



April 9, 1999

Mr. Randall L. Patterson
City Attorney
City of Brenham
P.O. Box 1059
Brenham, Texas 77834-1059

OR99-0966

Dear Mr. Patterson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 123371.

The City of Brenham (the "city") received a request for various information. You advise that you seek to withhold, under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code, information responsive to item #3 of the request: "Any documents . . . that support the claims made by C.J. Webster that National Casualty Company will pay \$1,230,000 in the matter of Honerkamp v. [the city]." You submit a sample of the information at issue.¹

Section 552.103(a) known as the litigation exception, excepts from required public disclosure 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.

¹In reaching our conclusion, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision No. 499 (1988), 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 (1991). The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 (1986) and authorities cited therein. To demonstrate that litigation is reasonably anticipated, the governmental body must furnish *concrete* evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.*

You stated in your January 19, 1999 letter that the requested information is "related to litigation." Upon our inquiry, however, you advised that there is no pending litigation. Nor, in our opinion, have you established that the information is related to reasonably anticipated litigation. Therefore, you may not withhold the information at issue under section 552.103.

Section 552.107 incorporates the attorney-client privilege. It protects 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 Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct." *See* Open Records Decision No. 574 (1990). In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and confidential attorney-client communications. *Id.* These two classes of information are the only information contained in the records at issue that may be withheld pursuant to the attorney-client privilege. *See also* Open Records Decision No. 589 (1991) (protected information in attorney billing statements) (copy enclosed) *overruling to extent of conflict* Open Records Decision No. 304 (1982). In our opinion, you have not established that the information at issue constitutes either attorney advice or confidential client communications. Therefore, you may not withhold the information at issue under section 552.107.

Section 552.111 excepts interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's policymaking process. Open Records Decision No. 615 (1993). The purpose of this section is "to protect from public disclosure advice and opinions *on policy matters* and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.) (emphasis added). In Open Records Decision No. 615 at 5, this office held that

to come within the [section 552.111] exception, information must be related to the *policymaking* functions of the governmental body. An agency's policymaking functions do not encompass routine internal administrative and personnel matters . . . [Emphasis in original.]

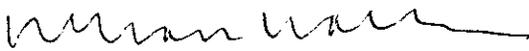
Section 552.111 does not protect facts and written observation of facts and events that are severable from advice, opinions, and recommendation. Open Records Decision No. 615 at 5. If, however, the factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make separation of the factual data impractical, that information may be withheld. Open Records Decision No. 313 (1982).

We understand you to raise the attorney work-product aspect of section 552.111. In Open Records Decision No. 647 (1996), this office concluded that a governmental body may withhold information under section 552.103 or section 552.111 of the Government Code if the governmental body can show (1) that the information was created for trial or in anticipation of litigation under the test articulated in *National Tank v. Brotherton*, 851 S.W.2d 193 (Tex. 1993), or after a lawsuit is filed, and (2) that work product consists of or tends to reveal an attorney's "mental processes, conclusions, and legal theories." Open Records Decision No. 647 (1996) (citing *United States v. Nobles*, 422 U.S. 225, 236 (1975)). As noted above, we do not believe that you have shown that the information at issue was created for or in anticipation of litigation. Nor, have you shown how the information otherwise constitutes advice, opinion, or recommendation on policy matter so as to fall within the protection of section 552.111. Therefore, you may not withhold the information at issue under section 552.111.

Although you also cite section 552.101, which requires withholding information made confidential by statutory or constitutional law or by judicial decision, you do not indicate how the information is subject to that section. Accordingly, you may not withhold the information at issue under section 552.101 either. You must release the submitted information.²

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 on as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



William Walker
Assistant Attorney General
Open Records Division

²We note specifically that you must also release the correspondence requested in the requestor's March 19, 1999 request.

WMW/eaf

Ref.: ID# 123371

Encl.: Submitted documents
Open Records Decision No. 589 (1991)

cc: Mr. Russell Honerkamp
1905 Church Street
Brenham, Texas 77833
(w/o enclosures)