



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 21, 2008

Ms. Helen Valkavich
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR2008-06997

Dear Ms. Valkavich:

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# 310643.

The City of San Antonio (the "city") received a request for all records pertaining to a possible merger of the San Antonio Park Police with the San Antonio Police Department. You claim that the requested information is excepted from disclosure under sections 552.106, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information, some of which is a representative sample.¹

Initially, we note that you have marked a portion of the submitted information as being non-responsive to the request for information. We also note that a portion of the submitted information, which we have marked, was created after the request for information was received. Thus, the information we have marked is also not responsive to the request. This decision does not address the public availability of the non-responsive information, and that information need not be released.

¹ We 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.

Next, we note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in part, that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1), (3). In this instance, the submitted information contains a completed report and paid invoices, which we have marked, that are subject to sections 552.022(a)(1) and 552.022(a)(3) of the Government Code. Therefore, the city may only withhold this information if it is confidential under "other law." Although you claim this information is excepted under sections 552.106 and 552.111 of the Government Code, we note that these sections are discretionary exceptions to disclosure that a governmental body may waive. *See id.* § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 473 (1987) (governmental body may waive section 552.111). As such, sections 552.106 and 552.111 do not make information confidential for purposes of section 552.022. Therefore, the city may not withhold any portion of the marked completed report and paid invoices under section 552.106 or section 552.111. As you have claimed no other exceptions to disclosure for this information, it must be released.

You seek to withhold the remaining information, which is not subject to section 552.022, under section 552.111 of the Government Code. This section 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." Gov't Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). 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). In *Gilbreath*, the Third Court of Appeals found that the deliberative process privilege aspect of section 552.111 was analogous to Exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5). *See* ORD 615 at 2 (quoting *Gilbreath*, 842 S.W.2d at 412). The court found that subsequent to the passage of the Act by the Texas Legislature, federal court decisions and decisions from

this office were interpreting the deliberative process privilege too broadly, straying from the interpretation for Exemption 5 that Congress intended. *See id.* The court held that this privilege “exempts those documents, and only those documents, normally privileged in the civil discovery context.” *Id.* Therefore, at the direction of the court, this office narrowed the scope and interpretation of the deliberative process privilege, applying the same discovery-based approach applied by federal courts in early interpretations of this privilege. *See id.* at 3. Prior to the passage of the Act, the United States Supreme Court in *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973), determined that the purpose of the privilege was to promote the frank discussion of legal or policy matters within governmental agencies. ORD 615 at 3 (quoting *Mink*, 410 U.S. at 87). In *Ackerly v. Ley*, 420 F.2d 1336, 1341 (D.C. Cir.), cert. denied, 400 U.S. 824 (1970), the court held that the privilege was intended to protect “those internal working papers in which opinions are expressed and policies formulated and recommended.” ORD 615 at 5 (quoting *Ackerly*, 420 F.2d at 1341). In light of these court decisions, this office has determined that section 552.111 excepts from disclosure only the advice, recommendations, and opinions of members of the governmental body at issue that relate to a policymaking matter. *See* ORD 615 at 5. Furthermore, the fact that a document may have been used in the policymaking process does not bring that information within the privilege. Additionally, 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. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking).

This office has also 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.

You contend that the remaining information consists of e-mails and other documents related to discussions of the proposed merger, as well as draft proposals and plans pertaining to the proposed merger. You indicate that the final versions of the draft proposals and plans will be released to the public in their final forms. Based on your representations and our review, we find that some of the draft documents pertain to the city’s determination of whether to merge the park police and police department. We also find that portions of the communications reveal advice, opinions, or recommendations regarding the same policymaking issue. Thus, you have established that the deliberative process privilege is applicable to this information, which we have marked, and it may be withheld under

section 552.111 of the Government Code. You indicate that the remaining information, such as staff training requirements, organization charts, and inventory lists, was used to analyze logistical concerns related to the functions and services of the park police and police department. However, while you may have reviewed the remaining information during your consideration of whether or not to implement the proposed merger, this information itself does not reveal the advice, recommendations, and opinions of city staff regarding the proposed merger. See ORD 615 at 3-5 (citing to *Mink*, 410 U.S. at 87 and *Ackerly*, 420 F.2d at 1341, which both determined that the deliberative process privilege applies only to information that reveals the advice, opinions, or recommendations of persons engaged in the preparation of proposed legislation). Therefore, the remaining information may not be withheld under section 552.111 of the Government Code.

You assert the remaining information is excepted under section 552.106 of the Government Code. This section excepts from disclosure “[a] draft or working paper involved in the preparation of proposed legislation[.]” Gov’t Code § 552.106(a). Section 552.106 protects advice, opinion, and recommendation on policy matters in order to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body. See Open Records Decision No. 460 at 3 (1987). Therefore, section 552.106 is applicable only to the policy judgments, recommendations, and proposals of persons who are involved in the preparation of proposed legislation and who have an official responsibility to provide such information to members of the legislative body. *Id.* at 1. Section 552.106 does not protect purely factual information from public disclosure. See *id.* 460 at 2; see also Open Records Decision No. 344 at 3-4 (1982) (for purposes of statutory predecessor, factual information prepared by State Property Tax Board did not reflect policy judgments, recommendations, or proposals concerning drafting of legislation). However, a comparison or analysis of factual information prepared to support proposed legislation is within the scope of section 552.106. ORD 460 at 2.

You state that the decision to merge the city’s park police and police department is currently in preliminary discussions. You also state that if the city decides to complete the merger, “it will be necessary to amend and adjust the City Code.” Based on these representations, we understand that the city has not actually proposed any new legislation at this time because a decision regarding the merger has not yet been made. Furthermore, the information you seek to withhold consists of the following types of documents: job descriptions, staffing assignments, and inventory worksheets. As previously stated, in order for information to be considered a working paper involved in the preparation of proposed legislation and therefore excepted under section 552.106, the information must reveal the policy judgments, recommendations, and proposals of persons who are involved in the preparation of proposed legislation. In this case, you have not demonstrated that proposed legislation exists, nor have you demonstrated how any of the remaining information reveals advice, recommendation, or opinion regarding proposed legislation. Therefore, none of the remaining information may be withheld under section 552.106 of the Government Code.

You claim that a portion of the remaining information is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) 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 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 a capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). 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).

In this case, you assert that a portion of the remaining information, which you have marked, consists of communications made for the purpose of facilitating the rendition of professional legal services. You state that the communications were between clients, client representatives, lawyers, and lawyer representatives identified by the city, and that the communications were to be kept confidential among the intended parties. Finally, you state that the city has not waived its privilege with respect to any of the communications at issue. Therefore, the city may withhold the information you have marked under section 552.107.

Next, we note that some of the remaining information may be protected under section 552.117(a)(1) of the Government Code.² Section 552.117(a)(1) excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that such information be kept confidential under section 552.024 of the Government Code. *See Gov't Code § 552.117(a)(1)*. Additionally, section 552.117 also encompasses personal cellular telephone numbers, provided that the cellular phone service is paid for by the employee with his or her own funds. *See Open Records Decision No. 670 at 6 (2001)* (extending section 552.117(a)(1) exception to personal cellular phone number and personal pager number of employee who elects to withhold home phone number in accordance with section 552.024). 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)*. The city may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, to the extent the cellular telephone numbers we have marked in the remaining information are personal cellular telephone numbers that belong to city employees who made timely elections under section 552.024, the numbers must be withheld under section 552.117(a)(1). To the extent the telephone numbers are not personal cellular telephone numbers or do not belong to city employees who made timely elections under section 552.024 of the Government Code, the marked cellular telephone numbers may not be withheld under section 552.117(a)(1). Furthermore, if the city employee whose personal information we have marked timely elected to withhold his information under section 552.024, the marked information must be withheld under section 552.117(a)(1). If that employee did not timely elect, the marked information may not be withheld under section 552.117(a)(1).

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home address, home telephone numbers, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 and 552.1175 of the Government Code.³ Thus, the city must withhold the personal information of peace officers we have marked in the remaining information under section 552.117(a)(2) of the Government Code.

We note that portions of the remaining information are excepted from disclosure under section 552.130 of the Government Code, which excepts from public disclosure information that relates to a driver's license or motor vehicle title or registration issued by an agency of

² The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987)*.

³ "Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

this state. Gov't Code § 552.130. Therefore, the city must withhold the Texas motor vehicle record information that we have marked under section 552.130 of the Government Code.

Finally, we note that the remaining information includes an e-mail address that is subject to section 552.137 of the Government Code, which 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). The e-mail address in the remaining information is not specifically excluded by section 552.137(c). As such, this e-mail address, which we have marked, must be withheld under section 552.137, unless the owner of the address has affirmatively consented to its release. See *id.* § 552.137(b).

In summary, the city may withhold the information we have marked under section 552.111 of the Government Code and the information you have marked under section 552.107 of the Government Code. To the extent the cellular telephone numbers we have marked are personal cellular telephone numbers that belong to city employees who made timely elections under section 552.024, the numbers must be withheld under section 552.117(a)(1) of the Government Code. If the personal information we have marked belongs to a city employee who timely elected under section 552.024, the city must withhold the marked information under section 552.117(a)(1) of the Government Code. The city must withhold the information we have marked under sections 552.117(a)(2), 552.130, and 552.137 of the Government Code. 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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

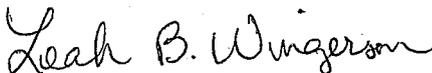
will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to 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 challenge 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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/ma

Ref: ID# 310643

Enc. Submitted documents

c: Mr. John Haning
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(w/o enclosures)