



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 14, 1995

Mr. Alberto Gonzales
General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

Mr. Jeff Eubank
General Counsel
State of Texas Department of Commerce
P.O. Box 12728
Austin, Texas 78711-2728

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

OR95-939

Ladies and Gentlemen:

The Office of the Governor (the "governor"), the State of Texas Department of Commerce (the "department"), and the General Services Commission (the "commission") have received several requests for "[a]ll files pertaining to the 'Energy Efficient Air Conditioner Program for Small Local Governments' . . . as described in the 'Proposal for the Expenditure of Stripper Well Funds' submitted by the Governor's Energy Office to the United States Department of Energy on or about May 20, 1992." You ask whether the Texas Open Records Act, Government Code chapter 552, requires release of this information. Because the information at issue here in large part overlaps, we consider your requests together. Your requests were assigned ID#s 29837, 29838, and 29839, respectively.

Mr. Jeff Eubank

Ms. Sharon Y. Lowe

The availability of some of the requested information was addressed in Open Records Letter Nos. 94-610 (1994) and 94-303 (1994), pursuant to which much of the requested information was made available to the requestors. Some of the requested information, however, was generated subsequent to the requests addressed in those letter rulings. The department seeks reconsideration of our ruling in Open Records Letter No. 94-610 (1994) with respect to some of the records addressed in Open Records Letter No. 94-610 (1994). The governor, the department, and the commission claim that sections 552.107(a) and 552.111 of the Government Code except from required public disclosure the information that has been generated since the date of the requests addressed in Open Records Letter No. 94-610 (1994).¹

We first address the department's request for reconsideration. At the outset, we note that the department is responsible for submitting in writing the reasons it believes the requested information is excepted from disclosure. Under the Open Records Act, all information held by governmental bodies is open to the public unless it is within a specific exception to disclosure. Gov't Code § 552.021(a). The custodian of records has the burden of proving that records are excepted from public disclosure. Attorney General Opinion H-436 (1974). If a governmental body does not claim an exception or fails to show how it applies to the records, it will ordinarily waive the exception unless the information is deemed confidential by law. See Attorney General Opinion JM-672 (1987).

In Open Records Letter No. 94-610 (1994), this office addressed the department's contention that various documents are excepted from required public disclosure under sections 552.107 and 552.111. We note, however, that neither section 552.107 nor section 552.111 provides a blanket exception for all communications between clients and attorneys or all documents created by an attorney or all inter- or intra-agency memoranda. Section 552.107 excepts only those communications that reveal client confidences or the attorney's legal opinion or advice. Open Records Decision Nos. 589 (1991) at 1, 574 (1990) at 3, 462 (1987) at 9-11. Section 552.111 excepts from 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. Correspondence that is not interagency or intra-agency does not fall within the exception. Purely factual material, such as objective statements concerning various events, is not excepted. *Id.* at 6.

¹The department also claims that section 552.103(a) of the Government Code excepts some of the requested information from required public disclosure. The department, however, has not identified, nor are we able to identify, which of the submitted documents the department claims fall within this exception. The custodian of records has the burden of proving that records are excepted from public disclosure. Attorney General Opinion H-436 (1974). If a governmental body does not claim an exception or fails to show how it applies to the records, it will ordinarily waive the exception unless the information is deemed confidential by law. See Attorney General Opinion JM-672 (1987). Because the department has failed to identify the records that it seeks to withhold under section 552.103(a), we are unable to conclude that any of the submitted information falls within that exception.

Because these exceptions do not ordinarily afford blanket protection, the governmental body asserting sections 552.107 and 552.111 must clearly mark or otherwise identify the information that it seeks to withhold under those exceptions in a manner that enables this office to evaluate the merits of its claim. As a courtesy, this office will attempt to clarify an ambiguous assertion. Ultimately, however, the governmental body asserting an exception has the burden of demonstrating the exception's applicability.

Although in its original request for a ruling to this office, the department provided a factual context in which to consider its assertion of sections 552.107 and 552.111, it failed to clearly mark which information fell within these exceptions. Consequently, we were unable to determine in many instances the applicability of the various exceptions raised by the department. As a courtesy to the department, we marked the information that we could discern, on its face, was excepted from disclosure. In its request for reconsideration, the department has provided additional proof to support the original arguments for withholding specific records under various exceptions. We decline to consider the additional facts provided in connection with its request for reconsideration and decline to reconsider our ruling in Open Records Letter No. 94-610 (1994) because the department did not meet its burden in its original request for a ruling.

Finally, we consider whether sections 552.107(1) and 552.111 of the Government Code except from required public disclosure the information not addressed in Open Records Letter Nos. 94-610 (1994) and 94-303 (1994).² Section 552.107(1) excepts information from disclosure if "it is information that . . . 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." Section 552.107(1) protects information that reveals client confidences to an attorney, including facts and requests for legal advice, or that reveals the attorney's legal advice. See Open Records Decision No. 574 (1990).

You have submitted to us for review numerous records that detail communications between attorney's representing the governor, the department, and the commission. You indicate that these records represent the legal advice of the respective agencies' attorneys and the requests of the agencies for legal advice. We conclude that the information we have marked falls within the protection of section 552.107(1) of the Government Code and need not be made available to the requestors.

Some of the submitted information, however, does not fall within the protection of section 552.107(1). Specifically, the governor appears to assert section 552.107 in conjunction with the attorney work product doctrine. Section 552.107, however, does not encompass this doctrine. Rather, information may be withheld from required public

²Sections 552.111 and 552.107(1) of the Government Code are discretionary exceptions. See Open Records Decision Nos. 630 (1994), 515 (1988). This means that you have the discretion to determine whether to claim these exceptions. Only when information is made confidential by law is a governmental body required to withhold requested information. See Gov't Code § 552.007(a).

Mr. Alberto Gonzales - Page 4
Mr. Jeff Eubank
Ms. Sharon Y. Lowe

disclosure under the attorney work product doctrine only upon a showing of the applicability of section 552.103(a) of the Government Code, the "litigation exception." *See* Open Records Decision No. 575 (1990). Because the governor has not shown the applicability of section 552.103(a) in this instance, and because such information is not otherwise excepted from required public disclosure under section 552.107(1), information that is claimed to be excepted under the attorney work product doctrine must be released.

You also claim that section 552.111 of the Government Code excepts some of the submitted information from required public disclosure. Section 552.111 excepts from required public disclosure "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency" This section protects from disclosure advice, opinions, and recommendations; it does not protect facts or written observations of facts. Open Records Decision No. 615 (1993) at 5. Furthermore, this section applies only to interagency and intra-agency memoranda. The purpose of section 552.111 is to prevent disclosure of information that, if released, will inhibit free discussion among agency personnel as to policy issues. *See id.* at 5-6. Where a record is genuinely a preliminary draft of a document that has been released or is intended for release in a final form, the draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document. Open Records Decision No. 559 (1990).

We have examined the information that you seek to withhold under section 552.111. Some of the submitted documents, for example, the document titled "Proposal for the Expenditure of Stripper Well Funds for the Efficient Air Conditioning in Public Buildings Program," are clearly drafts. These documents necessarily represent the advice, recommendations, or opinions of the drafters as to the form and content of the final documents. These documents, which we have marked, may be withheld under section 552.111 of the Government Code. In addition, we have marked other information that is excepted from disclosure under section 552.111. The remaining information, however, must be made available to the requestors.

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,



Loretta R. DeHay
Assistant Attorney General
Open Records Division

Mr. Alberto Gonzales - Page 5
Mr. Jeff Eubank
Ms. Sharon Y. Lowe

LRD/GCK/rho

Ref.: ID# 29837
ID# 29838
ID# 29839

Enclosures: Marked documents

cc: Mr. John C. Boehm, Jr.
Fulbright & Jaworski, L.L.P.
600 Congress Avenue, Suite 2400
Austin, Texas 78701
(w/o enclosures)

Mr. Michael Allen
Editor, Texas Journal
The Wall Street Journal
1233 Regal Row
Dallas, Texas 75247
(w/o enclosures)

Mr. Thomas D. Boyle
Gibson, Dunn & Crutcher
1717 Main Street, Suite 5400
Dallas, Texas 75201-7390
(w/o enclosures)

Mr. William F. Striebe, Jr.
United Technologies Carrier
P.O. Box 4800
Carrier Parkway
Syracuse, New York 13221
(w/o enclosures)