



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 17, 2007

Ms. Amy S. McHugh
Assistant City Attorney
City of Cedar Park
600 North Bell Boulevard
Cedar Park, Texas 78613

OR2007-09044

Dear Ms. McHugh:

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# 284137.

The City of Cedar Park (the "city") received four requests for information relating to several water projects, Representative Dan Gattis, Senator Steve Ogden, and four named individuals during a specified time period. You state that some of the responsive information has been or will be made available to the requestor. You assert, however, that the remaining responsive information is excepted from disclosure under sections 552.105, 552.107, and 552.111 of the Government Code. We have considered your claimed exceptions to disclosure and have reviewed the submitted information.

Initially, we note that some of the requested information may be subject to a previous request for information, in response to which this office issued Open Records Letter No. 2007-06824 (2007). Accordingly, to the extent information responsive to the current request is identical to information previously requested and ruled upon by this office, we conclude that, as we have no indication that the law, facts, and circumstances on which the prior ruling was based have changed, the city must continue to rely on that ruling as a previous determination and withhold or release that information in accordance with ORL 2007-05260. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney

general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

You assert that the documents in Exhibit D are excepted from disclosure under section 552.107 of the Government Code. 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. 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. *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).

The city explains that the records submitted as Exhibit D are communications that were created in furtherance of providing legal advice on a variety of topics relating to a proposed water and wastewater regional system. You have provided a list of some of the parties to these communications. In reviewing your list and the communications, we find that you have failed to identify some of the parties to the communications or explain their relationship

with the city. Since you have failed to demonstrate that the attorney-client privilege protects these communications, we conclude that the marked documents in Exhibit D are not excepted under section 552.107. The remaining documents in Exhibit D, however, may be withheld as privileged attorney-client communications.

Next you assert that the documents in Exhibit E are excepted under section 552.111 of the Government Code. 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. The purpose of this exception 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 only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 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) (stating that Gov’t Code § 552.111 is not applicable to personnel-related communications that did not involve policymaking). Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* ORD 615 at 5. If, however, the 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 may also be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

This office has also concluded that a preliminary draft of a policymaking 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. Finally, section 552.111 does not apply unless the entities between which the information is passed are shown to share a privity of interest or common deliberative process with regard to the policy matter at issue. Open Records Decision No. 561 at 9 (1990).

You assert that Exhibit E consists of communications, draft agreements, and engineering proposals between the city, the City of Leander, the City of Round Rock, the Lower Colorado River Authority, and outside consultants regarding the proposed regional water and wastewater system. Upon review, we agree that most of the information in Exhibit E is the advice, opinions, and recommendations of employees and other individuals with whom the city has privity on this policy issue and may be withheld under section 552.111. However, the remaining information in Exhibit E is factual. Accordingly, we conclude that the marked documents in Exhibit E are not excepted under section 552.111.

You also assert that some of the information in Exhibit E is excepted from disclosure under section 552.105. Section 552.105 of the Government Code excepts from disclosure *information relating to:*

- (1) *the location of real or personal property for a public purpose prior to the public announcement of the project; or*
- (2) *appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contract for the property.*

This exception is designed to protect a governmental body's planning and negotiating position in transactions involving the purchase of real or personal property for a public purpose until the transaction has been completed. Open Records Decision Nos. 564 (1990), 357 (1982), 310 (1982).

Although you generally state that some of the information in Exhibit E relates to the acquisition of easements related to the water and wastewater system, you do not identify the information in Exhibit E you claim falls within this exception. Gov't Code § 552.301(e)(2) (stating that governmental body must properly label submitted information to indicate which exceptions apply). Furthermore, after reviewing the remaining information and your statement, we find that the city has failed to explain how the release of this information would harm the city's negotiating position for purposes of section 552.105. Therefore, the remaining information in Exhibit E may not be withheld under section 552.105(2) of the Government Code.

Finally, we note that some of the remaining documents in Exhibits D and E contain personal e-mail addresses. Section 552.137 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.

Gov't Code § 552.137. Section 552.137 requires the city to withhold an e-mail address of a member of the public that is provided for the purpose of communicating electronically with the city, unless the member of the public has affirmatively consented to its release or the e-mail address is specifically excluded under section 552.137(c). The personal e-mail addresses of government employees must be withheld unless the employees have consented to release. The remaining personal e-mail addresses appear to belong to individuals who have a contractual relationship with the city. However, to the extent that these individuals do not have a contractual relationship with the city, their e-mail addresses must be withheld under section 552.137 unless they have consented to release.

In summary: (1) the city must continue to rely on our decision in Open Records Letter No.2007-06824 with respect to the information that was subject to that ruling; (2) with the exception of the information we have marked for release, the information in Exhibit D may be withheld under section 552.107 and the information in Exhibit E may be withheld under section 552.111; (3) personal e-mail addresses of government employees must be withheld under section 552.137 unless the employees have consented to release; (4) personal e-mail addresses of individuals with whom the city does not have a contractual relationship must

be withheld under section 552.137 unless the owners have consented to release; and (5) 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, 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,

A handwritten signature in cursive script that reads "Heather Ross".

Heather Pendleton Ross
Assistant Attorney General
Open Records Division

HPR/mcf

Ref: ID# 284137

Enc: Submitted documents

c: Ms. Judy Graci
15775 Booth Circle
Volente, Texas 78641
(w/o enclosures)