



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 24, 1995

Ms. Karen L. Horner
Assistant City Attorney
City of Baytown
P.O. Box 424
Baytown, Texas 77522-0424

OR95-202

Dear Ms. Horner:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 31234.

The City of Baytown (the "city") received a request for various information that you assert is excepted from required public disclosure based on several exceptions to disclosure in the Open Records Act. You first raise section 552.103 of the Government Code in regard to exhibit D, which consists of several documents that you say the city attorney created in anticipation of litigation.

Section 552.103(a) applies to information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, 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; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 588 (1991). You indicate that

you anticipate that a discharged former employee will sue the city for alleged employment discrimination and for the creation and/or maintenance of a hostile work environment. You inform us that the former employee has appealed her termination to the city manager, in accordance with the city's personnel policy manual. You also state that the exhaustion of the appeal to the city manager is a prerequisite to filing a lawsuit against the city.

In this instance, we believe that you have made the requisite showing that the requested information relates to reasonably anticipated litigation for purposes of section 552.103(a). The city may withhold from required public disclosure the documents in exhibit D.¹

You seek to withhold exhibit E pursuant to section 552.111 of the Government Code. Section 552.111 of the Government Code excepts from required public disclosure:

An interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.

This exception applies to a governmental body's internal communications consisting of advice, recommendations, or opinions reflecting the policymaking processes of the governmental body at issue. *See Open Records Decision No. 615 (1993)*. An agency's policymaking functions do not encompass routine internal administrative and personnel matters. *See id.* In addition, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of the communication. *See id.*

The information in exhibit E is primarily factual and concerns internal administrative and personnel matters. We therefore conclude that the city may not withhold from disclosure the documents in exhibit E under section 552.111 of the Government Code.

You seek to withhold exhibit F from disclosure based on section 552.107(1), which states that information is excepted from required public disclosure if

it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Rules of the State Bar of Texas.

¹We note that if the opposing parties in the anticipated litigation have seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103(a). *Open Records Decision Nos. 349, 320 (1982)*. In addition, 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)*.

Although section 552.107(1) appears to except information within rule 1.05 of the Texas State Bar Disciplinary Rules of Professional Conduct, the rule cannot be applied as broadly as written to information that is requested under the Open Records Act. Open Records Decision No. 574 (1990) at 5. To prevent governmental bodies from circumventing the Open Records Act by transferring information to their attorneys, section 552.107(1) is limited to material within the attorney-client privilege for confidential communications; "unprivileged information" as defined by rule 1.05 is not excepted under section 552.107(1). Open Records Decision Nos. 574 (1990) at 5; 462 (1987) at 13-14.

Rule 503(a)(5) of the Texas Rules of Civil Evidence states that "[a] communication is 'confidential' if 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." Rule 503(b) sets forth the general rule of the attorney-client privilege and states in part as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client... (5) among lawyers and their representatives representing the same client.

The documents at issue are legal memoranda between the city attorney and the requestor who was an assistant city attorney when the memoranda were communicated. The memoranda contain attorney advice and opinion. We believe that the city may invoke the attorney-client privilege.² See Open Records Decision No. 574 (1990).

This is so even though the requestor was one of the communicants in each memoranda. The requestor is no longer the city's attorney. The privilege continues for as long as the client wants to assert it, and is not affected by the termination of the attorney-client relationship. See *Bearden v. Boone*, 693 S.W.2d 25 (Tex. App.--Amarillo 1985, no writ).³

²You raise section 552.107(1) in regard to highlighted portion of some documents and in regard to some documents in their entirety. As you raise no exception to the portions of the documents that are not highlighted, those portions must be released.

³Nor does the fact that the requestor is a communicant in the memoranda mean that the city has waived the privilege. The protections afforded by the attorney-client privilege are waived by the voluntary disclosure of the information to a third party. *Jordan v. Court of Appeals for the Fourth Supreme Judicial District*, 701 S.W.2d 644 (Tex. 1985); see Tex. R. Civ. Evid. 511; Tex. R. Crim. Evid. 511. The city has not voluntarily released the memoranda to a third party.

Finally, we consider the application of section 552.106 of the Government Code to exhibit G, which is a draft of a city ordinance. Section 552.106 excepts from required public disclosure:

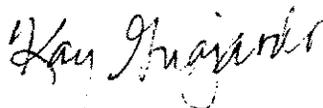
A draft or working paper involved in the preparation of proposed legislation.

We agree that section 552.106 may cover the information in exhibit G. See Open Records Decision No. 248 (1980). However, we must consider whether the city has waived the protection of section 552.106.

A governmental body waives the protection of section 552.106 if it incorporates the information into a final document which it releases to the public. See Open Records Decision No. 482 (1987) at 10. We have no information about whether the city council adopted the draft of the ordinance. Thus, we conclude that the city may withhold exhibit G from disclosure based on section 552.106 of the Government Code, unless the city waived the protection of that exception by incorporating the draft into a final document that was disclosed to the public.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay Guajardo
Assistant Attorney General
Open Government Section

KHG/rho

Ref.: ID# 31234

Enclosures: Submitted documents

cc: Ms. Patricia V. Grady
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(w/o enclosures)