



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 3, 2009

Ms. Cary Grace
Assistant City Attorney
City of Austin
P.O. Box 1088
Austin, Texas 78767

OR2009-15669

Dear Ms. Grace:

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# 360326.

The Austin Police Department (the "department") received a request for information related to the creation of the Austin Regional Intelligence Center (the "center"). You claim the marked information is excepted from disclosure under sections 552.107, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

You claim the submitted Interlocal Cooperation Agreement, Privacy Policy, and Concept of Operations Plan documents 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.

¹We 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.

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.

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. Finally, section 552.111 does not apply unless the agencies between which the information is passed are shown to share a privity of interest or common deliberative process with regard to the policy matter at issue. Open Records Decision No. 561 at 9 (1990).

You state, and the documents themselves indicate, the submitted Interlocal Cooperation Agreement, Privacy Policy, and Concept of Operations Plan documents are drafts. These documents relate to the structure and policies of the center, which the department is establishing jointly with other local law enforcement entities. You represent these documents will be released in their final form. Thus, we agree these draft documents contain the advice, opinion, or recommendation of department employees with respect to the policymaking functions of the department. You state the Interlocal Cooperation Agreement and Privacy Policy documents have been shared with individuals employed with the department and a City of Austin ("city") attorney. You also state the Concept of Operations Plan document has been shared with the department's partners in the center. Upon review of the submitted information and your arguments, we find the department shares a privity of interest with its partners and with the city in the creation and policies of the center. We therefore conclude the department shares a common deliberative process with these entities with respect to the submitted draft documents, and the department may withhold the documents you marked under section 552.111 of the Government Code.²

You assert the submitted e-mails are excepted by section 552.107 of the Government Code, which protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). When asserting the attorney-client privilege, a governmental body has the

²As this determination is dispositive of these documents, we need not address your claim under section 552.108 of the Government Code.

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). 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 the e-mails you marked were made in furtherance of the rendition of professional legal services and have been maintained as confidential. You have also identified all of the parties to these communications as department and city officials, staff, and attorneys. Accordingly, we agree the e-mails you marked are privileged and may be withheld under section 552.107.

In summary, the department may withhold the draft documents you marked under section 552.111 of the Government Code and the e-mails you marked under section 552.107 of the Government Code.

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, toll free, at (888) 672-6787.

Sincerely,

Bob Davis
Assistant Attorney General
Open Records Division

RSD/cc

Ref: ID# 360326

Enc. Submitted documents

cc: Requestor
(w/o enclosures)