



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 18, 2011

Ms. Michele Tapia
Assistant District Attorney
Civil Division
Dallas County District Attorney's Office
411 Elm Street, 5th Floor
Dallas, Texas 75202

OR2011-15159

Dear Ms. Tapia:

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# 433418.

Dallas County (the "county") received a request for e-mails sent or received by a named county commissioner during a specified time period. You claim the submitted information is excepted from disclosure under sections 552.101, 552.105, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note the county did not fully comply with section 552.301 of the Government Code. Section 552.301(b) requires a governmental body requesting an open records ruling from this office to "ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the tenth business-day after the date of receiving the written request." Gov't Code § 552.301(b). While the county raised sections 552.105, 552.107, and 552.111 of the Government Code within the ten-business-day time period as required by subsection 552.301(b), the county did not raise section 552.101 of the

¹We assume the "representative sample" of information 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 those records contain substantially different types of information than that submitted to this office.

Government Code until after the ten-business-day deadline had passed. Generally, if a governmental body fails to timely raise an exception, that exception is waived. *See generally id.* § 552.302; Open Records Decision No. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). Because section 552.101 is a mandatory exception to disclosure and may not be waived, we will consider your claim under section 552.101 for Exhibit C. *See* Gov't Code §§ 552.007, .301, .302, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions). We will also consider the county's timely-raised exceptions.

Section 552.107(1) of the Government Code 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. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate 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 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.*, 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, orig. proceeding). 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 the submitted information includes certain e-mails that constitute privileged attorney-client communications. However, you have not identified which e-mails you contend are privileged, nor have you identified any of the parties to the submitted e-mails. Thus, because you have not explained how or why any of the parties to the e-mails at issue are privileged, we find you have failed to demonstrate this information consists of

communications between privileged parties. Therefore, the county may not withhold any of the submitted e-mails under section 552.107.

You contend the e-mails submitted as Exhibit B are excepted from public disclosure under 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. Section 552.111 encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of this exception 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, orig. proceeding); 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 section 552.111 excepts from disclosure only those internal communications that consist of advice, opinions, recommendations, 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. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *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).

Section 552.111 can also encompass communications between a governmental body and a third party, including a consultant or other party with a privity of interest. *See* Open Records Decision No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). 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* ORD 561 at 9. We note that a governmental body does not have a privity of interest or common deliberative process with a private party with which the

governmental body is engaged in contract negotiations. *See id.* (section 552.111 not applicable to communication with entity with which governmental body has no privity of interest or common deliberative process).

You state the e-mails in Exhibit B constitute interagency and intraagency communications among county personnel and administrators. You do not identify any of the parties to these communications. Further, we note some of these e-mails have been shared with private companies and you do not explain how the county shares privity or a common interest with these parties. Upon review, we find you have failed to demonstrate how any of the e-mails are communications between privileged parties. Therefore, the county may not withhold any of Exhibit B under section 552.111 on the basis of the deliberative process privilege.

You assert Exhibit C is excepted from public disclosure based on the attorney work product privilege. Section 552.111 of the Government Code also encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland*, 22 S.W.3d at 360; ORD 677 at 4-8. 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 this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. TEX. R. CIV. P. 192.5; ORD 677 at 6-8. In order for this office to conclude 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.

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 Exhibit C consists of a communication developed by the district attorney's office with relevant individuals at the county "regarding the status of and plans" for litigation of certain cases. You contend this communication constitutes attorney work product. However, the e-mail at issue is a communication with a representative of the Texas Department of Criminal Justice. You have not demonstrated how this individual is a privileged party. Accordingly, you have failed to demonstrate how the work product privilege is applicable to the e-mail at issue. Thus, the county may not withhold any of Exhibit C on the basis of the attorney work product privilege under section 552.111.

You assert some of the information in Exhibit C is protected by common-law privacy under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision[.]" and encompasses the doctrine of common-law privacy. Gov't Code § 552.101. Common-law privacy excepts from public disclosure private information about an individual if the information (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. The type of information considered highly intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. Upon review, we find you have failed to demonstrate how any information in Exhibit C is highly intimate or embarrassing and not of legitimate public interest. Accordingly, none of the information in Exhibit C is confidential under common-law privacy, and the county may not withhold any of it under section 552.101 on that basis.

You seek to withhold Exhibit E under section 552.105 of the Government Code. Section 552.105 excepts from disclosure information relating to:

- (1) the location of real or personal property for a public purpose prior to the 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 contract for the property.

Gov't Code § 552.105. This exception is designed to protect a governmental body's planning and negotiating position in transactions involving the purchase of real or personal property for a public purpose until the transaction has been completed. Open Records Decision Nos. 564 (1990), 357 (1982), 310 (1982). You state the county is looking into selling a piece of county property and Exhibit E references a possible offer. However, you fail to demonstrate how release of this information would impair the county's negotiating

position with regard to the sale. As such, the county may not withhold any of Exhibit E under section 552.105.

We note the submitted information contains e-mail addresses that may be subject to section 552.137 of the Government Code.² Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov’t Code § 552.137(a)-(c). Provided the e-mail addresses at issue are not excluded by subsection (c), the county must withhold the e-mail addresses we have marked under section 552.137, unless their owners affirmatively consent to their public disclosure.

In summary, provided the e-mail addresses we have marked are not excluded by section 552.137(c) of the Government Code, the county must withhold the marked e-mail addresses under section 552.137, unless their owners affirmatively consent to their public disclosure. The remaining information must be released.

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, toll free, at (888) 672-6787.

Sincerely,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

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

Ref: ID# 433418

Enc. Submitted documents

c: Requestor
(w/o enclosures)