



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 28, 2010

Ms. Cheryl K. Byles  
Assistant City Attorney  
City of Fort Worth  
1000 Throckmorton Street, 3<sup>rd</sup> Floor  
Fort Worth, Texas 76102

OR2010-06105

Dear Ms. Byles:

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# 377261 (Fort Worth PIR Nos. 2184-10 and 2186-10).

The City of Fort Worth (the "city") received a request for the Community Relations Department investigation files regarding complaint numbers FW-09-141 and FW-09-146, filed by the requestor's client. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. You also state release of some of the requested information may implicate the interests of the United States Department of Housing and Urban Development ("HUD"). Thus, you state the city notified HUD of the request and of HUD's right to submit arguments to this office as to why its information should not be released. *See Gov't Code* § 552.304 (providing that interested party may submit comments stating why information should or should not be released). We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the information you submitted for review is not responsive to the request for information because it was created after the instant request for information was received by the city. This ruling does not address the public availability of any information that is not responsive to the request, and the city is not required to release this information, which we have marked, in response to this request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. App.—San Antonio 1978, writ dismissed).

You claim the submitted information is excepted from disclosure in its entirety under the deliberative process privilege encompassed by section 552.111 of the Government Code.

*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 section 552.111 excepts from disclosure only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5.

Section 552.111 can also encompass communications between a governmental body and a third-party. *See* Open Records Decision Nos. 631 at 2 (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body's consultants). For section 552.111 to apply to such communications, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See* ORD 561 at 9.

You inform this office the submitted information consists of the city's open investigative files regarding a housing discrimination complaint. Upon review of these files, we marked the portions of the internal city documents that constitute advice, opinion, or recommendation regarding city policy matters. The city may withhold this marked information under section 552.111 of the Government Code. The remaining portions of the internal documents, however, consist of factual information that is severable from any advice, opinion, or recommendation. The remaining responsive documents are not internal to the city, as they reflect they were either created by or have been provided to parties outside the city. You do not explain how these third parties share a privity of interest or common deliberative process with the city. Accordingly, you have not established the applicability of the deliberative process privilege to the remaining information, and no remaining information may be withheld under section 552.111 of the Government Code.

You next claim the information you highlighted is excepted from disclosure under section 552.101 of the Government Code. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception 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). It protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that 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) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). 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, individuals 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. The privilege excepts the informer's statement only to the extent necessary to protect that informer's identity. Open Records Decision No. 549 at 5 (1990).

You highlighted the names of individuals you state reported possible violations of the city's Minimum Building Standards Code. You explain these individuals reported the violations to city staff charged with enforcement of the violations at issue. Further, section 7-125 of the Minimum Building Standards Code you provide reflects the reported violations are misdemeanors punishable by a fine of up to \$2,000 per day per violation. Accordingly, we agree the city may withhold the information you highlighted under section 552.101 of the Government Code in conjunction with the informer's privilege.

Section 552.101 of the Government Code also 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. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). This office has found some kinds of medical information or information indicating disabilities or specific illnesses to be excepted from required public disclosure under common-law privacy. See Open Records Decision No. 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we marked the portions of the remaining information that are highly intimate or embarrassing and of no legitimate public interest. The city must withhold this marked information under section 552.101 in conjunction with common-law privacy.

The remaining information may include a city employee's personal information that is protected under section 552.117 of the Government Code.<sup>1</sup> Section 552.117(a)(1) excepts from disclosure the current 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 request this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Additionally, section 552.117 encompasses personal cellular telephone numbers, provided the cellular

---

<sup>1</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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 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 information is protected by 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). 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.

We have marked a city employee's cellular telephone number in the remaining information. You have not informed us whether or not this employee timely chose to not allow public access to his personal information. Furthermore, you have not informed us whether or not he paid for the telephone service pertaining to the marked cellular telephone number. Therefore, if the cellular telephone number we have marked is the employee's personal cellular telephone number and the employee timely requested confidentiality for this number, the city must withhold the information we marked pursuant to section 552.117(a)(1) of the Government Code. However, if the employee did not timely request confidentiality or the marked cellular telephone number is not a personal cellular telephone number, this information may not be withheld under section 552.117(a)(1).

The remaining information also contains private e-mail addresses that are subject to 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 id.* § 552.137(a)-(c). The e-mail addresses at issue are not specifically excluded by section 552.137(c). Accordingly, the city must withhold the e-mail addresses we marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their disclosure.<sup>2</sup>

As of the date of this letter, we have not received any comments from HUD explaining why any portion of the submitted information should not be released to the requestor. Thus, we have no basis to conclude the release of any portion of the submitted documents would implicate the interests of HUD, and none of the submitted information may be withheld on that basis.

In summary, the city may withhold the information we marked under section 552.111 of the Government Code and the information you highlighted under section 552.101 in conjunction with the informer's privilege. The city must withhold the information we marked under

---

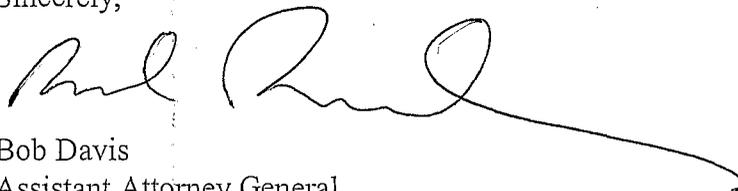
<sup>2</sup>We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including private e-mail addresses under section 552.137, without the necessity of requesting an attorney general decision.

section 552.101 of the Government Code in conjunction with common-law privacy. If the cellular telephone number we have marked is the personal cellular telephone number of a city employee who timely requested confidentiality for this information, the city must withhold the cellular telephone number we marked under section 552.117(a)(1) of the Government Code. The city must withhold the e-mail addresses we marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their disclosure. The remaining responsive information must be released.<sup>3</sup>

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,



Bob Davis  
Assistant Attorney General  
Open Records Division

RSD/cc

Ref: ID# 377261

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)

---

<sup>3</sup>The requestor in this instance has a right of access to some information that otherwise would be protected by exceptions and laws enacted to protect a person's right to privacy. *See* Gov't Code § 552.023(a) (person or person's authorized representative has a special right of access to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person's privacy interests). Thus, if the city receives another request for this particular information from a different requestor, the city should again seek a decision from this office.