



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 27, 2009

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

OR2009-07162

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# 344223 (COSA File No. 09-0243).

The City of San Antonio (the "city") received a request for four categories of information pertaining to the Municipal Court Advisory Committee (the "committee"). You indicate that most of the requested information will be provided to the requestor. You claim that the portions of the submitted information not released are excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We first address your argument that all of the information at issue is excepted under section 552.111 of the Government Code, as it is potentially the most encompassing exception you raise. 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 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. 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). Additionally, 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).

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.

You state that the information at issue contains commentary regarding policy making issues of the committee pertaining to the selection of judges. You contend that one of the documents at issue, which you have marked, consists of a draft document intended for public release. However, with respect to the document you have marked as a draft, you state that it consists of information "prepared by the Municipal Court Administrator for review by the [committee]" and that the "[f]inal decisions on recommendations were released to public." Because the document was prepared for review by the committee, and only the final recommendations of the committee were released to the public, we find that this version of the document is not a draft document for purposes of section 552.111. However, upon review of your arguments and the information at issue, we agree that the information we have marked within this document consists of advice, opinion, or recommendations on policy matter of the committee that may be withheld under section 552.111 of the Government

Code. However, the remaining information in that document consists of purely factual information. Additionally, much of the remaining information at issue also consists of purely factual information. Further, some of the information does not pertain to the selection and appointment of judges in general, but instead pertains to an employment dispute filed by a municipal court employee. This information encompasses a routine internal personnel matter and does not pertain to a policymaking issue of the committee. Finally, you have submitted information which was sent to the committee by the State Commission on Judicial Conduct (the "commission"). You do not explain how the committee and the commission share a privity of interest or common deliberative process. Accordingly, we find that you have failed to demonstrate that the remaining information at issue consists of advice, recommendation, and opinion that reflects the policymaking processes of the commission. Accordingly, the remaining information at issue may not be withheld under section 552.111.

Next, we address your claim under section 552.101 of the Government Code for a portion of the remaining information. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes, such as section 33.032 of the Government Code, which provides that "[e]xcept as otherwise provided by this section and [s]ection 33.034, the papers filed with and proceedings before the commission are confidential prior to the filing of formal charges." *Id.* § 33.032(a).

You state that the information you have marked came from the commission and relates to proceedings before the commission. Further, none of the exceptions to confidentiality in sections 33.032 and 33.034 appear to apply. *Id.* § 33.032, .034. Based upon your arguments and our review of the information at issue, we determine that the information you have marked is confidential under section 33.032 of the Government Code, and must be withheld under section 552.101 of the Government Code.

Next, you claim that a portion of the remaining information is excepted under section 552.107(1) of the Government Code, which 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 two documents in the remaining information, which you have marked, reveal communications between the city’s attorney and the city’s personnel. You have specifically identified the city attorney and city personnel 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 the documents that you have marked under section 552.107. Accordingly, the city may withhold the documents you have marked under section 552.107 of the Government Code.

In summary, the city may withhold the information we have marked under section 552.111 of the Government Code. The city may withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 33.032 of the Government Code. The city may withhold the information you have marked under section 552.107 of the Government Code. 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](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,

A handwritten signature in cursive script that reads "Laura E. Ream".

Laura E. Ream  
Assistant Attorney General  
Open Records Division

LER/dls

Ref: ID# 344223

Enc. Submitted documents

c: Requestor  
(w/o enclosures)