



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 6, 2012

Mr. Ray Rodriguez
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR2012-17790

Dear Mr. Rodriguez:

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# 470235 (COSA File No. W009704-082012).

The City of San Antonio (the "city") received a request for all city e-mails from January 1, 2012, to the date of the request that reference any of four named towing companies. You state the city has made or will make certain information available to the requestor. You claim the submitted information is excepted from disclosure under sections 552.103, 552.106, 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 a portion of the submitted information, which we have marked, is not responsive to the instant request because it was created after the request was received by the city. This ruling does not address the public availability of the information that is not responsive to the request, and the city is not required to release this information in response to this request.

¹We assume the "representative sample" of records 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 those submitted to this office.

Section 552.103 of the Government Code 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 purpose of section 552.103 is to protect the litigation interests of governmental bodies that are parties to the litigation at issue. *See id.* § 552.103(a); Open Records Decision No. 638 at 2 (1996) (section 552.103 only protects the litigation interests of the governmental body claiming the exception). A governmental body has the burden of providing relevant facts and documents to show section 552.103(a) is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state the city was subject to pending litigation in the city's municipal court prior to the receipt of the request for information. As such, litigation was pending against the city at the time of the request. You explain the litigation pertains to the enforcement of a local ordinance regulating the non-consent towing of motorized vehicles. You state the named towing companies have received citations under this ordinance and hearings on the matter are scheduled for October 16, 2012. You state the information you have marked is directly related to the pending litigation. Based on your representations and our review, we find the responsive information at issue is related to the pending litigation. Accordingly, section 552.103 of the Government Code is generally applicable to the responsive information you have marked.

We note however, the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* ORD 551 at 4-5. Therefore, if the opposing

party has seen or had access to information relating to pending litigation through discovery or otherwise, 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 note ~~the opposing party to the pending litigation has seen or had access to a portion of the~~ information at issue. Therefore, this information, which we have marked, is not protected by section 552.103 and may not be withheld on that basis. However, the city may withhold the remaining responsive information it has marked under section 552.103 of the Government Code.² We note the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). We will address your remaining arguments for the remaining responsive information, including the portion of the information to which the opposing party had access or has seen.

You assert some of the remaining responsive information is protected under section 552.106 of the Government Code, which excepts from disclosure “[a] draft or working paper involved in the preparation of proposed legislation[.]” Gov’t Code § 552.106(a). Section 552.106 protects advice, opinion, and recommendation on policy matters in order to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body. *See* Open Records Decision No. 460 at 3 (1987). Therefore, section 552.106 is applicable only to the policy judgments, recommendations, and proposals of persons who are involved in the preparation of proposed legislation and who have an official responsibility to provide such information to members of the legislative body. *Id.* at 1. Section 552.106 does not protect purely factual information from public disclosure. *See id.* at 2; *see also* Open Records Decision No. 344 at 3-4 (1982) (for purposes of statutory predecessor, factual information prepared by State Property Tax Board did not reflect policy judgments, recommendations, or proposals concerning drafting of legislation). However, a comparison or analysis of factual information prepared to support proposed legislation is within the scope of section 552.106. ORD 460 at 2. Having considered your arguments and reviewed the information at issue, we find the city has failed to demonstrate any of the remaining information at issue constitutes advice, opinion, recommendation, and analysis regarding proposed legislation. Therefore, the city may not withhold any of the remaining information at issue under section 552.106 of the Government Code.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* Gov’t Code § 552.107(1). 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

²As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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 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). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact 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. 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 some of the remaining responsive information consists of confidential communications between or among city attorneys, staff, and outside counsel hired by the city. You inform us these communications were made for the purpose of facilitating the rendition of professional legal services to the city. However, we note the remaining information at issue consists of communications shared with the counsel of the opposing party to the pending litigation. Thus, the city has not demonstrated the applicability of the attorney-client privilege to the remaining information at issue, and none of it may be withheld under section 552.107(1) of the Government Code.

You also assert some of the remaining responsive information is excepted from disclosure under section 552.111 of the Government Code, which excepts from disclosure “[a]n 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); *see also 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 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. See *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). 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).

This office has also concluded a preliminary draft of a document 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 state some of the remaining responsive information contains advice, opinions, or recommendations on policymaking matters of the city. You state this information was communicated between city employees and is for internal use only. We note the information at issue includes drafts of a public notice that we understand will be released to the public in its final form. Based on your representations and our review, we agree some of the information at issue, which we have marked, consists of advice, opinions, or recommendations on policymaking matters. Thus, the city may withhold the information we have marked under section 552.111 of the Government Code. However, we find the remaining information at issue either consists of purely factual information or was communicated with parties you have not identified as sharing a privity of interest or common deliberative process with the city. Therefore, we conclude you have failed to demonstrate any of the remaining information at issue constitutes internal communications containing advice, recommendations, or opinions reflecting the policymaking processes of the city. Consequently, the city may not withhold any of the remaining information at issue under section 552.111 of the Government Code.

We note the remaining responsive information contains a cellular telephone number that may be subject to section 552.117 of the Government Code.³ Section 552.117(a)(1) excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code §§ 552.024, .117. 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). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request under section 552.024 the information be kept confidential. We note section 552.117 also encompasses a personal cellular telephone number, unless the cellular service is paid for by a governmental body. *See* Open Records Decision No. 506 at 5-7 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Therefore, to the extent the individual whose information is at issue made a timely election under section 552.024 and the cellular telephone number we have marked is paid for with personal funds, the city must withhold this information under section 552.117(a)(1) of the Government Code. Conversely, to the extent the individual did not make a timely election under section 552.024 or the cellular telephone service was not paid for with personal funds, the city may not withhold the information at issue under section 552.117(a)(1) of the Government Code.

Section 552.130 excepts from disclosure information that relates to a motor vehicle operator's or driver's license or permit, title, or registration issued by an agency of this state or another state or country. Gov't Code § 552.130. Accordingly, the city must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

Section 552.137 provides, "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). *Id.* § 552.137(a)-(c). The city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their release.

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

In summary, with the exception of the information we have marked, the city may withhold the information it has marked under section 552.103 of the Government Code. The city may withhold the information we have marked under section 552.111 of the Government Code. ~~To the extent the individual whose information is at issue made a timely election under section 552.024 and the cellular telephone number we have marked is paid for with personal funds, the city must withhold this information under section 552.117(a)(1) of the Government Code. The city must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code and the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their release. The remaining responsive 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,



Michelle R. Garza
Assistant Attorney General
Open Records Division

MRG/som

Ref: ID# 470235

Enc. Submitted documents

c: Requestor
(w/o enclosures)