



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 8, 2008

Ms. Cara Leahy White
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6000 Western Place, Suite 200
Fort Worth, Texas 76107

OR2008-00305

Dear Ms. White:

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 #299007.

The City of Southlake (the "city"), which you represent, received two requests for information from different requestors pertaining to a specified hostile work environment claim. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.108, 552.111, 552.130, 552.147, and 552.221 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that some of the information contained within the submitted compact disc is not responsive to the present request for information. You state that responsive Mobile Data Terminal ("MDT") and Mobile Data Console ("MDC") data is contained within this compact disc, but that segregating responsive information from non-responsive information is difficult, "if not impossible." We note that the fact that it may be burdensome to provide the information at issue does not relieve a governmental body of its responsibility to comply with the Act. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976) (cost or difficulty in complying with predecessor of Act does not determine availability of information). We note further that information that is not responsive to this request need not be released. Moreover, we do not address such information in this ruling. *See Econ.*

Opportunities Dev. Corp. v. Bustamante, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

Next, you assert that the requested information is in active use and therefore unavailable pursuant to section 552.221 of the Government Code. Section 552.221(a) provides that a governmental body must promptly produce public information to a requestor for inspection, duplication, or both to the extent that the information is not subject to an exception to disclosure under the Act and to the extent that the information is not in immediate active use. See Gov't Code § 552.221(a); see also Open Records Decision No. 467 at 6 (1987). You state that the information at issue is currently being used to assist with an internal affairs investigation. We note that the mere fact that an investigation is in progress does not enable information relating to it to be withheld from public disclosure under section 552.221. Based on your representations, we conclude that the information at issue is not in active use for purposes of section 552.221 of the Government Code. Accordingly, no information may be withheld on this basis. We now turn to your remaining arguments against disclosure of the responsive information. We will first address your argument under section 552.108 of the Government Code, as this is potentially the most encompassing exception you raise.

You assert that portions of the submitted MDT and MDC information may be subject to section 552.108 of the Government Code. Section 552.108(a)(1) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime.” Gov't Code § 552.108(a)(1). Generally, 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 *id.* §§ 552.108(a)(1), .301(e)(1)(A); see also *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state that the submitted MDT and MDC data concerns active investigations, and that this data must be withheld under section 552.108. However, you have not identified information that pertains to active investigations, nor have you otherwise explained how release of any of the MDT or MDC information would interfere with law enforcement. Accordingly, we find that you have failed to demonstrate the applicability of section 552.108 to any of the submitted information, and none may be withheld on this basis.

Section 552.101 of the Government Code 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, including criminal history record information (“CHRI”) generated by the National Crime Information Center or by the Texas Crime Information Center. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Texas Department of Public Safety

("DPS") maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from the DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-.127. You have submitted to this office voluminous records contained on a compact disc. Upon review, we agree that the submitted compact disc contains CHRI. We have printed and marked a representative sample of the types of information that must be withheld under section 552.101 of the Government Code as CHRI made confidential by section 411.083. We note that section 411.083 does not apply to active warrant information. *See id.* § 411.081(b) (police department allowed to disclose information pertaining to person's current involvement in the criminal justice system). Therefore, except for the type of information we have marked under 411.083, the city must release responsive information that is contained within the submitted compact disc.

You state that portions of the submitted information are excepted under common-law privacy. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Indus. Found.*, 540 S.W.2d at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. A compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Furthermore, we find that a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. In addition, this office has found that personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990). Upon review, the city must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. No other information may be withheld on this basis.

You claim that certain e-mails are excepted from disclosure under section 552.107(1) of the Government Code. Section 552.107(1) 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). 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, 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), (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. *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 the e-mails at issue are communications between city attorneys and city employees, and that these communications were made in furtherance of the rendition of legal services and advice for the city. You further state that all of these communications were made in confidence, intended for the sole use of the city and its attorneys, and that they have not been shared or distributed to others. Based on our review of your representations and the submitted information, we find that you have demonstrated the applicability of the attorney-client privilege to some of the e-mails at issue. Accordingly, these e-mails, which

we have marked, may be withheld under section 552.107.¹ We note, however, that it is unclear whether the remaining e-mails constitute communications involving attorneys, as you have not identified any individual from any e-mail. Accordingly, we find that you have failed to demonstrate the applicability of the attorney-client privilege to these e-mails, and the city may not withhold them under section 552.107. *See* TEX. R. EVID. 511 (stating that a person waives a discovery privilege if he voluntarily discloses the privileged information).

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.” 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 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).

Section 552.111 only protects information that shows the advice or recommendations about actual governmental policy; investigatory documents used to formulate policy are not protected under this section. *See* ORD 615 at 4. Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See id.* 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).

¹As our ruling is dispositive, we need not address your remaining argument against disclosure regarding these e-mails.

You inform us that the submitted information pertains to an internal investigation regarding a hostile work environment complaint filed against the city's chief of police. You state that the "memoranda and notes were made as part of the [c]ity's decision making process with regard not only to the investigation at issue, but also with regard to the necessity to draft or alter [c]ity policy." However, upon review, we find that the submitted information generally consists of factual information regarding a specific investigation into a city personnel matter. Accordingly, none of the submitted information may be withheld under section 552.111 as advice, opinion, or recommendations on policymaking matters.

We next note that a portion of the submitted information is excepted from disclosure under section 552.117(a)(2).² Section 552.117(a)(2) excepts from public disclosure a peace officer's home address and telephone number, social security number, and family member information regardless of whether the peace officer made an election under section 552.024 of the Government Code. Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Accordingly, we have marked information that the city must withhold under section 552.117(a)(2) of the Government Code.

Section 552.130 provides that information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(1), (2). The city must withhold the Texas motor vehicle record information we have marked under section 552.130 of the Government Code.

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *Id.* § 552.137(a)-(c). The e-mail addresses at issue are not types specifically excluded by section 552.137(c) of the Government Code. We assume that the city has not received consent for the release of the e-mail addresses at issue. Therefore, the city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code.

Finally, you assert that the city may withhold social security numbers from the remaining information. Section 552.147 of the Government Code provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act. We

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

agree that the city may withhold the social security numbers in the submitted information under section 552.147.³

In summary, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and section 411.083 of the Local Government Code. The city may withhold the e-mail we have marked under section 552.107. The city must withhold the information we have marked under sections 552.117 and 552.130 of the Government Code, and, assuming it has not received consent for their release, the e-mail addresses we have marked under section 552.137 of the Government Code. The city may withhold the social security numbers from the information at issue under section 552.147 of the Government Code. The remaining information must be released to the requestor.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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).

³We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge 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,



Reg Hargrove
Assistant Attorney General
Open Records Division

RJH/eeg

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