



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 3, 2009

Ms. Heather Silver
Assistant City Attorney
City of Dallas
1500 Marilla Street
Dallas, Texas 75201

OR2009-02725

Dear Ms. Silver:

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# 336108.

The City of Dallas ("city") received a request for all e-mail transactions of fourteen named city employees over a specified period of time. You state that you will provide some of the information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, 552.117, and 552.137 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, you claim a portion of Exhibit F is excepted from disclosure under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes, including the Medical Practice

¹Although the city raises section 552.101 of the Government Code in conjunction with Rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Thus, we will not address the city's claim that the submitted information is confidential under section 552.101 in conjunction with either of these rules.

²We 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.

Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in part the following:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b), (c). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). You claim that the information in Exhibit F constitutes medical records prepared by a physician. Based on this representation and our review, we find that a portion of the e-mails contained in Exhibit F consists of medical records for purposes of the MPA. Thus, the information we have marked may only be disclosed in accordance with the MPA. However, we find that you have failed to demonstrate how the remaining information constitutes medical records pertaining to the diagnosis, evaluation, or treatment of a patient for the purposes of the MPA. We therefore conclude that the city may not withhold any of the remaining information on the basis of the MPA.

You assert that the remaining information in Exhibit F, as well as the entirety of Exhibit G, is excepted from disclosure under section 552.101 in conjunction with common-law privacy. Section 552.101 also encompasses the doctrines of common-law and constitutional privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types 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. In addition, this office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Based upon your representations and our review, we conclude that the city must withhold the information we have marked in Exhibit G under section 552.101 in conjunction with common-law privacy. However, the remaining information in Exhibits F and G is not highly intimate or embarrassing; therefore, the remaining information is not confidential under common-law privacy, and the city may not withhold it on that ground.

Next, you assert that Exhibits B, C, and D are excepted from disclosure under section 552.103 of the Government Code. Section 552.103 provides in part as follows:

(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). The 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 received the request for information and (2) the information at issue is related to that litigation. *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).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.³ Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not

³In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

You state that Exhibits B and C relate to pending litigation. You inform us, and provide documentation showing that, prior to the city's receipt of the request for information, the city was named as a defendant in the lawsuit styled *Ashley Yarberry v. City of Dallas*, Civil Action No. 3-07CV0893. You assert that Exhibit B directly relates to claims at issue in this pending litigation. You also provide documentation showing that, prior to the city's receipt of the request for information, the city was named as a defendant in the lawsuit styled *Helen Watts v. City of Dallas*, Cause No. 08-13000. You assert that Exhibit C directly relates to claims at issue in this pending litigation. Based on these representations and our review of the submitted information, we find that Exhibits B and C are related to the pending proceedings for purposes of section 552.103 of the Government Code.

You state that the information in Exhibit D relates to a collision between a vehicle owned by the city and a privately owned vehicle. You inform us that on May 20, 2008, the city received a letter from an attorney representing the individual involved in the collision, which requested that the city not destroy, alter, or otherwise dispose of certain items as they will be needed for the prosecution of the potential lawsuit against the city. Based on these representations, and our review of the information at issue, we conclude that the city reasonably anticipated litigation when it received the requests for information. You state that the information in Exhibit D pertains to the subject of damages and liability at issue in the anticipated litigation. Thus, we agree that the information in Exhibit D is related to the anticipated litigation at issue. Accordingly, the city may withhold Exhibits B, C, and D under section 552.103 of the Government Code. As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

We note, however, that once the 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 No. 349 at 2 (1982). We also note that the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

Next, you claim that the information in Exhibit H is excepted from disclosure under section 552.107 of the Government Code. Section 552.107 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 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).

In this instance, you state that the information in Exhibit H consists of confidential communications between city attorneys and employees that were made for the purpose of rendering professional legal advice. Based on this representation and our review of the submitted information, we find that Exhibit H consists of privileged attorney-client communications that the city may withhold under section 552.107 of the Government Code.

The city asserts that Exhibit E is excepted from public disclosure under section 552.111 of the Government Code, which excepts from public 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. The purpose of this exception 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 only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of a 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. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (Gov't Code § 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 a 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. If, however, the 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 may also be withheld under section 552.111. See Open Records Decision No. 313 at 3 (1982).

You assert that Exhibit E relates to general policy issues and reflects the policymaking process of the city. You further assert that this information contains advice, opinions, and recommendations concerning the procedures that Dallas Fire-Rescue paramedics should use when responding to medical emergencies, major accidents, and other types of emergency medical calls. Based on these representations and our review, we find that the city may withhold the information we have marked in Exhibit E under section 552.111 of the Government Code. However, the remaining information in Exhibit E consists of general factual information, and does not constitute advice, opinions, or recommendations for purposes of section 552.111. Thus, this information may not be withheld on that basis.

We note that section 552.117(a)(1) of the Government Code may be applicable to a portion of the remaining information in Exhibits F and G. Section 552.117(a)(1) of the Government Code excepts from disclosure the current and former home addresses, 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 of the Government Code. Gov't § 552.117(a)(1). Whether a particular piece of information is protected under section 552.117(a)(1) must be determined at the time the request for it is made. See Open Records Decision No. 530 at 5 (1989). Thus, pursuant to section 552.117(a)(1), if the employees at issue made a timely election to keep their information confidential, then the city must withhold the employees' personal information. Accordingly, we have marked the information in Exhibits F and G that must be withheld under section 552.117(a)(1) if that section applies. However, you may not withhold this information under section 552.117(a)(1) if the employees did not make a timely election to keep their information confidential.

We also note that section 552.1175 of the Government Code may be applicable to some of the remaining information in Exhibit E.⁴ This section provides in part:

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure;

...

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(a), (b). A portion of the remaining information in Exhibit E consists of information pertaining to a city of Fort Worth police officer. You do not inform this office, nor does any of the submitted information indicate, whether the officer at issue has elected to keep this information confidential in accordance with subsections 552.1175(b)(1) and (2). Accordingly, if the officer elects to restrict access to this information in accordance with section 552.1175(b) of the Government Code, the city must withhold the information that we have marked in Exhibit E under section 552.1175. However, if no election is made, the city may not withhold this information under section 512.1175 of the Government Code and it must be released to the requestor.

Lastly, we note that some of the remaining information in Exhibit F is excepted under section 552.137 of the Government Code. Section 552.137 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). *See* Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the

⁴The Office of the Attorney General will raise a mandatory exception, such as section 552.1175, on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

public,” but is instead the address of the individual as a government employee. You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, the city must withhold the e-mail addresses we have marked under section 552.137.

In summary, the city may only release the medical records we have marked in Exhibit F in accordance with the MPA. The city must withhold the information we have marked in Exhibit G under section 552.101 in conjunction with common-law privacy. The city may withhold the entirety of Exhibits B, C, and D pursuant to section 552.103 of the Government Code. The city may also withhold the entirety of Exhibit H under section 552.107. The city may withhold the information we have marked in Exhibit E under section 552.111. If the employee at issue timely elected to keep their personal information confidential, then you must withhold the information we have marked in Exhibits F and G under section 552.117(a)(1) of the Government Code. You may not withhold this information under section 552.117(a)(1) if the employee did not make a timely election to keep their information confidential. If the officer at issue elects to keep their personal information confidential, then you must withhold the information we have marked in Exhibit E under section 552.1175 of the Government Code. You may not withhold this information under section 552.1175 if the officer does not make an election to keep their information confidential. Lastly, the city must withhold the information we have marked in Exhibit F under section 552.137 of the Government Code. All remaining information must be released to the requestor.

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,



Adam Leiber
Assistant Attorney General
Open Records Division

ACL/eb

Ref: ID# 336108

Enc. Submitted documents

c: Requestor
(w/o enclosures)