



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 4, 2004

Mr. David Mendez  
Bickerstaff, Heath, Smiley, Pollan, Kever & McDaniel, L.L.P.  
816 Congress Avenue, Suite 1700  
Austin, Texas 78701

OR2004-4587

Dear Mr. Mendez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 202908.

The City of Bryan (the "city"), which you represent, received a request for "Any and all documents – including notes, e-mails, letters or memos – from [the mayor] or [the city secretary] that mention concerns expressed about [the city attorney], over the past year." You claim that a portion of the submitted information is not subject to the Public Information Act (the "Act") and, alternatively, that this information is excepted from disclosure under section 552.111 of the Government Code. You claim that the remaining submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You assert that the documents in Exhibit C are not subject to the Act. The Act is applicable to "public information." *See* Gov't Code § 552.021. "Public information" is defined 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.

Gov't Code § 552.002(a). Thus, virtually all information in the physical possession of a governmental body is public information that is encompassed by the Act. *Id.* § 552.022(a)(1); *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). Likewise, the Act is applicable to information that a governmental body does not physically

possess, if the information is collected, assembled, or maintained for a governmental body, and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2); *see also* Open Records Decision No. 462 at 4 (1987) (Act applies to information collected or maintained by consultant if information relates to governmental body's official duties or business, consultant acts as agent of governmental body in collecting information, and governmental body has or is entitled to access to information). However, the Act does not require a governmental body to release information if the governmental body that receives the request has neither possession of the information nor a right of access to it. *See* Open Records Decision Nos. 534 at 2-3 (1989), 518 at 2-3 (1989).

You assert that the documents at issue are not subject to the Act. You inform us that the information in question consists of "notations [that] appear to have been made by the Mayor in preparation for or during a meeting with the City Attorney and other city officials concerning performance evaluation of the city Attorney." You state that these notations "appear to be merely the personal observations and impressions" of the mayor. You also state that these documents were "rejected by the City when presented for filing in the City's personnel files." Having considered your arguments and reviewed the information at issue, we conclude that the Act is applicable to the documents in Exhibit C. *See* Open Records Decision No. 635 (1995); *see also* Open Records Decision Nos. 626 (1994) (handwritten notes taken during oral interview by Texas Department of Public Safety promotion board members subject to Act), 450 (1986) (notes of appraisers taken in course of teacher appraisals subject to Act), 120 (1976) (faculty members' written evaluations of doctoral student's qualifying exam subject to Act); *but see* Open Records Decision Nos. 635 (1995) (calendar purchased and maintained by governmental employee who had sole access to it not subject to Act), 77 (1975) (personal notes made by individual faculty members for personal use as memory aids not subject to Act). The documents at issue are clearly related to the official business of the city. Such information is not beyond the scope of the Act simply because the information is in the possession of a particular official or employee of a governmental body, rather than the governmental body as a whole. *See* Open Records Decision No. 635 at 3 (1995). On the contrary, information that clearly relates to a governmental body's official business is subject to the Act, regardless of whether the information is held by a particular official or employee, the governmental body's administrative offices, or the custodian of records. *Id.*; *see also* Open Records Decision No. 425 at 1-2 (1985) (overruled on other grounds by Open Records Decision No. 439 (1986)) (information relating to selection of new school superintendent sent by consulting firm to board members' home addresses subject to Act). Accordingly, we conclude that the documents in Exhibit C constitute "public information" under section 552.002 of the Act. Therefore, the city must release this information unless it comes within an exception to public disclosure.

You assert that Exhibit C is excepted from disclosure under section 552.111 of the Government Code. 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 deliberative or policymaking processes of the governmental body. Open Records Decision No. 615 at 5-6 (1993). An agency's policymaking functions, however, 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. See *Arlington Indep. Sch. Dist. v. Texas Atty. Gen.*, 37 S.W.3d 152, 160 (Tex. App.—Austin 2001, no writ); Open Records Decision No. 615 at 4-5.

You indicate that the documents in Exhibit C are draft memoranda involving employee evaluations. Upon review, we find that the documents in Exhibit C relate to administrative and personnel matters. Therefore, the city may not withhold Exhibit C under section 552.111. As the city claims no other exceptions for this information, it must be released.

You assert that the documents in Exhibit B are excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) excepts from disclosure information protected by 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.<sup>1</sup> TEX. R. EVID. 503(b)(1). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives.<sup>2</sup> TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body seeking to establish that a communication is protected by the attorney-client privilege must inform this office of the identity and capacity of each

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<sup>1</sup> The privilege does not apply when an attorney or representative is acting in a 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). Because government attorneys often act in capacities other than that of professional legal counsel, including as administrators, investigators, or managers, the mere fact that a communication involves an attorney for the government does not demonstrate this element.

<sup>2</sup> Specifically, the privilege applies only to confidential communications between the client or a representative of the client and the client's lawyer or a representative of the lawyer; between the lawyer and the lawyer's representative; by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein; between representatives of the client or between the client and a representative of the client; or among lawyers and their representatives representing the same client. See TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E); see also *id.* 503(a)(2), (a)(4) (defining "representative of the client," "representative of the lawyer.")

individual involved in the communication. Finally, the attorney-client privilege applies only to a communication that is confidential. *Id.* 503(b)(1). A confidential communication is a communication that 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 the definition of a confidential communication 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) of the Government Code 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 inform us that Exhibit B consists of confidential communications made for the purpose of facilitating the rendition of professional legal services. You also identify the communicants as client representatives and legal counsel for the city. Accordingly, we find that the city may withhold Exhibit B under section 552.107(1).<sup>3</sup>

In summary, the city may withhold Exhibit B under section 552.107(1). 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

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<sup>3</sup>As our ruling is dispositive, we do not address your claim under section 552.101.

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,



Amy D. Peterson  
Assistant Attorney General  
Open Records Division

ADP/sdk

Ref: ID# 202908

Enc. Submitted documents

c: Mr. Ethan Butterfield  
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(w/o enclosures)