



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

October 25, 2006

Mr. Charles K. Eldred
Assistant City Attorney
City of Jonestown
Knight & Partners
Executive Office Terrace
223 West Anderson Lane, Suite A-105
Austin, Texas 78752

OR2006-12619

Dear Mr. Eldred:

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# 262922.

The City of Jonestown (the "city"), which you represent, received a request: (1) to inspect all correspondence regarding Waterscape development and Omni Joint Ventures; and (2) for copies of all correspondence between city council members concerning Waterscape development and Omni Joint Ventures. You state that you are not asserting any exceptions for the second category of information. Thus, to the extent any responsive information to the second category existed on the date you received the request, we assume you have released it to the requestor. You claim, instead, that a portion of the first category of information is not subject to the Act. You also raise sections 552.107, 552.111, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

¹We 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.

Initially, we address your claim that the information contained in Exhibit C is not subject to the Act. You contend that the drafts in Exhibit C are “not actually city documents” because they consist of incomplete “drafts of a development agreement that is still being negotiated and that has not been approved by or submitted to the City Council.” We note that the Act applies to information that is “collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business by a governmental body.” Gov’t Code § 552.002(a)(1). This encompasses information prepared by attorneys or consultants for the governmental body. *See* Open Records Decision Nos. 462 at 4 (1987); 445 (1986). Thus, virtually all information that is in a governmental body’s physical possession constitutes public information. Gov’t Code § 552.002; *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1989). Although you contend that section 552.022 states that only completed reports, rather than drafts, are public information, we note that section 552.022 is not intended to be an exhaustive list of the types of information that are subject to the Act. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 359 (Tex. 2000). Rather, the section provides a list of the types of information that generally may only be withheld if they are expressly confidential under “other law.” Gov’t Code § 552.022(a). Thus, the city may not withhold the information in Exhibit C on the basis that section 552.022 does not apply. *See also* Open Records Decision Nos. 551 (1990) (construing predecessor statute, held that information listed is illustrative, though not exhaustively so, of “public information,” and does not limit the applicability of enumerated exceptions), 460 (1987) (predecessor statute does not limit the meaning of other sections of the Act, therefore information may not be withheld solely because it is in incomplete form), 407 (1984) (although predecessor statute “specifically [makes] public” certain categories of information, including “investigations . . . upon completion,” information in possession of governmental body which has not yet become part of finalized investigative report may not be withheld simply because report not yet completed). Accordingly, as the drafts are maintained by the city in connection with the transaction of its official business, this information is subject to the Act and may only be withheld if an exception to disclosure applies. Thus, we address the exceptions you raise for this information.

Next, you claim that the information located in Exhibit B is subject to section 552.107(1) of the Government Code, which protects information coming within the attorney-client privilege. *See* Gov’t Code § 552.107(1). 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 either 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). 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. 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. Finally, 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 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) 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 that the information located in Exhibit B consists of confidential attorney-client communications between city attorneys and city employees made in furtherance of the rendition of professional legal services. Moreover, you state that these communications were not intended to be disclosed to third parties, and we understand this to mean that the confidentiality of the communications has been maintained. Based on your representations and our review of the submitted records, we agree that this information consists of confidential attorney-client communications, and therefore, the information in Exhibit B is excepted from disclosure under section 552.107 of the Government Code.

We now turn to your claim that section 552.111 of the Government Code is applicable to the information located in Exhibit C. 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.” *See Gov’t Code* § 552.111. Section 552.111 encompasses the deliberative process privilege. *See Open Records Decision No. 615 at 2* (1993). In *Open Records Decision No. 615*, 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, and opinions reflecting the policymaking processes of the governmental body. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *see also Arlington Indep. Sch. Dist.*

v. Tex. Attorney Gen., 37 S.W.3d 152 (Tex. App.—Austin, 2001, no pet.). The purpose of section 552.111 is “to protect from public disclosure advice and opinions on policy matters and to encourage frank and open discussion within the agency in connection with its decision-making processes.” *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref’d n.r.e.).

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. *See* Open Records Decision No. 615 at 5-6. A governmental body’s policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body’s policy mission. *See* Open Records Decision No. 631 at 3 (1995). Further, a 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. *See* Open Records Decision No. 559 at 2 (1990). Section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* Open Records Decision No. 615 at 5. But, if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

You inform us that the information in Exhibit C consists of early drafts of a development agreement to allow for the development of a tract under development standards and to provide for annexation into the city. You state that the information consists of internal communications between city employees and their attorneys, containing advice, recommendations, and opinions that reflect the deliberations and policymaking process of the city. Further, you advise that the agreement, currently being negotiated by the City Attorney and City Manager at the direction of the City Council, will be submitted to the City Council for approval when finalized and made available for public comment in its final form. Based upon your representations and our review of the information located in Exhibit C, we agree that the information you seek to withhold under section 552.111 consists of advice, opinions, and recommendations regarding a policymaking matter of the city. *See* Open Records Decision No. 631 at 4 (1995). Accordingly, the city may withhold the information located in Exhibit C pursuant to section 552.111 of the Government Code.

Finally, we agree that section 552.137 of the Government Code is applicable to information located in Exhibit D. Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov’t Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee’s work e-mail

address because such an address is not that of the employee as a “member of the public,” but is instead the address of the individual as a government employee. The e-mail addresses we have marked are not of the type specifically excluded by section 552.137(c). You state that the city has not received consent to release any of the email addresses at issue. Therefore, the city must withhold the e-mail addresses we have marked in Exhibit D under section 552.137 of the Government Code.

In sum, the city may withhold: (1) the information in Exhibit B under section 552.107 of the Government Code; and (2) the information in Exhibit C pursuant to section 552.111 of the Government Code. The city must withhold the e-mail addresses we have marked in Exhibit D under section 552.137 of the Government Code. The remaining information in Exhibit D 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, 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,



Alix K. Cornett
Assistant Attorney General
Open Records Division

AKC/krl

Ref: ID# 262922

Enc. Submitted documents

c: Ms. Cher Groody
8303 Oveta Street
Jonestown, Texas 78654
(w/o enclosures)