



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 26, 2010

Ms. Camila W. Kunau  
Assistant City Attorney  
City of San Antonio  
P.O. Box 839966  
San Antonio, Texas 78283

OR2010-04308

Dear Ms. Kunau:

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# 373841 (COSA File Nos. 10-0021, 10-0043, 10-0092, 10-0113, and 10-0270).

The City of San Antonio (the "city") received five requests from four different requestors for employment information pertaining to two named individuals as well as information pertaining to a specified city contract. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, and 552.111 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information, which we have marked, is not responsive to the instant requests because it was created after the city received the requests. This ruling does not address the public availability of information that is not responsive to the requests, and the city is not required to release that information in response to the requests.

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. Section 552.101 encompasses the doctrine of common-law privacy.

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<sup>1</sup>We note, in your letter dated March 15, 2010, you withdrew your assertion under section 552.108 of the Government Code.

Section 552.102 of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *Id.* § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 683-85 (Tex. 1976) for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101. Accordingly, we address the city's section 552.102(a) claim in conjunction with its common-law privacy claim under section 552.101 of the Government Code.

In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) it 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. 540 S.W.2d at 685. The type of information considered intimate or 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. 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). This office has also found that personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from disclosure under common-law privacy. *See* Open Records Decision No. 600 (1992) (public employee's withholding allowance certificate, designation of beneficiary of employee's retirement benefits, direct deposit authorization, and employee's decisions regarding voluntary benefits programs, among others, protected under common-law privacy). However, information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and therefore generally not protected from disclosure under common-law privacy. *See* Open Records Decision Nos. 444 at 5-6 (1986) (public has interest in public employee's qualifications and performance and the circumstances of public employee's resignation or termination), 423 at 2 (1984) (explaining that because of greater legitimate public interest in disclosure of information regarding public employees, employee privacy under section 552.102 is confined to information that reveals "intimate details of a highly personal nature").

Upon review, we find that the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the city must generally withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. The city has failed to demonstrate, however, that the remaining information is highly intimate or embarrassing and not of legitimate public interest. Therefore, the city may not withhold any portion of the remaining information

under section 552.101 in conjunction with common-law privacy or section 552.102 of the Government Code.

Section 552.101 also encompasses information protected by the common-law informer's privilege, which has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The informer's privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law enforcement authority, provided the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5. However, witnesses who provide information in the course of an investigation but do not make the initial report of the violation are not informants for the purposes of claiming the informer's privilege.

In this instance, you state the entirety of the remaining information is protected under the informer's privilege. You state that the submitted information contains the identifying information of individuals who reported "improper and possibly criminal activities" to city staff and to the city's police department. However, you do not identify the specific criminal or civil statute that was allegedly violated. Furthermore, upon review, we find that the information at issue pertains to witnesses who provided information during the course of an investigation rather than to actual informants. Accordingly, we find you have failed to establish that the informer's privilege is applicable to the information at issue; thus, the city may not withhold any of the remaining information under section 552.101 of the Government Code on that basis.

We note the submitted information contains the third requestor's ("requestor 10-0113") W-4 forms. Prior decisions of this office have held section 6103(a) of title 26 of the United States Code renders tax return information confidential for purposes of section 552.101 of the Government Code. Attorney General Opinion H-1274(1978) (tax returns); ORD 600 (W-4 forms). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return or with respect to the determination of the existence, or possible existence, of liability . . . for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense[.]" *See* 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's

liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp 748, 754 (M.D.N.C. 1989), *aff'd in part*, 993 F.2d 1111 (4th Cir. 1993).

Subsections (c) and (e) of section 6103 are exceptions to the confidentiality provisions of section 6103(a) and provide for disclosure of tax information to the taxpayer or the taxpayer's designee. *See* 26 U.S.C. § 6103(c), (e)(1)(A)(i) (tax return information may be disclosed to taxpayer), (e)(7) (information may be disclosed to any person authorized by subsection(e) to obtain such information if Secretary of Treasury determines such disclosure would not seriously impair tax administration); *see also Lake v. Rubin*, 162 F.3d 113 (D.C. Cir. 1998) (26 U.S.C. § 6103 represents exclusive statutory route for taxpayer to gain access to own return information and overrides individual's right of access under the federal Freedom of Information Act). Section 6103(c) provides, unless the Secretary of Treasury determines that disclosure would seriously impair tax administration, tax record information may be released to any person or persons as the taxpayer may designate in a consent to such disclosure. *See* 26 U.S.C. § 6103(c). The submitted information contains the W-4 forms of requestor 10-0113. Therefore, pursuant to section 6103(c) of title 26 of the United States Code, the city must release these forms, which we have marked, to requestor 10-0113 if the Secretary of Treasury determines such disclosure would not seriously impair federal tax administration. Otherwise, the marked W-4 forms are confidential under section 6103 of title 26 of the United States Code and must be withheld under section 552.101 of the Government Code.

Section 552.101 also encompasses chapter 411 of the Government Code, which makes confidential criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center. *See* Gov't Code § 411.083(a). 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 laws with respect to the CHRI it generates. *See id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that 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 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. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* ORD 565. Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 in conjunction with chapter 411, subchapter F of the Government Code. The submitted information contains CHRI that is confidential under

section 411.083. Thus, the city must withhold this information, which we have marked, under section 552.101 of the Government Code.<sup>2</sup>

The remaining information contains requestor 10-0270's and requestor 10-0113's fingerprints. Section 552.101 also encompasses information other statutes make confidential, such as section 560.003 of the Government Code, which provides "[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act]." *Id.* § 560.003; *see id.* § 560.001(1) ("biometric identifier" means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry). Section 560.002 provides, however, that "[a] governmental body that possesses a biometric identifier of an individual ... may not sell, lease, or otherwise disclose the biometric identifier to another person unless ... the individual consents to the disclosure[.]" *Id.* § 560.002(1)(A). Accordingly, we find a person, or the person's authorized representative, has a right of access under section 560.002(1)(A) to that person's biometric information. In this instance, the requestor 10-0270 and requestor 10-0113 have a right of access to their own respective fingerprints, which we have marked, under section 560.002(1)(A). Therefore, the city must release the marked fingerprints to these requestors under section 560.002 of the Government Code. Otherwise, the city must withhold the marked fingerprints from the remaining requestors under section 552.101 in conjunction with section 560.003 of the Government Code.

We now address your claims under sections 552.107 and 552.111 of the Government Code for some of the remaining responsive information. 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 must provide 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). 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

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<sup>2</sup>We note that the requestor 10-0113 and the fourth requestor ("requestor 10-0270") can obtain their own respective CHRI from DPS. *See* Gov't Code § 411.083 (b)(3).

services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication is protected 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 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless the governmental body otherwise waives the privilege. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state that a portion of the remaining information consists of communications made for the purpose of facilitating legal services and that the communications are exclusively between city lawyers and city employees, a list of whom you have provided. You state these communications were made in confidence, and the city has maintained their confidentiality. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the information you have marked constitutes privileged attorney-client communications the city may withhold under section 552.107 of the Government Code.<sup>3</sup>

You assert most of the remaining responsive information is excepted from disclosure under the deliberative process privilege encompassed by section 552.111 of the Government Code. *See Open Records Decision No. 615 at 2 (1993)*. Section 552.111 excepts from disclosure “an interagency 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 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

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<sup>3</sup>As our ruling for this information is dispositive, we need not address your remaining argument against its disclosure.

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). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5.

You generally assert the remaining information constitutes intra-agency memoranda or letters that are "part of an integral intra-agency communication." However, you have failed to explain how the remaining information constitutes advice, recommendations, opinions, or material reflecting the policymaking processes of the city. Therefore, we conclude that city may not withhold any of the remaining information under section 552.111 of the Government Code.

We note that portions of the remaining information may be excepted from disclosure under sections 552.117, 552.130, 552.136, and 552.137 of the Government Code.<sup>4</sup> Section 552.117(a)(1) excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that such information be kept confidential under section 552.024 of the Government Code. See Gov't Code § 552.117(a)(1). Additionally, section 552.117 encompasses personal cellular telephone numbers, provided that the cellular telephone service is paid for by the employee with his or her own funds. See Open Records Decision No. 670 at 6 (2001) (extending section 552.117(a)(1) exception to personal cellular telephone number and personal pager number of employee who elects to withhold home telephone number in accordance with 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). The city may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. The remaining information contains cellular telephone numbers and other personal information of city employees. If the city employees at issue have timely elected to withhold their information under section 552.024, the information we have marked must generally be

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<sup>4</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

withheld under section 552.117(a)(1). If these employees did not make a timely election, the marked information may not be withheld under section 552.117(a)(1).<sup>5</sup>

Next, we note some of the remaining information is subject to section 552.130 of the Government Code. Section 552.130 excepts from disclosure information that "relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state." Gov't Code § 552.130(1), (2). The city must generally withhold the Texas motor vehicle information we have marked under section 552.130 of the Government Code.

Section 552.136(b) of the Government Code states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." *Id.* § 552.136. An access device number is one that may be used to (1) obtain money, goods, services, or another thing of value, or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument, and includes an account number. *Id.* § 552.136(a). The city must generally withhold the information we have marked under section 552.136 of the Government Code.

Section 552.137 of the Government Code states 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 public disclosure. *Id.* § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). The remaining information contains e-mail addresses that are not the type specifically excluded by section 552.137(c). Accordingly, the city must withhold the e-mail addresses we have marked under section 552.137 in the remaining information, unless the owners of the addresses have affirmatively consented to their release. *See id.* § 552.137(b). However, requestor 10-0113 and requestor 10-0270 have a right to their own e-mail addresses under section 552.137(b) of the Government Code. *Id.*

We note some of the information we have marked under sections 552.101 in conjunction with common-law privacy, 552.102, 552.117, 552.130, and 552.136 belongs to requestor 10-0113 and requestor 10-0270. These exceptions protect personal privacy. Because these requestors have a right of access to their own private information under section 552.023 of the Government Code, you may not withhold these requestors' respective information from them under sections 552.101 in conjunction with common-law privacy, 552.102, 552.117, 552.130, and 552.136. *See id.* § 552.023(b) (governmental body may not deny access to person to whom information relates or person's agent on grounds that

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<sup>5</sup>Regardless of the applicability of section 552.117, 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. Gov't Code § 552.147(b).

information is considered confidential by privacy principles). Thus, requestor 10-0133's private information must be released to her, and requestor 10-0270's private information must be released to her. Otherwise, the city must withhold the information we have marked under sections 552.117, 552.130, and 552.136 of the Government Code.

In summary, the city must release the marked W-4 forms to requestor 10-0113 if the Secretary of Treasury determines such disclosure would not seriously impair federal tax administration. Otherwise, the marked W-4 forms are confidential under section 6103 of title 26 of the United States Code and must be withheld under section 552.101 of the Government Code. The city must withhold the CHRI we have marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code. Requestor 10-0133's fingerprint must be released to her and requestor 10-0270's fingerprint must be released to her under section 560.002 of the Government Code, but city must withhold the marked fingerprints from the remaining requestors under section 552.101 in conjunction with section 560.003 of the Government Code. The city may withhold the information you have marked under section 552.107 of the Government Code. In regard to the information we have marked under sections 552.101 in conjunction with common-law privacy, 552.102, 552.117, 552.130, and 552.136, requestor 10-0133's private information must be released to her, and requestor 10-0270's private information must be released to her. Otherwise, the city must withhold: the information we have marked 552.101 in conjunction with common-law privacy and section 552.102; under section 552.117(a)(1) if the city employees at issue have timely elected to withhold their information under section 552.024; the Texas motor vehicle record information we have marked under section 552.130; the credit card and insurance policy numbers we have marked under section 552.136. Except for requestor 10-0270 and 10-0133's respective e-mail addresses which must be released to them, the city must also withhold the e-mail addresses we have marked under section 552.137, unless the owners of the e-mail addresses have affirmatively consented to their release. The remaining responsive information must be released to the requestors.<sup>6</sup>

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<sup>6</sup>We note that requestor 10-0113 and requestor 10-0270 have a special right of access to some of the information being released that would otherwise be confidential with regard to the general public. We further note this 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: a W-4 form under section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code; a fingerprint under section 552.101 in conjunction with section 560.003 of the Government Code; Texas driver's license numbers and Texas license plate numbers under section 552.130 of the Government Code; credit card and insurance policy numbers under section 552.136 of the Government Code; and 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. Accordingly, if the city receives another request for this information from an individual other than one with a right of access under section 552.023, the city is authorized to withhold these requestors' fingerprints under section 552.101 in conjunction with section 560.003 of the Government Code, Texas driver's license number under section 552.130, credit card and insurance policy numbers under section 552.136, e-mail address under section 552.137 and requestor 10-0113's W-4 forms under section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code, without the necessity of requesting an attorney general decision.

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](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Paige Lay  
Assistant Attorney General  
Open Records Division

PL/eeg

Ref: ID# 373841

Enc. Submitted documents

cc: Requestor (4)  
(w/o enclosures)