under section 552.107(1) of the Government Code, but to the extent that the marked portions of this information exist separate and apart from the submitted e-mail chains, must release such information, (3) may withhold the portions of the submitted information that we have marked under the deliberative process exception of section 552.111, and (4) must release the remainder of the submitted information to the requestor.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Ryan T. Mitchell
Assistant Attorney General
Open Records Division

RTM/jb

Ref: ID# 336900

Enc. Submitted documents

cc: Requestor
(w/o enclosures)