



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 9, 2009

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

OR2009-04722

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# 339357 (COSA File No. 09-0062).

The City of San Antonio (the "city") received a request for correspondence between and among the U.S. Department of Justice, the mayor, the city attorney, and all city council members regarding the request for a pre-clearance for the special election. You state that many of the requested records will be released to the requestor. You claim that the submitted 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.

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 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). 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. 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.*, 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 most of the submitted information, which you have marked, reveals communications between the city’s attorneys and the city’s employees. You have specifically identified the city attorneys and city employees at issue. You represent that these communications were made for the purpose of facilitating the rendition of professional legal services. You also represent that the confidentiality of these communications has been maintained. Based on your representations and our review, we conclude that section 552.107 is applicable to most of the information that you have marked under section 552.107. However, one of the submitted e-mails you have marked under section 552.107, is between a city attorney and an employee of Bexar County. Thus, we find that you have failed to demonstrate that this e-mail, which we have marked, is a confidential communication between privileged parties. Thus, this e-mail may not be withheld under section 552.107 of the Government Code. However, the city may withhold the remaining information you have marked under section 552.107 of the Government Code.¹

We note, however, that some of the individual e-mails contained in one of the submitted e-mail strings, which we have marked, consist of communications with non-privileged parties, including an employee of Bexar County. You have failed to demonstrate that these e-mails independently constitute privileged attorney-client communications. Accordingly, to the extent these non-privileged e-mails are maintained by the city separate and apart from the e-

¹As our ruling is dispositive as to this information, we need not address your remaining arguments for this information.

mail string at issue, they may not be withheld under section 552.107. In this case, we will address your remaining argument against disclosure for this information, as well as the remaining information at issue.

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." Gov't Code § 552.111. This exception encompasses the deliberative process privilege. See Open Records Decision No. 615 at 2 (1993). 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, 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 ORD 615 at 5. Section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5. When determining if an interagency memorandum is excepted from disclosure under section 552.111, we must consider whether the agencies between which the memorandum is passed share a privity of interest or common deliberative process with regard to the policy matter at issue. See Open Records Decision No. 561 at 9 (1990).

You state that the information at issue "reflect[s] discussion and thought processes by and among city personnel on the subject of the election . . . a significant policy initiative by the city." Upon review of your arguments and the information at issue, we agree that information within one of the e-mails, which we have marked, consists of advice, opinion, or recommendations on a city policy matter and may be withheld under section 552.111 of the Government Code. However, the remaining non-privileged e-mails you seek to withhold under section 552.111 consist of purely factual information. Accordingly, we find that you have failed to demonstrate that the non-privileged e-mails consists of advice, recommendation, and opinion that reflects the policymaking processes of the city. Accordingly, the remaining e-mail at issue may not be withheld under section 552.111. Additionally, to the extent the marked non-privileged e-mails subject to our ruling under section 552.107, are maintained by the city separate and apart from the e-mail string at issue, the city may not withhold them under section 552.111 of the Government Code.

We note that the remaining information contains an e-mail address that is subject to section 552.137 of the Government Code.² 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). Gov’t Code § 552.137 (a) - (c). We have marked the e-mail address in the remaining information that is not of a type specifically excluded by subsection (c). Accordingly, the city must withhold the marked e-mail address under section 552.137 of the Government Code, unless the owner affirmatively consents to its disclosure.

In summary, the city may withhold most of the submitted e-mails you have marked under section 552.107 of the Government Code. However, to the extent the non-privileged e-mails we have marked are maintained by the city separate and apart from the submitted e-mail string, the separate e-mails must be released. The city may withhold the information we have marked under section 552.111 of the Government Code. The city must withhold the marked e-mail address under section 552.137 of the Government Code, unless the owner affirmatively consents to its disclosure. The remaining information must be released to the requestor.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Laura E. Ream
Assistant Attorney General
Open Records Division

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

Ref: ID# 339357

Enc. Submitted documents

c: Requestor
(w/o enclosures)
