



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 27, 2007

Mr. Rashaad V. Gambrell  
Assistant City Attorney  
City of Houston  
P.O. Box 1562  
Houston, Texas 77251-1562

OR2007-02323

Dear Mr. Gambrell:

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# 271123.

The Houston Police Department (the "department") received a request for "reports, correspondence, memoranda, or analysis of tasers regarding: 1) purchase of tasers, 2) price for tasers, 3) analysis or discussion of potential contracts for tasers, 4) use and operation of tasers, 5) physical and/or medical effects on targets of tasers, and 6) potential liability risks of use of tasers by law enforcement." You state that portions of the requested information will be released to the requestor, however, you claim that the submitted information is excepted from disclosure under sections 552.107, 552.108, 552.111, and 552.137 of the Government Code.<sup>1</sup> We have considered your arguments and reviewed the submitted information. We have also considered comments submitted by the requestor and an attorney for the Beaumont Police Department. See Gov't Code § 552.304 (interested third party may submit comments stating why requested information should or should not be released).

Initially, we note that you have submitted some information in Exhibit 3 that does not pertain to tasers. This information, which we have marked, is thus not responsive to the request for

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<sup>1</sup>Although you also assert the attorney-client privilege under section 552.101 of the Government Code in conjunction with the Texas Rules of Evidence 503, we note that section 552.107 is the proper exception to raise for your attorney-client privilege claim in this instance. See Open Records Decision No. 676 (1988).

information. This ruling does not address the public availability of any information that is not responsive to the request, and the department is not required to release that information in response to this request.

You claim that the information submitted in Exhibit 2 is subject to section 552.107 of the Government Code. Section 552.107(1) protects information that comes 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. See 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. See 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. See *In re Tex. 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. See 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. See *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 2 consists of confidential attorney-client communications that were made in connection with the rendition of professional legal services between a department attorney and department employees. Based on your representations and upon our review of the information in question, we conclude that the department may withhold Exhibit 2 under section 552.107(1) of the Government Code.

Section 552.108 of the Government Code provides in pertinent part:

(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 [required public disclosure] if:

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

Gov't Code § 552.108(b)(1). Section 552.108(b)(1) is intended to protect “information which, if released, would permit private citizens to anticipate weaknesses in [a law enforcement agency], avoid detection, jeopardize officer safety, and generally undermine [law enforcement] efforts to effectuate the laws of this State.” *City of Ft. Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.). This office has stated that under the statutory predecessor to section 552.108(b), a governmental body may withhold information that would reveal law enforcement techniques or procedures. *See, e.g.*, Open Records Decision Nos. 531 (1989) (release of detailed use of force guidelines would unduly interfere with law enforcement), 456 (1987) (release of forms containing information regarding location of off-duty police officers in advance would unduly interfere with law enforcement), 413 (1984) (release of sketch showing security measures to be used at next execution would unduly interfere with law enforcement), 409 (1984) (if information regarding certain burglaries exhibit a pattern that reveals investigative techniques, information is excepted under predecessor to section 552.108), 341 (1982) (release of certain information from Department of Public Safety would unduly interfere with law enforcement because release would hamper departmental efforts to detect forgeries of drivers' licenses), 252 (1980) (predecessor to section 552.108 is designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted).

To claim section 552.108(b)(1), a governmental body must explain how and why release of the requested information would interfere with law enforcement and crime prevention. Gov't Code §§ 552.108(a)(1), (b)(1), .301; Open Records Decision No. 562 at 10 (1990). Generally known policies and techniques may not be withheld under section 552.108. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (Penal Code provisions, common law rules, and constitutional limitations on use of force are not protected under predecessor to section 552.108), 252 at 3 (governmental body did not meet burden because it did not indicate why investigative procedures and techniques requested were any different from those commonly known).

The department states that Exhibit 3 contains “documentation of specific guidelines for police officers regarding the procedure to be followed when using and handling tasers as well as other guidelines to advise police officers in their decision making with respect to the use

of tasers as a means of force.” The department informs us that Exhibit 3 contains curricula for department officers trained in Taser use. Furthermore, the department explains that release of this information would provide an advantage to criminal suspects during confrontations with police officers. The department also argues that release of this information could increase the chance of injury to police officers during confrontations with criminal suspects. You have also submitted to this office an affidavit from an officer with the department, which further explains how release of the information at issue would impair an officer’s ability to safely handle confrontations with criminal suspects. Based on these arguments and our review, we find that the release of portions of Exhibit 3 would interfere with law enforcement. Accordingly, the department may withhold the information in Exhibit 3, which we have marked, including the submitted video tape, under section 552.108(b)(1) of the Government Code. We find, however, that the department has not demonstrated that release of the remaining information would interfere with law enforcement. Thus, the remaining information in Exhibit 3 is not excepted from disclosure under section 552.108.

Our office has also received a letter from an attorney with the Beaumont Police Department (“BPD”) claiming that a portion of the submitted information, consisting of the BPD’s Use of Force Directive, is subject to section 552.108(b)(1). The BPD explains how the release of their information would compromise the safety and security of BPD officers and their department. Upon review, we find that the release of the BPD information we have marked would interfere with the law enforcement interests of another governmental body. Thus, the information we have marked in Exhibit 4 may also be withheld under section 552.108(b)(1). *Cf.* Open Records Decision No. 372 (1983) (law enforcement exception may be invoked by proper custodian of information that relates to criminal incident).

The department claims section 552.111 of the Government Code for the remaining submitted information. Section 552.111 excepts from public disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. *See* Open Records Decision No. 615 at 2 (1993). Section 552.111 encompasses the deliberative process privilege. The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615 (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* Open Records Decision No. 615 at 5. A governmental body’s policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see*

also *City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). 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, 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).

This office also has concluded that a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

The department argues that the information in Exhibit 4 consists of advice, opinion or recommendations on policymaking matters, particularly draft documents. Having considered the department's arguments and reviewed the information at issue, we conclude that the department may withhold some of this information under section 552.111 of the Government Code. We have marked that information accordingly. We conclude, however, that the department has failed to demonstrate that the remaining documents in Exhibit 4 constitute internal communications that consist of advice, recommendations, and opinions that reflect the policymaking processes of the department. Further, although you inform us that the some of the remaining submitted information consists of draft documents, you have not informed us that the remaining information will be released to the public in their final form. Therefore, we find that the department has failed to establish the applicability of section 552.111 to the remaining documents at issue. *See* Gov't Code § 552.301(e)(1) (requiring governmental body to explain the applicability of the raised exception). Accordingly, none of the remaining information may be withheld under section 552.111.

Section 552.111 also encompasses the attorney work product privilege found at rule 192.5 of the Texas Rules of Civil Procedure. *See* TEX. R. CIV. P. 192.5; *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines attorney work product as consisting of

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX.R.CIV.P. 192.5. A governmental body that seeks to withhold information on the basis of the attorney work product privilege under section 552.111 bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *See id.*; Open Records Decision No. 677 at 6-8. In order for this office to conclude that information was created 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.

*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; Open Records Decision No. 677 at 7. Upon review, we find that the department has failed to demonstrate that the remaining information in Exhibit 4 was prepared for trial or in anticipation of litigation. Therefore, none of it may be withheld under section 552.111 as attorney work product.

Finally, we address your claim that information in Exhibit 5 is excepted under section 552.137 of the Government Code. This section provides the following:

(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.

Gov't Code § 552.137. 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 id.* § 552.137(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under section 552.137. If the e-mail address you have marked in Exhibit 5 belongs to a member of the general public, the department must withhold this e-mail address under section 552.137, unless the owner of the e-mail address has affirmatively consented to its public disclosure. However, to the extent that the marked e-mail address belongs to an employee of an entity with which the department has a contractual relationship, the e-mail address may not be withheld under section 552.137.

We note that some of the information at issue is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. *Attorney General Opinion JM-672 (1987)*. A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See Open Records Decision No. 550 (1990)*. Accordingly, the information at issue must be released to the requestor in accordance with applicable copyright law.

In summary, the department is not required to disclose the submitted non-responsive information. The department may withhold the information we have marked under sections 552.107, 552.108, and 552.111 of the Government Code. If applicable, the marked e-mail address must be withheld under section 552.137 of the Government Code. The department must release the remaining responsive information to the requestor, but any copyrighted information may only be released in accordance with copyright law.

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,



Debbie K. Lee  
Assistant Attorney General  
Open Records Division

DKL/eb

Ref: ID# 271123

Enc. Submitted documents

c: Mr. Joseph R. Larsen  
Ogden, Gibson, Broocks, & Longoria, LLP  
1900 Pennzoil South Tower  
711 Louisiana  
Houston, Texas 77002  
(w/o enclosures)

Ms. Judith Sachitano Rawls  
Assistant City Attorney  
Beaumont Police Department  
P.O. Box 3827  
Beaumont, Texas 77704-3827  
(w/o enclosures)