



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

August 10, 2009

Ms. Josefina J. Brostrom
Assistant County Attorney
El Paso County
500 East San Antonio, Room 503
El Paso, Texas 79901

OR2009-11104

Dear Ms. Brostrom:

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# 351839 (EPCA file# OP-09-257).

The El Paso County Attorney's Office (the "county attorney") received a request for all information regarding a specified case transfer. You state the county attorney has provided some of the requested information to the requestor. You claim the submitted case notes, letters, e-mails, and policy documents are exempted from disclosure under sections 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). 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).

You assert the submitted case notes, letters, and e-mails numbered as pages 1 through 46 of Attachment 4 consist of communications made for the purpose of facilitating the rendition of professional legal services. You state the communications were between El Paso County (the "county") staff and attorneys representing the county, and were to be kept confidential among the intended parties. Finally, you state the confidentiality of the communications has been maintained. Based on your representations and our review, we find the county attorney has established the applicability of section 552.107 to most of the submitted case notes, letters, and e-mails. We note, however, that one of the submitted letters consists of communications involving a person who is not county staff or an attorney for the county. You have not explained, nor is it otherwise apparent, how this communication was made between privileged parties. Consequently, we find you have failed to demonstrate the applicability of section 552.107 to this letter. As you have claimed no other exceptions to disclosure for this letter, we have marked it for release. Therefore, with the exception of the letter marked for release, the county attorney may withhold the submitted case notes, letters, and e-mails numbered pages 1 through 46 in Attachment 4 under section 552.107 of the Government Code.

You claim the remaining notes and draft policy document are excepted from disclosure under the deliberative process privilege encompassed by section 552.111 of the Government Code. *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 section 552.111 excepts from disclosure only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. Likewise, section 552.111 does not generally except from disclosure purely factual information 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.

This office has also concluded a preliminary draft of a document 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.

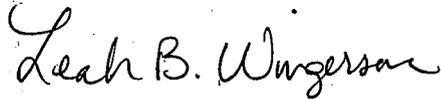
You argue the remaining notes and draft policy document reflect communications between county officials regarding revisions to county policies related to changes in attorneys of record. Based on your arguments, we find you have sufficiently demonstrated how the information contained in the notes and draft policy document pertains to the county's policymaking processes. You contend the information at issue consists of the advice, recommendations, and opinions of county officials regarding the policy issues. Furthermore, you state the final version of the policy document has been released to the public. Based on your arguments and our review, we find you have established the deliberative process privilege is applicable to the draft policy document and some of the information in the remaining notes at issue. Accordingly, the county attorney may withhold the information we have marked under section 552.111 of the Government Code. You have failed to demonstrate, however, how the remaining notes reveal advice, recommendations, and opinions regarding policymaking issues. Consequently, the remaining information may not be withheld under section 552.111 of the Government Code. As you have claimed no other exceptions to disclosure for the remaining information, it must be released.

In summary, with the exception of the letter marked for release, the county attorney may withhold pages 1 through 46 of Attachment 4 under section 552.107 of the Government Code, along with the information we have marked under section 552.111 of the Government Code. The remaining information must be released.

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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

Ref: ID# 351839

Enc. Submitted documents

c: Requestor
(w/o enclosures)