



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

May 19, 2003

Mr. Kuruvilla Oommen
Assistant City Attorney
City of Houston - Legal Department
P.O. Box 1562
Houston, Texas 77251-1562

OR2003-3331

Dear Mr. Oommen:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 181254.

The Houston Police Department (the "Department") received a media request for the following three categories of information:

1. A copy of the internal review of the police crime lab order [sic] by Police Chief Sam Nuchia in October 1996.
2. Any and all correspondence and notes sent to or received by the department from any city department or official regarding the [Department] crime lab since January 1, 1996.
3. Any and all correspondence between the [Department] and any individual or attorney representing any individual regarding the department's crime lab since January 1, 1996.

You assert the requested information is excepted from disclosure under sections 552.101, 552.107, 552.108, 552.111, 552.117, 552.122, and 552.137 of the Government Code.¹ We

¹ In your letter postmarked March 20, 2003, we note your withdrawal of previously claimed exceptions to required disclosure under sections 552.103 and 552.130 of the Government Code.

have reviewed the representative sample of information you submitted and we have considered the exceptions you claim.²

First, you assert section 552.107(1) of the Government Code excepts Exhibits 3A, 3B, and 3C. Section 552.107(1) 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 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 a 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. 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. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You explain the documents tabbed “107” constitute communications between staff attorneys, who generated the information in furtherance of the rendition of legal services to those

² We assume the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

clients. Based on your arguments and a review of the documents, we agree the information you have labeled "107" constitutes communications made for the purpose of facilitating legal services. Accordingly, the Department may withhold Exhibits 3A, 3B, and 3C under section 552.107 of the Government Code.

Second, you claim section 552.108 of the Government Code exempts portions of Exhibit 2 from required public disclosure. Section 552.108(a)(2) exempts from required public disclosure "[i]nformation held by a law enforcement agency . . . that deals with the detection, investigation, or prosecution of crime . . . if . . . it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication." Gov't Code § 552.108(a)(2). Section 552.108(b)(2) of the Government Code exempts from public disclosure "[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution," but only where "an investigation . . . did not result in conviction or deferred adjudication." Gov't Code § 552.108(b)(2). The information the Department seeks to withhold properly falls under section 552.108(b)(2) rather than 552.108(a)(2). A governmental body claiming section 552.108(b)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. You inform us that two summaries in Exhibit 2 pertain to incident numbers 92611500 and 23817898, both of which relate to criminal investigations that did not result in conviction or deferred adjudication. Therefore, the Department may withhold the summaries we have marked under section 552.108(b)(2).³

Third, you seek to withhold some of Exhibits 2 and 4 based on section 552.111 of the Government Code. Section 552.111 exempts from disclosure "an interagency or intraagency 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 writ), and held that section 552.111 exempts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). The preliminary draft of a policymaking document that has been released or is intended for release in final form is excepted from disclosure in its entirety under section 552.111 because such a 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 at 2 (1990). However, 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

³ As 552.108 is dispositive, we do not address you claim that section 552.101, in conjunction with common-law privacy, exempts a portion of this information from required public disclosure.

issues. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; ORD 615 at 4-5.

In this instance, you contend the information tabbed "552.111" represents internal communications consisting of advice, opinions, and recommendations on the City of Houston's position and policy. Based on your arguments and our review of the documents, we agree some of the information reflects advice pertaining to the policymaking process of the City. Therefore, the Department may withhold the information we have marked under section 552.111 of the Government Code.

Fourth, you note the applicability of section 552.117(1) of the Government Code, which excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024. Whether section 552.117 protects information from disclosure depends on when the request for information is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the Department must withhold the information you have highlighted in Exhibits 5A and 5B under section 552.117 on behalf of a current or former official or employee only if the individual made a request for confidentiality under section 552.024 prior to the date on which the Department received the present request for information. The Department may not withhold this information under section 552.117 if an individual did not make a timely election to keep the information confidential.

Fifth, you assert section 552.122(b), which excepts from disclosure test items developed by a licensing agency or governmental body. In Open Records Decision No. 626 (1994), this office determined that the term "test item" in section 552.122 includes any standard means by which an individual's or group's knowledge or ability in a particular area is evaluated, but does not encompass evaluations of an employee's overall job performance or suitability. Whether information falls within the section 552.122 exception must be determined on a case-by-case basis. Open Records Decision No. 626 at 6 (1994). Traditionally, this office has applied section 552.122 where release of "test items" might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Additionally, when answers to test questions might reveal the questions themselves, the answers may be withheld under section 552.122(b). *See* Open Records Decision No. 626 at 8 (1994).

You explain the contents of Exhibits 6A and 6B are tests administered by the Department. Further, you contend these exhibits contain acceptable solutions, the release of which would reveal the test questions. Having reviewed your arguments and the information at issue, we conclude Exhibits 6A and 6B qualify as "test items" for the purposes of section 552.122(b). Therefore, the Department may withhold these exhibits under section 552.122(b) of the Government Code.

Last, we address your claim under section 552.137 of the Government Code, which states the following:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. This provision makes certain e-mail addresses confidential.⁴ See Gov't Code § 552.137. You explain that no member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, except for the information we have marked, we agree the Department must withhold the e-mail addresses of the members of the public, which you have highlighted, under section 552.137 of the Government Code.

In summary, the Department must withhold the personal information of those employees who made proper elections to keep such information confidential under section 552.117 of the Government Code. The Department must withhold the e-mail addresses under section 552.137 of the Government Code. Further, the Department may withhold Exhibits 3A, 3B, and 3C under section 552.107 of the Government Code. Also, the Department may withhold the summaries we have marked in Exhibit 2 under section 552.108(b)(2). The Department may withhold the information we have marked in Exhibit 2 pursuant to section 552.111 of the Government Code. Finally, the Department may withhold Exhibits 6A and 6B in accordance with section 552.122 of the Government Code. The Department must release the remainder of the submitted information as it claims no other applicable exceptions.

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.*

⁴ Section 552.137 does not apply to a general business e-mail address or to a government employee's work e-mail address.

§ 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,



Christen Sorrell
Assistant Attorney General
Open Records Division

CHS/seg

Ref: ID# 181254

Enc: Submitted documents

c: Ms. Roma Khanna
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(w/o enclosures)