



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 8, 2003

Mr. Michael Heskett
Acting Assistant State Librarian
Texas State Library and Archives Commission
P. O. Box 12927
Austin, Texas 78711-2927

OR2003-8787

Dear Mr. Heskett:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 191313.

The Texas State Library and Archives Commission (the "commission") received a request for the following information:

- (1) from Bullock or Bush papers, any documents related to DPS or the Rangers,
- (2) any communication between President Bush or his representatives, or Gov. Perry's office [with the commission], related to the archives, specifically Gov. Bush's papers. Also tapes of TSLAC meetings for 2002 and 2003, calendar, [and]
- (3) any documentation in Gov. Bush's papers related to the archives or the disposal of his papers

You state that some information will be released to the requestor. You also state that by agreement with the requestor, you are redacting the home addresses and home phone numbers of government officials and employees, e-mail addresses of members of the public not on letterhead or in printed material, and numbers identifying drivers and motor vehicles.

You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.106, 552.107, 552.108, 552.111, 552.124, and 552.137 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information, some of which consists of representative samples.²

The commission asserts that much of the submitted information is excepted from disclosure under section 552.107 of the Government Code. 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 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).

¹Although you raise section 552.103 as an exception to disclosure, you did not submit to this office written comments stating the reasons why section 552.103 would allow the information to be withheld. Therefore, we find that you have waived section 552.103. *See* Gov’t Code §§ 552.301, .302.

²We 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 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 that those records contain substantially different types of information than that submitted to this office.

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).

Although you assert section 552.107, this office has not received arguments from any party establishing the applicability of the claimed exception. *See Gov't Code §§ 552.301, .302*. Therefore, we find that none of the submitted information may be withheld under section 552.107 of the Government Code.

Next, we will address your assertions of section 552.111 of the Government Code. You first assert that some of the submitted information constitutes agency memoranda. Section 552.111 excepts 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 excepts 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.). 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. Open Records Decision No. 615 at 5-6 (1993). 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; Open Records Decision No. 615 at 4-5 (1993).

Section 552.111 is applicable to information created for a governmental body by an outside consultant when the outside consultant is acting at the request of the governmental body and performing a task that is within the authority of the governmental body. *See Open Records Decision No. 631 at 2 (1995)*. Finally, 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).

Although you assert section 552.111, this office has not received arguments from any party establishing the applicability of the claimed exception. *See Gov't Code §§ 552.301, .302*. Therefore, we find that none of the submitted information may be withheld under section 552.111 of the Government Code as agency memoranda.

Additionally, you assert that some of the submitted information is excepted by section 552.111 as attorney work product. In order to be considered "work product," the material must have been made or developed for trial or in anticipation of litigation by or for a party or a party's representative. TEX. R. CIV. P. 192.5; Open Records Decision No. 677 at 4 (2002). In order for this office to conclude that material was made or developed in anticipation of litigation, we must be satisfied that

- a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

See Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204. Although you assert that the submitted information constitutes work product under section 552.111, this office has not received arguments from any party establishing the applicability of the claimed exception. *See Gov't Code* §§ 552.301, .302. Therefore, we find that none of the submitted information may be withheld under section 552.111 of the Government Code as attorney work product.

Next, we address your assertion of section 552.106 of the Government Code. Section 552.106 excepts from required public disclosure "[a] draft or working paper involved in the preparation of proposed legislation[.]" *Gov't Code* § 552.106(a). Section 552.106 resembles section 552.111 in that both of these exceptions protect advice, opinion, and recommendation on policy matters, in order to encourage frank discussion during the policymaking process. *See Open Records Decision No. 460 at 3 (1987)*. However, section 552.106 applies specifically to the legislative process and thus is narrower than section 552.111. *Id.* The purpose of section 552.106 is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body. *Id.* at 2. Therefore, section 552.106 is applicable only to the policy judgments, recommendations, and proposals of persons who are involved in the preparation of proposed legislation and who have an official responsibility to provide such information to members of the legislative body. *Id.* at 1; *see also Open Records Decision Nos. 429 at 5 (1985) (statutory predecessor to Gov't Code § 552.106 not applicable to information relating to governmental entity's efforts to persuade other governmental entities to enact particular ordinances), 367 at 2 (1983) (statutory predecessor applicable to recommendations of executive committee of State Board of Public Accountancy for possible amendments to Public Accountancy Act)*. Furthermore, section 552.106 does not protect purely factual information from public disclosure. *See Open Records Decision No. 460 at 2; see also Open Records Decision No. 344 at 3-4 (1982) (for purposes of statutory predecessor, factual information prepared by State Property Tax Board did not reflect policy judgments, recommendations, or proposals concerning drafting of legislation)*. However, a comparison or analysis of factual information prepared to support proposed legislation is within the scope of section 552.106. *See Open Records Decision No. 460 at 2.*

The commission asserts that all of Attachment F-1 is excepted from disclosure under section 552.106. Although you assert section 552.106, this office has not received arguments from any party establishing the applicability of the claimed exception. *See* Gov't Code §§ 552.301, .302. Therefore, we find that none of the submitted information may be withheld under section 552.106 of the Government Code.

Next, we will address the commission's assertions of section 552.108 of the Government Code. Section 552.108 provides in pertinent part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

(1) release of the information would interfere with the detection, investigation or prosecution of crime; [or]

(2) 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;

....

(b) An 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 is excepted from the requirements of Section 552.021 if:

(1) release of the internal record would interfere with law enforcement or prosecution of crime; [or]

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code § 552.108(a)(1), (2), (b)(1), (2). We note, however, that section 552.108 only applies to records of a law enforcement agency or prosecutor. *See* Open Records Decision Nos. 439 (1988) (concluding that predecessor to section 552.108 only applies to records created by agency, or portion of agency, whose primary function is to investigate crimes and enforce criminal laws), 287 (1981). The commission is not a law enforcement agency. Furthermore, while you generally assert that some of the responsive documents are law enforcement records, you have not indicated that any local, state, or federal law enforcement entity has asked that the commission withhold this information so as not to interfere with that entity's law enforcement efforts. *See, e.g.*, Open Records Decision No. 586 (1991) (need of another governmental body to withhold requested information may provide compelling reason for nondisclosure under predecessor to section 552.108); Open Records Decision Nos. 474 (1987), 372 (1983) (where incident involving allegedly criminal conduct is still

under active investigation or prosecution, predecessor to section 552.108 may be invoked by any proper custodian of information which relates to incident). Therefore, we conclude that none of the submitted records may be withheld under section 552.108.

Next, you assert that the names of requestors for public information are excepted under section 552.124 of the Government Code. Section 552.124 makes confidential “[a] record of a library or library system, supported in whole or in part by public funds, that identifies or serves to identify a person who requested, obtained, or used a library material or service.” Section 552.124 requires withholding the names, addresses, and other information specifically identifying a person who used or requested a library material or service. *See, e.g.,* Open Records Decision No. 649 at 3 (1996) (confidentiality provisions strictly construed). The legislative history of section 552.124 of the Government Code suggests that the purpose of this section is to codify, clarify, and extend Open Records Decision No. 100 (1975), in which we discussed the privacy interest of people in “library circulation records which would disclose the identity of library patrons in connection with material they have obtained from a library.” Further, in Open Records Decision No. 489 (1988), we reiterated our statement in Open Records Decision No. 100 that library circulation records that identify the reading habits of borrowers were protected by constitutional privacy. Thus, we find that section 552.124 of the Government Code was not intended to protect the identities of individuals who make requests under the Public Information Act (the “Act”), but rather to protect the identities of individuals who use the services of a library in the traditional sense. The information you have submitted which you seek to withhold under section 552.124 does not identify an individual who “requested, obtained, or used a library material or service” as contemplated by section 552.124. Instead, this information merely identifies individuals who have made requests for information under the Act. As such, this identifying information may not be withheld under section 552.124 of the Government Code.

Next, section 552.137 of the Government Code provides:

(a) Except as otherwise provided by this section, 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.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Act of June 2, 2003, 78th Leg., R.S., ch. 1089, § 1, 2003 Tex. Sess. Law Serv. 3124 (to be codified as an amendment to Gov't Code § 552.137).

Section 552.137 requires a governmental body to withhold certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with the governmental body, unless the relevant members of the public have affirmatively consented to the release of the e-mail addresses. We note, however, that section 552.137 does not apply to the work e-mail addresses of officers or employees of a governmental body, a website address or Uniform Resource Locator, or the general e-mail address of a business. E-mail addresses within the scope of section 552.137(c) are also not excepted from disclosure under section 552.137.

We determine that the e-mail addresses we have marked are excepted from disclosure under section 552.137(a). Unless the commission has received affirmative consent to disclose the e-mail addresses, the commission must withhold the marked e-mail addresses under section 552.137 of the Government Code.

Finally, you assert that Attachments I-1 and I-2 are excepted under section 552.101 of the Government Code in conjunction with sections 306.003 and 306.004 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. In Open Records Decision No. 648 (1996), we addressed the application of sections 306.003 and 306.004 of the Government Code, which work together to provide a measure of confidentiality for records of communications between citizens and the lieutenant governor. Open Records Decision No. 648 at 1-2 (1996). Both statutes grant the lieutenant governor the discretion to release information covered by the statutes. *Id.* at 2.

Section 306.003 provides as follows:

(a) Records of a member of the legislature or the lieutenant governor that are composed exclusively of memoranda of communications with residents of this state and of personal information concerning the person communicating with the member or lieutenant governor are confidential. However, the member or the lieutenant governor may disclose all or a part of a record to which this subsection applies, and that disclosure does not violate the law of this state.

(b) The method used to store or maintain a record covered by Subsection (a) does not affect the confidentiality of the record.

The confidentiality provision in section 306.003(a) applies to the records of a member of the legislature or of the lieutenant governor consisting of two kinds of information: 1) records of memoranda of communications with Texas residents and 2) records of personal information about the person communicating with the legislator or lieutenant governor. *Id.* Thus, "personal information" about a person communicating with a legislator or the lieutenant governor is within section 306.003(a) even if it is not recorded in a memorandum prepared by the member. *Id.* While section 306.003(a) deems confidential the records subject to the provision, it gives the lieutenant governor the discretion to disclose all or part of such record. Gov't Code § 306.003(a).

While section 306.003 applies to records consisting of memoranda of communications and records of a correspondent's personal information, section 306.004 refers to the communications themselves. Section 306.004 provides as follows:

(a) To ensure the right of the citizens of this state to petition state government, as guaranteed by Article I, Section 27, of the Texas Constitution, by protecting the confidentiality of communications of citizens with a member of the legislature or the lieutenant governor, the public disclosure of all or part of a written or otherwise recorded communication from a citizen of this state received by a member or the lieutenant governor in his official capacity is prohibited unless:

(1) the citizen expressly or by clear implication authorizes the disclosure;

(2) the communication is of a type that is expressly authorized by statute to be disclosed; or

(3) the official determines that the disclosure does not constitute an unwarranted invasion of personal privacy of the communicator or another person.

(b) This section does not apply to a communication to a member of the legislature or the lieutenant governor from a public official or public employee acting in an official capacity.

(c) A member or the lieutenant governor may elect to disclose all or part of a communication to which this section applies, and that disclosure does not violate the law of this state.

Gov't Code § 306.004. A "communication" includes "conversation, correspondence, and electronic communication." Gov't Code § 306.001. The communication is not subject to public disclosure unless one of the three conditions stated in section 306.004(a) apply. As with the records within section 306.003(a), the lieutenant governor has discretion to disclose all or part of the records subject to section 306.004(a). After reviewing Attachment I, we agree that this information constitutes records of the lieutenant governor composed exclusively of memoranda of communications with a resident of this state and is of personal information concerning the person communicating with the lieutenant governor. Therefore, we conclude you must withhold Attachments I-1 and I-2 under section 552.101 of the Government Code.

In summary, we conclude that the e-mail addresses we have marked are excepted from disclosure under section 552.137(a) of the Government Code. The commission must also withhold Attachments I-1 and I-2 under section 552.101 of the Government Code in conjunction with sections 306.003 and 306.004 of the Government Code. The remaining information must be released.

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,



Sarah I. Swanson
Assistant Attorney General
Open Records Division

SIS/lmt

Ref: ID# 191313

Enc. Submitted documents

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