



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 2, 2008

Ms. Katherine R. Fite
Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2008-13547

Dear Ms. Fite:

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# 324245.

The Office of the Governor (the "governor") received a request for a specified settlement agreement between a named individual and the Texas Lottery Commission (the "commission").¹ You state that you do not have a final version of the requested settlement agreement. You claim that the submitted responsive information, a draft settlement agreement, is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information. Pursuant to section 552.305 of the Government Code, you state that you have notified the Office of the Attorney General (the "OAG") of the request and of its right to submit arguments to this office as to why the information should not be released. *See Gov't Code* § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested

¹We note that the governor sought and received clarification regarding this request. *See Gov't Code* § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

²Although you raise section 552.101 in conjunction with Texas Rule of Evidence 503, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

third party to raise and explain applicability of exception to disclosure under Act in certain circumstances). We have received and considered the OAG's arguments.

Initially, we note, and you have indicated, that you have submitted information which is not responsive to the present request. This ruling does not address the public availability of the information marked as non-responsive, and you need not release such information in response to the request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed).

The OAG raises section 552.103 of the Government Code for the submitted information. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A government body asserting section 552.103 has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the department received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ refused n.r.e.); Open Records Decision No. 551 at 4 (1990). The government body must meet both prongs of this test for information to be excepted under section 552.103(a).

The OAG states that the submitted draft settlement agreement relates to litigation "concerning a Texas Whistleblower case involving the commission." The OAG further states that, at the time of the request, "the OAG was having the settlement agreement approved by the [governor] and a purchase voucher issued as required by the General Appropriations Act." The OAG explains that, although the case was almost settled, the OAG still reasonably anticipates litigation because the "settlement agreement had not been finalized." Based on these representations and our review of the information, we conclude

that litigation was pending on the date that the governor received this request for information and that this information is related to the litigation. We note, however, that the opposing party to the litigation and his attorney have signed the submitted draft settlement agreement. Accordingly, we conclude that the opposing party to the litigation has had access to the draft settlement agreement at issue. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that is related to litigation through discovery procedures. *See* ORD 551 at 4-5. When the opposing party to the litigation has seen or had access to information that is related to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, as the OAG has not established the applicability of section 552.103, none of the submitted information may be withheld under that exception.

Next, the governor and the OAG raise section 552.107 of the Government Code for the submitted information. Section 552.107 excepts from disclosure "information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Evidence or the Texas Disciplinary Rules of Professional Conduct." Gov't Code § 552.107(1). This section protects information that comes within the attorney-client privilege under Texas Rule of Evidence 503. 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). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* 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, 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 the submitted information constitutes confidential communications “created by attorneys in the OAG in furtherance of the rendition of legal services for their client, the State of Texas.” You also state that the information at issue “reveal[s] confidential attorney-client communications relating to the settlement negotiations.” The OAG states that the submitted information constitutes confidential communications between “the OAG and a client agency, as well as internal communications between OAG attorneys and/or employees.” The OAG states that these communications have remained confidential. As noted above, however, the opposing party to the litigation has had access to the submitted draft settlement agreement. Thus, we find that the submitted information does not constitute confidential communications between privileged parties. *See* Tex. R. Evid. 503(a)(5). You also claim that the submitted draft settlement agreement “reflect[s] compromise negotiations” protected by Texas Rules of Evidence 408. However, Rule 408 governs the admissibility of information developed through compromise negotiations. *See id.* 408. This rule does not prohibit an attorney from disclosing the information at issue or otherwise deem it confidential. *See* Open Records Decision No. 416 (1984) (finding evidentiary rule has no effect on question of required public disclosure under the Act). Therefore, none of the submitted information may be withheld under section 552.107(1) of the Government Code.

Next, the governor and the OAG raise section 552.111 of the Government Code for the submitted information. Section 552.111 of the Government Code 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. Section 552.111 encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). 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, 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, and opinions that reflect 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) (Gov’t Code § 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).

Moreover, 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. 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 state that the submitted draft settlement agreement “reflects advice, opinion and recommendations of the drafter by revealing preliminary and evolving drafts of documents.” We conclude, however, that because the opposing party to litigation has had access to the draft settlement agreement, the deliberative process privilege under section 552.111 has been waived. *See* Open Records Decision Nos. 435 at 3-4 (1986), 400 at 2 (1983); *see also* Gov’t Code § 552.007(b) (information voluntarily made available to a member of the public “must be made available to any person.”). Therefore, none of the submitted information may be withheld under section 552.111 of the Government Code and the deliberative process privilege.

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.*; ORD 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; ORD 677 at 7.

The governor and the OAG contend that the submitted draft settlement agreement consists of attorney work product. However, because the opposing party to the litigation has had access to the submitted information, we conclude that the work product privilege under section 552.111 has been waived. *See* Tex. R. Evid. 511(a) (concerning waiver of privilege by voluntary disclosure); *see also* Gov't Code § 552.007(b); ORD 435 at 3-4, 400 at 2. Therefore, none of the submitted information may be withheld under section 552.111 of the Government Code and the work product privilege. As neither the governor nor the OAG has raised any other exception to disclosure, we conclude that the submitted 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 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). If the governmental body does not file suit over 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,



Bill Dobie
Assistant Attorney General
Open Records Division

WJD/jh

Ref: ID# 324245

Enc. Submitted documents

cc: Mr. John Moritz
Fort Worth Star-Telegram
400 West 7th Street
Fort Worth, Texas 76102
(w/o enclosures)

Ms. Zindia T. Thomas
Assistant Attorney General
Public Information Coordinator
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548
(w/o enclosures)