



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

April 25, 2003

Ms. Helen Valkavich  
Assistant City Attorney  
City of San Antonio  
P.O. Box 839966  
San Antonio, Texas 78283-3966

OR2003-2808

Dear Ms. Valkavich:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 180052.

The City of San Antonio (the "city") received a written request for "all email (sent and received), and memos issued by" five named city employees. You state that most of the responsive information will be released to the requestor. You contend, however, that the remaining information coming within the scope of the request either is not "public information" for purposes of the Public Information Act (the "Act") or is excepted from required disclosure pursuant to sections 552.101, 552.103, 552.105, 552.106, 552.107(1), 552.111, and 552.131(b) of the Government Code.<sup>1</sup>

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<sup>1</sup>You have provided evidence to this office that the requestor has agreed to exclude from his request the following categories of information encompassed by his request: social security numbers, e-mail addresses for members of the public, attachments to e-mails that consist of news releases or "PIO" news clippings, certain unsolicited spam e-mails received by one of the named employees, account numbers contained in the city's cellular telephone bills, references to child support payments and withholdings for medical insurance contained in payroll records, direct deposit information, documents related to contracts and real estate leases still in negotiation, attachments to "BDA and Time Warner Rundowns," attachments to "the City Manager's Report Program and the Week in Preview Events," references regarding illnesses or other personal situations that would reveal whether a city employee has family members, computer log-on numbers, and city employees' home addresses and home telephone numbers. Accordingly, this ruling does not address the extent to which these categories of information are subject to required public disclosure except to the extent you have specifically argued that such information contained in the submitted records may be withheld from the public.

We first consider the extent to which the submitted e-mails you characterize as being "personal in nature" are subject to public disclosure under the Act. Chapter 552 of the Government Code is only applicable to "public information." See Gov't Code § 552.021. Section 552.002 defines public information as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." Information that is collected, assembled, or maintained by a third party may be subject to disclosure under chapter 552 of the Government Code if it is maintained for a governmental body, the governmental body owns or has a right of access to the information, and the information pertains to the transaction of official business. See Open Records Decision No. 462 (1987).

You argue that the "personal" e-mails were not collected, assembled, or maintained in connection with the transaction of any official business of the city, nor were they collected, assembled, or maintained pursuant to any law or ordinance. Based on your comments and our review of the e-mails at issue, we generally agree that those communications do not relate to the transaction of official city business and therefore do not constitute "public information" of the city. Consequently, the city is not required to disclose those e-mail communications under chapter 552 of the Government Code. Cf. Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). However, we have marked one document that constitutes "public information" under the Act because it is maintained by the city connection with the transaction of official city business. Because you have made no other arguments for withholding that communication, it must be released to the requestor.

Section 552.105 of the Government Code excepts from disclosure information relating to:

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Section 552.105 is designed to protect a governmental body's planning and negotiating position with regard to particular transactions. Open Records Decision Nos. 564 (1990), 357 (1982), 310 (1982). Information excepted under section 552.105 that pertains to such negotiations may be excepted so long as the transaction is not complete. Open Records Decision No. 310 (1982). A governmental body may withhold information "which, if released, would impair or tend to impair [its] 'planning and negotiating position in regard to particular transactions.'" Open Records Decision No. 357 at 3 (1982) (quoting Open Records Decision No. 222 (1979)). The question of whether specific information, if publicly released, would impair a governmental body's planning and negotiation position in regard

to a particular transaction is a question of fact. Accordingly, this office will accept a governmental body's good faith determination in this regard, unless the contrary is clearly shown as a matter of law. Open Records Decision No. 564 (1990).

You state that the city has determined that portions of the requested information relate to either the location or the purchase price of various real properties that the city intends to purchase. You further inform us that negotiations with landowners for the purchase of the properties have not yet been completed. However, you have not explained how the release of all of the information you seek to withhold under section 552.105 would impair the city's planning and negotiation position in each of the particular transactions. We have marked the information that the city may withhold pursuant to section 552.105 of the Government Code.

Section 552.106 of the Government Code protects drafts and working papers involved in the preparation of proposed legislation. The purpose of the exception is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the legislative body; it protects the internal "deliberative" or policy-making processes of a governmental body. Open Records Decision No. 460 (1987). Section 552.106 does not except purely factual material; rather, it excepts only policy judgments, recommendations, and proposals involved in the preparation of proposed legislation. *Id.* Additionally, section 552.106 is inapplicable where a governmental body has no official authority to act with regard to specific legislation and is acting merely as an interested third party to the legislative process. Open Records Decision No. 429 (1985).

After reviewing the information you seek to withhold under section 552.106, we conclude that you have demonstrated that much of that information consists of drafts of and working papers related to proposed city ordinances and resolutions, as well as other proposed legislation. Consequently, to the extent these documents have not been released to any outside parties, we conclude that those documents may be withheld pursuant to section 552.106. On the other hand, any draft or working paper that has been revealed to outside parties may not be withheld pursuant to section 552.106 and must now be released to the requestor. *See* Gov't Code § 552.007 (prohibiting selective disclosure). We have marked the information the city may withhold pursuant to section 552.106.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002).

First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating

professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “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.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body.<sup>2</sup> See *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

After reviewing your arguments and the documents you submitted to this office, we conclude that you have demonstrated the applicability of section 552.107(1) to most of the information you seek to withhold pursuant to the attorney-client privilege.<sup>3</sup> However, many of the communications you seek to withhold under section 552.107(1) were either sent to or received from individuals whom you have not identified as being city representatives, city attorneys, or representatives of city attorneys. We have marked the information the city may withhold pursuant to section 552.107(1).

Section 552.111 of the Government Code excepts from required public disclosure “an interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency.” In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no

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<sup>2</sup>In this instance, however, where you have marked only a portion of a document as coming within the protection of section 552.107(1), this office considered only whether the information you marked comes within the attorney-client privilege.

<sup>3</sup>Because we resolve this aspect of your request under section 552.107(1), we need not address the applicability of section 552.103 of the Government Code.

writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6.

The draft of a document that has been released or is intended for release in final form necessarily represents the advice, opinion, and recommendation of the drafter as to the form and content of the final document, and may therefore be withheld under section 552.111 of the Government Code. *See* Open Records Decision No. 559 (1990). Generally, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. Open Records Decision No. 615 at 5 (1993). However, where a document is a genuine preliminary draft that has been released or is intended for release in final form, factual information in that draft which also appears in a released or releasable final version is excepted from disclosure by section 552.111. Open Records Decision No. 559 (1990). However, severable factual information appearing in the draft but not in the final version is not excepted by section 552.111. *Id.* Additionally, because section 552.111 is a discretionary exception, this exception is waived with regard to information that has been shared with outside parties. *See* Open Records Decision No. 400 (1983). We have marked the information that the city may withhold pursuant to section 552.111.

Finally, we discuss whether the city may withhold any of the submitted information pursuant to section 552.131(b) of the Government Code. Section 552.131 excepts from public disclosure information that "relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body." Gov't Code § 552.131(a). Section 552.131(b) provides as follows:

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].

Gov't Code § 552.131(b). Section 552.131(b) protects information about a financial or other incentive that is being offered to a business prospect by a governmental body or another person. You state that portions of the submitted information relate to economic development negotiations in which the city is engaged with a business prospect. However, after reviewing the submitted information, we conclude that only a small portion of the information you seek to withhold under this section specifically relates to any financial or other incentive that the city or another person actually offered to the business prospect. We therefore conclude that

only the information that we have marked as coming under the protection of section 552.131 is excepted from public disclosure.

In summary, most of the e-mail communications you characterize as being “personal in nature” are not “public information” and thus are not subject to the Act; however, the city must release the communications that we have marked. The city may withhold the information we have marked as coming under the protection of sections 552.105, 552.106, 552.107(1), 552.111, and 552.131 of the Government Code. The remaining submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body’s intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general’s Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep’t of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



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Open Records Division

CN/RWP/seg

Ref: ID# 180052

Enc: Submitted documents

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