



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 8, 1995

Ms. Sharon Y. Lowe
Counsel
Intergovernmental Programs Division
General Services Commission
P.O. Box 13047
Austin, Texas 78711-3047

OR95-360

Dear Ms. Lowe:

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# 30685.

The General Services Commission/State Energy Conservation Office ("SECO") received a request for information relating to the SECO evaluation scoring forms and memoranda concerning proposed LoanSTAR contracts. You have submitted the evaluation forms and contend that they are excepted from required public disclosure under sections 552.104, 552.107(1), and 552.111 of the Government Code. You also have submitted an intra-agency memorandum and claim it is excepted from required public disclosure under section 552.107(1) of the Government Code.

Section 552.107(1) excepts from disclosure

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.

Although section 552.107(1) excepts information within rule 1.05 of the Texas State Bar Disciplinary Rules of Professional Conduct,¹ 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;² “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 (explaining scope of attorney-client privilege). Furthermore, section 552.107(1) does not protect information not containing legal advice or opinion, or revealing client confidences. Open Records Decision No. 574 (1990) at 3, 5.

The memorandum submitted for our review is addressed to the General Counsel for the Office of the Governor. You state that your office “submits recommendations for bid awards for review and approval by the Governor’s Office of General Counsel pursuant to Chapters 447 and 2305 of the Government Code.” We have reviewed the memorandum and agree that some of the information constitutes confidential communications disclosed to a third party in furtherance of the rendition of professional legal services to your client agency. *See supra* note 2. For your convenience, we have marked the information that may be withheld under section 552.107(1). The remaining information contained on the memorandum is factual information that may not be withheld from public disclosure.

Section 552.111 excepts “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Section 552.111 excepts from public disclosure “only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the deliberative or policymaking processes of the governmental body at issue.” Open Records Decision No. 615 (1993) at 5. The policymaking functions of an agency, however, “do not encompass routine internal administrative and personnel matters.” *Id.* Furthermore, section 552.111 does not except purely factual information from disclosure. *Id.*

¹Rule 1.05(a) prohibits an attorney from divulging “confidential information.” For purposes of the state bar rule, “confidential information” includes not only material within the attorney-client privilege of rule 503 of the Texas Rules of Civil Evidence or rule 503 of the Texas Rules of Criminal Evidence (“privileged information”), but also “all information relating to a client or furnished by the client . . . acquired by the lawyer during the course of or by reason of the representation of the client” (“unprivileged information”). Tex. Disciplinary R. Prof. Conduct 1.05(a) (1991) (definition of “[c]onfidential information”), *reprinted in* Gov’t Code tit. 2, subtit. G app. A.

²A “confidential communication” is a communication “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.” Tex. R. Civ. Evid. 503(a)(5).

We have reviewed the evaluation forms submitted for our consideration. We agree that the portions you have marked constitute internal communications consisting of advice, recommendations, and opinions reflecting the policymaking functions of your agency. You may, therefore, withhold the information you have marked under section 552.111 of the Government Code. As we resolve the question of the evaluation forms under section 552.111, we need not address the applicability of sections 552.104 and 552.107(1).

We are resolving this matter with an 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 should 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,



Kymerly K. Oltrogge
Assistant Attorney General
Open Government Section

KKO/LBC/rho

Ref: ID# 30685

Enclosures: Marked documents

cc: Jim Turner, P.E.
President
Ventana Energy Services, Inc.
612 Brazos Street, Suite 210
Austin, Texas 78701
(w/o enclosures)