



September 22, 1999

Ms. Katherine Minter Cary
Assistant Attorney General
Public Information Coordinator
Office of the Attorney General
P. O. Box 12548
Austin, Texas 78711-2548

OR99-2664

Dear Ms. Cary:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 129028.

The Office of the Attorney General (the "OAG") received a request for various information relating to the requestor's complaints to the OAG regarding public information matters. You seek to withhold a portion of the information responsive to the requests under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code.

Section 552.101 requires withholding, *inter alia*, information made confidential by statute. You assert that some of the information at issue is protected from disclosure by section 154.073 of the Civil Practice and Remedies Code. Subsection (a) of that section provides in part that "a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution formal judicial proceedings, is confidential, is not subject to disclosure . . ." Having reviewed your arguments and the information for which you claim the protection of section 154.073, we conclude that you have established that your Exhibit D must be withheld under that section.

You also raise in conjunction with section 552.101 of the Government Code the provisions of rule 503 of the Texas Rules of Evidence. That rule sets out the attorney-client privilege for purposes of evidentiary privileges in litigation. The rule is not a confidentiality provision for purposes of section 552.101 of the Public Information Act. *See* Open Records Decision No. 575 (1990). No information may be withheld under rule 503 in conjunction with section 552.101.

Section 552.103(a) 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.

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 provide a copy of what appears to be a draft of a petition by the requestor against John Cornyn, the Attorney General. You do not indicate, however, how this document, which does not appear to have been filed in court, came into the possession of the OAG. In our opinion, neither the draft petition nor the other documentation you provided evidencing the fact that the requestor had filed suit in the past against other governmental bodies regarding public information matters establishes that the OAG may reasonably anticipate litigation for purposes of section 552.103. Therefore, none of the information at issue may be withheld under section 552.103.

Section 552.107(1) incorporates the attorney-client privilege.¹ 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.* Accordingly, 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. We have marked those portions of the information at issue which we believe you have established as subject to the section 552.107(1) exception.

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

¹You also raised the attorney-client privilege in the context of section 552.101 of the Government Code. This office considers the attorney-client privilege to be an aspect of section 552.107(1). Open Records Decision No. 574 (1990).

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).

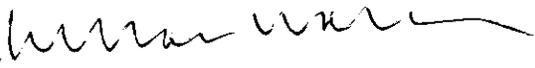
In Open Records Decision No. 429 (1985), this office indicated that information protected by section 552.111 must be prepared by a person or entity with an official reason or duty to provide the information in question. *See also* Open Records Decision Nos. 283 (1981), 273 (1981). This helps assure that the information plays a role in the deliberative process; if it does not, it is not entitled to protection under section 552.111. Open Records Decision No. 464 (1987). *See Wu v. National Endowment of the Humanities*, 460 F.2d 1030 (5th Cir.), *cert. denied*, 410 U.S. 926 (1972).

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. 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). Drafts of documents *intended for release* may be withheld under 552.111. Open Records Decision No. 559.

In our opinion, most of the information at issue which might fall within the scope of section 552.111 is included in the information we have permitted you to withhold under section 552.107(1). We have marked additional information which we believe you have established as subject to section 552.111. Except as noted above, you must release the information at issue.

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 regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



William Walker
Assistant Attorney General
Open Records Division

WMW/ch

Ref: ID# 129028

Encl. Submitted documents

cc: Mr. Steve Lisson
Initiate!!
P.O. Box 2013
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(w/o enclosures)