



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 7, 2005

Mr. John Danner
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR2005-09140

Dear Mr. Danner:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Public Information Act (the "Act"). Your request was assigned ID# 233671.

The City of San Antonio (the "city") received a request for all e-mails sent or received by specified city employees during a certain time period.¹ You state that the city will release some of the requested information, but claim that some of the information is excepted from disclosure under sections 552.101, 552.103, 552.105, 552.106, 552.107, 552.108, 552.111, 552.116, 552.131, and 552.139 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the submitted information includes e-mail passwords and other information that are not subject to the Act. In Open Records Decision No. 581 (1990), this office determined that certain computer information, such as source codes, documentation

¹With regard to the questions raised by the requestor, we note that the Act does not require a governmental body to answer questions. See Open Records Decision No. 555 at 1-2 (1990). However, a governmental body must make a good faith effort to relate a request to information it holds. You state that the city will release any information it possesses that is responsive to the questions.

²You inform us, and provide documentation showing, that the city asked for and received clarification regarding this request. See Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); see also Open Records Decision No. 663 (1999) (discussing tolling of deadlines during period in which governmental body is awaiting clarification).

information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. Based on the reasoning in this decision and our review of the information at issue, we determine that the information that we have marked does not constitute public information under section 552.002 of the Government Code. Accordingly, this information is not subject to the Act and need not be released.³

Next, the city argues that some of the submitted e-mails are not public information subject to the Act. *See* Gov't Code § 552.021 (Act is only applicable to "public information"). Section 552.002 defines public information as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." The city contends that the e-mails at issue were not collected, assembled, or maintained in connection with the transaction of any official business of the city, nor were they collected, assembled, or maintained pursuant to any law or ordinance. It also asserts that the e-mails at issue are simply an incidental use of e-mail by a city employee with regard to personal matters. Based on your arguments and our review of the documents at issue, we agree that the e-mails we have marked do not constitute "public information" that is subject to the Act. Consequently, the city is not required to disclose the marked e-mails under the Act. *Cf.* Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information made confidential by other statutes. You contend that some of the submitted information is confidential pursuant to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), sections 1320d through 1320d-8 of title 42 of the United States Code. At the direction of Congress, the Secretary of Health and Human Services ("HHS") has promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* HIPAA, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 ("Privacy Rule"); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, excepted as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a).

³We need not address your argument under section 552.139 for this information.

This office recently addressed the interplay of the Privacy Rule and Act. *See* Open Records Decision No. 681 (2004). In that decision, we noted that section 164.512 of title 45 of the Code of Federal Regulations provides that a covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted that the Act “is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public.” *See* Open Records Decision No. 681 at 8 (2004); *see also* Gov’t Code §§ 552.002, .003, .021. We therefore held that the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. Open Records Decision No. 681 at 9 (2004); *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). We therefore determine that the city may not withhold the information at issue pursuant to section 552.101 in conjunction with HIPAA.

You also claim that some of the submitted information is excepted from disclosure under section 552.101 in conjunction with section 261.201(a) of the Family Code, which provides as follows:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). After reviewing the information at issue and the information provided by your office, we determine that you have not established that the information at issue was used or developed in an investigation of abuse or neglect under chapter 261. We therefore are unable to determine that section 261.201 is applicable to this information. Accordingly, the city may not withhold any of the information at issue under section 552.101 in conjunction with section 261.201.

You assert that some of the submitted information is excepted from disclosure under section 552.101 in conjunction with section 402.083 of the Labor Code. Section 402.083(a) of the Labor Code states that “[i]nformation in or derived from a claim file regarding an employee is confidential and may not be disclosed by the [Texas Workers’ Compensation Commission]

except as provided by this subtitle.” In Open Records Decision No. 533 (1989), the City of Brownsville received a request for similar information. This office construed the predecessor to section 402.083(a) to apply only to information that the governmental body obtained from the Industrial Accident Board, now the Texas Workers’ Compensation Commission. You have not informed us, and the documents do not reflect, that this information was obtained from the commission. Therefore, the information at issue is not confidential under section 402.083, and it may not be withheld under section 552.101 on that basis.

You also argue that portions of the submitted information are confidential under sections 418.176 through 418.182 of the Government Code. These provisions make certain information related to terrorism confidential. *See* Gov’t Code §§ 418.176 (information relating to emergency response providers), 418.177 (information relating to risk or vulnerability assessment), 418.178 (information relating to construction or assembly of weapons), 418.179 (encryption codes and security keys for communications system), 418.180 (information prepared for United States), 418.181 (information relating to critical infrastructure), and 418.182 (information relating to security systems).

We note that the fact that information may relate to a governmental body’s security concerns does not make the information *per se* confidential under the Texas Homeland Security Act. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the Texas Homeland Security Act must adequately explain 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 state that the information at issue pertains to the city’s Emergency Operations Center (the “center”), part of whose function is to deal with terrorism issues. One of the submitted documents reveals the location of the center’s emergency override button. As we are able to discern that release of this information would identify technical details of particular vulnerabilities of critical infrastructure to an act of terrorism, this information, which we have marked, is confidential under section 418.181, and must be withheld under section 552.101. *See* Gov’t Code § 418.181 (providing that 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). However, although the city raises sections 418.176 through 418.182 for the remaining information at issue, you have not explained the applicability of these sections to any of this information. *See id.* § 552.301(e)(1)(A); Open Records Decision Nos. 542 (1990) (governmental body has burden of establishing that exception applies to requested information), 532 (1989), 515 (1988). Therefore, you have not established that the remaining information at issue is confidential under any of these sections of the Government Code, and you may not withhold it from release under section 552.101 on this basis.

Section 552.101 also encompasses common law and constitutional privacy. Information must be withheld from the public under section 552.101 in conjunction with common law privacy when the information is (1) highly intimate or embarrassing, such that its release

would be highly objectionable to a person or ordinary sensibilities, and (2) of no legitimate public interests. See *Industrial Foundation*, 540 S.W.2d at 685. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

This office has found that the following types of information are excepted from required public disclosure under constitutional or common law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, see Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, see Open Records Decision Nos. 600 (1992), 545 (1990), and information concerning the intimate relations between individuals and their family members, see Open Records Decision No. 470 (1987). Likewise, we have previously concluded that a sexual assault victim has a common law privacy interest that prevents disclosure of identifying information. Open Records Decision No. 339 (1982); Open Records Decision No. 440 (1986) (detailed descriptions of serious sexual offenses must be withheld); see *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information).

However, as this office has often noted, the public has a legitimate interest in information that relates to the workplace conduct of public officials and employees. See Open Records Decision Nos. 470 at 4 (1987) (public employee's job performance does not generally constitute his or her private affairs), 405 at 2 (1983) (manner in which public employee performed his or her job cannot be said to be of minimal public interest). We have marked the submitted information that the city must withhold under sections 552.101 in conjunction with privacy. However, none of the remaining submitted information may be withheld on that basis.

You claim that some of the submitted information, which you have separated into different groups, is excepted from public disclosure under section 552.103 of the Governmental Code which provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body receives the request for information, and (2) the information at issue is related to that litigation. *See Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

In order to establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). In Open Records Decision No. 638 (1996), this office stated that a governmental body has met its burden of showing that litigation is reasonably anticipated when it received a notice of claim letter and the governmental body represents that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act ("TTCA"), Civ. Prac. & Rem. Code, ch. 101, or an applicable municipal ordinance.

You assert that the city reasonably anticipates litigation relating to one group of documents. You state, and provide documentation showing, that the city received several claim letters and represent that these letters comply with the notice requirements of the TTCA. Based on our review of the information at issue, we conclude that litigation was reasonably anticipated

when the city received the request, and that the information is related to the reasonably anticipated litigation for the purposes of section 552.103. However, the information at issue solely consists of claim letters that have been obtained from opposing parties. Once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided all other parties in the anticipated litigation is not excepted from disclosure under section 552.103(a), and must be disclosed. Therefore, the claim letters may not be withheld under section 552.103.

This office has also concluded that litigation was reasonably anticipated when a potential opposing party filed a complaint with the Equal Employment Opportunity Commission ("EEOC"). Open Records Decision No. 336 (1982). You state that some of the submitted information relates pending EEOC complaints. After reviewing your arguments, we agree that you have established that litigation pertaining to these EEOC complaints was reasonably anticipated when the city received this request for information. However, we are unable to determine that the information at issue is related to the anticipated litigation for purposes of section 552.103(a). Therefore, the city may not withhold the information at issue pursuant to section 552.103 of the Government Code. We also conclude that the city has failed to demonstrate that the remaining information it seeks to withhold under section 552.103 pertains to litigation that is pending or reasonably anticipated. Therefore, this information may not be withheld under section 552.103.

You assert that some of the submitted information is excepted under section 552.105 of the Government Code. Section 552.105(2) excepts from disclosure information relating to "appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property." Section 552.105 was designed to protect a governmental body's planning and negotiating position with respect to particular transactions. Open Records Decision No. 564 at 2 (1990). Information excepted under section 552.105 that pertains to such negotiations may be excepted so long as the transaction is not complete. Open Records Decision No. 310 (1982). A governmental body may withhold information "which, if released, would impair or tend to impair [its] 'planning and negotiating position in regard to particular transactions.'" Open Records Decision Nos. 357 at 3 (1982), 222 (1979). The question of whether specific information, if publicly released, would impair a governmental body's planning and negotiation position in regard to particular transactions is a question of fact. Accordingly, this office will accept a governmental body's good faith determination in this regard, unless the contrary is clearly shown as a matter of law. Open Records Decision No. 564 (1990). You have not established or provided any arguments that the information at issue relates to the appraisal or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property; therefore, the city may not withhold any of the remaining information at issue under section 552.105.

You claim that some of the remaining information is excepted from disclosure under section 552.106. Section 552.106 excepts from disclosure “[a] draft or working paper involved in the preparation of proposed legislation” and “[a]n internal bill analysis or working paper prepared by the governor’s office for the purpose of evaluating proposed legislation.” Section 552.106 ordinarily applies only to persons with a responsibility to prepare information and proposals for a legislative body. Open Records Decision No. 460 (1987). The purpose of section 552.106 is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body; and therefore section 552.106 encompasses only policy judgments, recommendations and proposals involved in preparation of proposed legislation, and does not except from disclosure purely factual information. *Id.* at 2. However, a comparison or analysis of factual information prepared to support proposed legislation is within the ambit of section 552.106. *Id.* Upon review, we determine that you have not established that any of the submitted documents are excepted from disclosure under section 552.106.

You claim that some of the submitted information is excepted from disclosure under section 552.107.⁴ Section 552.107 protects information that comes 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. *See* 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. *See* 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. *See 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 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. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (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.

⁴We note that section 552.107, not section 552.101, is the proper exception for claiming the attorney-client privilege. Open Records Decision No. 676 (2002).

See 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 seek to withhold communications between employees of and attorneys for the city. You indicate that these communications were made in connection with the rendition of professional legal services and have remained confidential. Based on your arguments, we conclude that you may withhold the information we have marked under section 552.107(1). However, you have not established that section 552.107 is applicable to the remaining information at issue. Accordingly, we determine that the city may not withhold that information under section 552.107.

You claim that some of the submitted information is excepted from disclosure under section 552.108 of the Government Code. Section 552.108 excepts from disclosure certain law enforcement and prosecutorial information, and, by its terms, applies only to a law enforcement agency or a prosecutor. A governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See Gov't Code* §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). The city is not a law enforcement agency. This office has determined, however, that where an incident involving alleged criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information that relates to the incident. *See Open Records Decision Nos. 474 (1987), 372 (1983)* (where incident involving allegedly criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information relating to incident). Where a non-law enforcement agency has custody of information relating to a pending case of a law enforcement agency, the agency having custody of the information may withhold the information under section 552.108 if the agency demonstrates that the information relates to the pending case and provides this office with a representation from the law enforcement entity that the law enforcement agency wishes to withhold the information. However, you have neither demonstrated that any of the information at issue relates to a pending criminal investigation or prosecution nor provided a representation from a law enforcement entity that wishes to withhold the information from disclosure.

We also note that section 552.108 generally does not apply to records created by an agency whose chief function is essentially regulatory in nature. *See Open Records Decision No. 199 (1978)*. An agency that does not qualify as a law enforcement agency may, under certain limited circumstances, claim that section 552.108 protects records in its possession. *See, e.g., Attorney General Opinion MW-575 (1982); see also Open Records Decision Nos. 493 (1988), 272 (1981)*. If an administrative agency's investigation reveals possible criminal conduct that the administrative agency intends to report to the appropriate law enforcement

agency, section 552.108 will apply to information gathered by the administrative agency, if its release would interfere with law enforcement. *See* Gov't Code 552.108(a)(1), (b)(1); *see also* Attorney General Opinion MW-575 (1982); Open Records Decision Nos. 493 (1988), 272 (1981).

You assert that releasing some of the remaining information at issue would “unduly interfere with law enforcement.” However, you have not explained that the agency that created the submitted information is a law enforcement agency or that the submitted information has been forwarded to an appropriate law enforcement agency. We therefore determine that the city may not withhold any of the information at issue under section 552.108.

You assert that some of the submitted information is excepted from release under section 552.111 of the Government Code. Section 552.111 excepts from required public disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” 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 (1993), 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* Open Records Decision 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).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* Open Records Decision No. 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.

Based on your arguments and our review of the information at issue, we have marked the portions of this information that constitute drafts and other communications consisting of advice, opinions, and recommendations reflecting the policymaking processes of the city. Accordingly, we conclude that the city may withhold these particular marked portions of the remaining submitted information pursuant to section 552.111 of the Government Code. However, you have not established that section 552.111 is applicable to the remaining information at issue, therefore, that information may not be withheld on this basis.

Section 552.116 of the Government Code provides in part:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, or a joint board operating under Section 22.074, Transportation Code, is excepted from [public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public disclosure] by this section.

(b) In this section:

(1) 'Audit' means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, or a resolutions or other action of a joint board described by Subsection (a) and includes an investigation.

(2) 'Audit working paper' includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116(a)-(b). A governmental body that invokes section 552.116 must demonstrate that the audit working papers are from an audit authorized or required by statute by identifying the applicable statute. You state that some of the submitted documents

constitute audit working papers created by municipal auditors; however, you have not identified the applicable statute, charter provision, or city ordinance, if any, that authorized or required the audit. Thus, we find that you have not sufficiently demonstrated that the information at issue was prepared or maintained by a municipality in conducting an audit authorized or required by a statute of this state or the United States or charter provision or city ordinance. *See* Gov't Code § 552.116(a), (b)(1), (b)(2). Therefore, the city may not withhold the information at issue under section 552.116.

We note that some of the submitted information may be excepted from disclosure under section 552.117. Section 552.117(a)(1) excepts from disclosure the home addresses, home telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the city may only withhold information under section 552.117 on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the request for information was received. For those employees who timely elected to keep their personal information confidential, the city must withhold the family information we have marked. The city may not withhold this information under section 552.117 for those employees who did not make a timely election to keep the information confidential.

You further contend that some of the submitted information is excepted under section 552.131 of the Government Code. Section 552.131 provides:

(a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

(1) a trade secret of the business prospect; or

(2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].

(c) After an agreement is made with the business prospect, this section does not except from [required public disclosure] information about a financial or other incentive being offered to the business prospect:

(1) by the governmental body; or

(2) by another person, if the financial or other incentive may directly or indirectly result in the expenditure of public funds by a governmental body or a reduction in revenue received by a governmental body from any source.

Gov't Code § 552.131. You state that portions of the submitted information relate to economic development. However, we find that the city has not explained how the information at issue consists of a financial or other incentive being offered to the business prospect. Therefore, we conclude that the city may not withhold any portion of the remaining submitted information under section 552.131 of the Government Code.

You seek to withhold some of the remaining information under section 552.137 of the Government Code. This exception states in part:

(a) Except as otherwise provided by this section, 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 this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137(a)-(b). Section 552.137 excepts from public disclosure certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with a governmental body, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. Section 552.137 does not apply to a government employee's work e-mail address or a business's general e-mail address or web address. E-mail addresses that are encompassed by subsection 552.137(c) are also not excepted from disclosure under section 552.137. We have marked the types of e-mail addresses that are excepted from disclosure under section 552.137(a). Unless the city has received affirmative consent for the release of these e-mail addresses, we conclude that it must withhold the addresses pursuant to section 552.137(a) of the Government Code.

Finally, we note that some of the submitted information is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception

applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the we have marked the information that is not subject to the Act, and need not be released. The city must withhold the information we have marked under section 552.101 in conjunction with section 418.181 of the Government Code and privacy. The city may withhold the information we have marked under sections 552.107 and 552.111. To the extent the information we have marked pertains to the family member information of any current or former employees of the city who timely elected confidentiality for the information under section 552.024, this information must be withheld under section 552.117(a)(1). The city must withhold the types of e-mail addresses we have marked under section 552.137, unless the owner of a particular e-mail address has affirmatively consented to its disclosure. The remaining information must be released to the requestor, however, the information that is protected by copyright may only be released in accordance with federal copyright law.

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

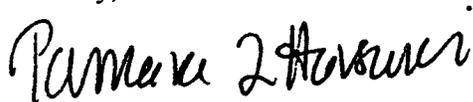
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Tamara L. Harswick
Assistant Attorney General
Open Records Division

TLH/sdk

Ref: ID# 233671

Enc. Submitted documents

c: Mr. Christopher A. Steele
San Antonio Professional Firefighters Association
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(w/o enclosures)