



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 21, 2006

Ms. Leann D. Guzman  
Assistant City Attorney  
City of Fort Worth  
1000 Throckmorton Street  
Fort Worth, Texas 76102

OR2006-10988

Dear Ms. Guzman:

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# 260209.

The City of Fort Worth (the "city") received a request for certain e-mails sent and/or received by the city's mayor and city manager during a specified time period. You state that some of the requested information will be released to the requestor. You also state that some of the requested information is subject to our previous ruling in Open Records Letter No. 2006-07831 (2006).<sup>1</sup> You indicate that the relevant facts and circumstances have not changed since the issuance of this previous ruling. Therefore, the city may continue to rely on Open Records Letter No. 2006-07831 for any information subject to that ruling. You claim that the submitted information is excepted from disclosure under sections 552.107, 552.111, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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<sup>1</sup>In Open Records Letter No. 2006-07831, this office held that the city could withhold certain information under sections 552.107 and 552.111 of the Government Code. We also held that, if a timely election was made under section 552.024 of the Government Code, the city must withhold certain personal information under section 552.117 of the Government Code. We also held that certain e-mail addresses must be withheld under section 552.137 of the Government Code.

Initially, we note that the city was late in providing this office with some of the requested information. Section 552.301(e) of the Government Code requires the governmental body to submit to the attorney general, not later than the fifteenth business day after the date of its receipt of the request, (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request, or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples of the information if it is voluminous. *See* Gov't Code § 552.301(e)(1)(A)-(D). For purposes of section 552.301, the current request is considered to have been received by the city on July 5, 2006. *See id.* § 552.263(e) (a request for information is considered to have been received by a governmental body on the date the governmental body receives the deposit or bond if the governmental body requires a deposit or bond in accordance with this section). Accordingly, the fifteenth business day was July 26, 2006. While you provided most of the requested information on July 26<sup>th</sup>, you did not submit a portion of the requested information until July 27<sup>th</sup>. Consequently, we find that the city failed to comply with the procedural requirements of section 552.301 as to the information submitted on July 27<sup>th</sup>.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Generally, a governmental body may demonstrate a compelling reason to withhold information by a showing that the information is made confidential by another source of law or affects third party interests. *See* Open Records Decision No. 630 (1994). You assert that the information at issue is excepted from disclosure under section 552.111 of the Government Code. However, section 552.111 is a discretionary exception to disclosure that protect the governmental body's interests and may be waived by the governmental body. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). Thus, section 552.111 does not demonstrate a compelling reason to withhold the information at issue. As you raise no other exception to disclosure for the information submitted on July 27<sup>th</sup>, we find that this information must be released to the requestor.

Next, we address your arguments as to the remaining information. 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 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. 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. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state that Exhibit C and a portion of Exhibit D, which you have highlighted, consist of communications between the city attorney, the deputy city attorney, and various city employees. You further explain these communications are confidential, were not intended to be disclosed to third parties, and were made in rendering professional legal services. Based on your representations and our review, we find that you have demonstrated the attorney-client privilege in this instance. Therefore, the city may withhold Exhibit C and the portion of Exhibit D which you have highlighted under section 552.107 of the Government Code.

Next, we address your arguments under section 552.111 of the Government Code, which 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. 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. We also note that section 552.111 is applicable to communications that involve a governmental body's consultants. *See* Open Records Decision Nos. 631 at 2 (1995) (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority).

You indicate that the remaining information you have highlighted in Exhibit D consists of inter-agency and intra-agency communications concerning the Wright Amendment and the operation of the Dallas/Fort Worth International Airport. You also indicate that these communications contain opinions and recommendations on these policymaking issues. Based on your representations and our review, we conclude that you have demonstrated the applicability of section 552.111 of the Government Code to the remaining information you have highlighted in Exhibit D. This highlighted information may be withheld on that basis.

Next, you claim that some of the information in Exhibit E is excepted from disclosure under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses, home telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the city may only withhold information under section 552.117 on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the request for information was received. If the employee at issue timely elected to keep his personal information confidential, the city must withhold the personal information we have marked under section 552.117. The city may not withhold this information under section 552.117 if the employee at issue did not make a timely election to keep the information confidential.

Finally, you claim that Exhibit F contains e-mail addresses obtained from the public that are excepted from disclosure under section 552.137 of the Government Code. Under section 552.137, a governmental body must withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See* Gov't Code § 552.137 (b). You do not inform us that

a member of the public has affirmatively consented to the release of any e-mail address contained in Exhibit F. Therefore, the city must withhold the e-mail addresses you have marked in Exhibit F under section 552.137.

In summary, the city may withhold Exhibit C and that portion of Exhibit D which you have highlighted under section 552.107 of the Government Code. The city may withhold the remaining information you have highlighted in Exhibit D under section 552.111 of the Government Code. The city must withhold the personal information we have marked under section 552.117 of the Government Code if the employee at issue made a timely election under section 552.024 of the Government Code. The e-mail addresses you have marked in Exhibit F must be withheld under section 552.137 of the Government Code. The remaining 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,



James A. Person III  
Assistant Attorney General  
Open Records Division

JAP/dh

Ref: ID# 260209

Enc. Submitted documents

c: Ms. Emily Ramshaw  
The Dallas Morning News  
P.O. Box 655237  
Dallas, Texas 75265  
(w/o enclosures)