



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 12, 2010

Ms. Cary Grace
Assistant City Attorney
City of Austin
P.O. Box 1088
Austin, Texas 78767-8828

OR2010-06814

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# 379075.

The City of Austin (the "city") received a request for eight categories of information pertaining to the city's proposed Water Treatment Plant 4. You state a portion of the requested information will be released. You claim that the submitted information is 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 representative sample of information.¹

Initially, we note, and you acknowledge, that the city failed to meet the deadlines set forth in section 552.301 of the Government Code with respect to a portion of the submitted information. The city failed to timely submit a portion of the information it seeks to withhold and its supporting arguments against disclosure of that information under section 552.301(e). *See* Gov't Code § 552.301(e)(1)(A), (D). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural

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.

requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). Normally, a compelling interest is demonstrated when some other source of law makes the information at issue confidential or third-party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). You assert the information at issue, which was not timely submitted, is excepted from disclosure under section 552.101. Because section 552.101 of the Government Code can provide a compelling reason to withhold information, we will address your claim under this exception.

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception encompasses information that another statute makes confidential. You raise section 552.101 in conjunction with section 418.181 of the Government Code. Sections 418.176 through 418.182 were added to chapter 418 of the Government Code as part of the Texas Homeland Security Act (the “HSA”). These provisions make certain information related to terrorism confidential. Section 418.181 provides:

Those documents or portions of documents in the possession of a governmental entity are confidential if they identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism.

Id. § 418.181; *see also id.* § 421.001 (defining critical infrastructure to include “all public or private assets, systems, and functions vital to the security, governance, public health and safety, and functions vital to the state or the nation”). The fact that information may relate to a governmental body’s security measures does not make the information *per se* confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation of a statute’s key terms is not sufficient to demonstrate the applicability of the claimed provision. As with any exception to disclosure, a claim under section 418.181 must be accompanied by an adequate explanation of how the responsive records fall within the scope of the claimed provision. *See* Gov’t Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You contend that a portion of the submitted information, which consists of maps showing the location of karsts along the Barton Springs segment of the Edwards Aquifer, is confidential under section 418.181. You inform us that this segment of the Edwards Aquifer provides drinking water to approximately 50,000 city residents through municipal and private wells. You indicate, and we agree, that the city’s drinking water supply system is part of the city’s critical infrastructure for purposes of section 418.181. *See generally id.* § 421.001

(defining “critical infrastructure” to include all public or private assets, systems, and functions vital to security, governance, public health and safety, economy, or morale of state or nation). You argue that the information at issue reveals vulnerabilities of drinking water supply systems to chemical and biological attacks. In support of this argument, you state that public release of this information would make it impossible for the city to secure a large number of sites that are vulnerable to a potential introduction of toxic substances into multiple water supply systems. Based on your representations and our review of the information at issue, we find that you have demonstrated the applicability of section 418.181 to the information at issue. Thus, the city must withhold the information you have marked under section 552.101 on the basis of section 418.181.

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 capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, lawyer representatives, and lawyers representing another party in a pending action concerning a matter of common interest therein. TEX. R. EVID. 503(b)(1)(A)-(E). 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 pet.). 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 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 that a portion of the submitted information consists of communications between assistant city attorneys and staff of the Law Department, management and staff in the Austin

Water Utility, personnel in the City Manager's office, staff in the city's Public Works Department, management and staff in the city's Watershed Protection Department, personnel in one or more council members' offices, staff in the city's Contract and Land Management Department, staff in the city's Financial Services Department, personnel who work for contract consultants hired by the city, and outside counsel for the city. You individually identify all of the parties to the communications. You further state these communications were intended to be and have remained confidential. Based on your representations and our review of the information at issue, we find you have generally demonstrated the applicability of the attorney-client privilege to the e-mails and attachments you have marked. Thus, the city may generally withhold the e-mails and attachments you have marked under section 552.107 of the Government Code. However, we note some of the individual e-mails and attachments in the submitted e-mail chains consist of communications with non-privileged parties. Thus, to the extent these non-privileged e-mails, which we have marked, exist separate and apart from the submitted e-mail chains, the city may not withhold them under section 552.107 of the Government Code. However, a portion of these non-privileged e-mails is subject to section 552.137 of the Government Code.

Section 552.137 provides that "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). We have marked an e-mail address that is not a type specifically excluded by section 552.137(c) of the Government Code. Accordingly, the marked e-mail address must be withheld under section 552.137 of the Government Code, unless the owner consents to its disclosure.²

Section 552.111 of the Government Code 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, recommendations, and opinions 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

²This office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). 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).

This office also has concluded that a preliminary draft of a 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 assert that the document you have marked is a draft that is excepted from disclosure under section 552.111. You state that this document has been released or is intended for release in its final form. Based on your representation and our review, we find the city may withhold the information you have marked under section 552.111 of the Government Code.

In summary, the city must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code. The city may generally withhold the e-mails and attachments you have marked under section 552.107 of the Government Code. However, to the extent the non-privileged e-mails, which we have marked, exist separate and apart from the submitted e-mail chains, the city may not withhold them under section 552.107 of the Government Code. The city may withhold the information you have marked under section 552.111 of the Government Code. The city must withhold the e-mail address we have marked under section 552.137 unless the owner consents to its disclosure. 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_ori.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,



Lauren J. Holmsley
Assistant Attorney General
Open Records Division

LJH/jb

Ref: ID# 379075

Enc. Submitted documents

c: Requestor
(w/o enclosures)