



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 4, 2010

Mr. Mark Sokolow  
City Attorney  
City of Georgetown  
P.O. Box 409  
Georgetown, Texas 78627-0409

OR2010-08126

Dear Mr. Sokolow:

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# 381607 (ORR #s 4 & 5).

The City of Georgetown (the "city") received a request for five categories of information related to a named individual's written determination concerning a named council member. You state you have released some of the responsive information. You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.102, 552.107, 552.111, and 552.116 of the Government Code. You have also marked portions of the submitted information under sections 552.103 and 552.109 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, we note a portion of the submitted information is not responsive to the instant request for information because it was created after the date the city received the present request. 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 that information in response to the request.

Next, we note some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2010-07575 (2010). We have no indication the law, facts, and circumstances on which the prior ruling was based have changed. Accordingly, to the extent the submitted information is identical to that previously ruled upon by this office, the city must continue to rely on Open Records

---

<sup>1</sup>We assume 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 those records contain substantially different types of information than that submitted to this office.

Letter No. 2010-07575 as a previous determination and withhold or release the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the submitted information was not previously requested and ruled upon by this office, we will address your arguments against disclosure of the information.

Next, we note section 552.301 of the Government Code prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(d) of the Government Code, the governmental body must provide the requestor, within ten business days after the date of its receipt of the request for information, a statement the governmental body has asked for a decision from the attorney general and a copy of the governmental body's written communication to the attorney general asking for a decision, including a statement of the exceptions that apply. *See id.* § 552.301(b), (d). Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request: (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, and (2) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e)(1)(A), (2). You have marked portions of the submitted information under sections 552.103 and 552.109 of the Government Code. However, you have failed to provide notice to the requestor that you have raised these sections, or to submit any arguments to this office explaining the applicability of these exceptions. Consequently, we find the city failed to comply with the requirements of section 552.301 with respect to these exceptions.

Generally, a governmental body's failure to comply with section 552.301 results in the waiver of its claims under the exceptions at issue, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). A compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Although the city has marked information under section 552.103 of the Government Code, this section is discretionary in nature and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Accordingly, we find you have waived your claim under section 552.103 of the Government Code, and no portion of the submitted information may be withheld on that basis. However, because section 552.109

of the Government Code can provide a compelling reason to withhold information, we will consider the applicability of this section to the information you have marked.

We also note the city has redacted portions of the submitted information. As noted above, pursuant to section 552.301 of the Government Code, a governmental body that seeks to withhold requested information must submit to this office a copy of the information, labeled to indicate which exceptions apply to which parts of the copy, unless the governmental body has received a previous determination for the information at issue. Gov't Code §§ 552.301(a), (e)(1)(D). The city has redacted a bank account number, a signature line, and the home telephone number of an official. Redaction of a bank account number without requesting an attorney general decision is now permitted pursuant to the previous determination issued to all governmental bodies in Open Records Decision No. 684, which authorizes the withholding of ten categories of information, including a bank account number under section 552.136 of the Government Code. *See* Open Records No. 684 (2009) at 8. Further, section 552.024 of the Government Code authorizes a governmental body to redact from public release a current or former official's or employee's home telephone number without the necessity of requesting a decision from this office under the Act, if the employee or official timely elected to withhold such information. Gov't Code § 552.024(a)-(c). However, you do not assert, nor does our review of our records indicate, the city has been authorized to withhold the remaining redacted information without seeking a ruling from this office. *See* Gov't Code § 552.301(a). In this instance, we can discern the nature of the redacted information; thus, being deprived of that information does not inhibit our ability to make a ruling. However, in the future, the city must not redact requested information it submits to this office in seeking an open records ruling, unless the information is the subject of a previous determination under section 552.301 of the Government Code. *See id.* §§ 552.301(e)(1)(D), .302. Failure to comply with section 552.301 may result in the information being presumed public under section 552.302 of the Government Code. *See id.* § 552.302.

You claim section 552.107 of the Government Code with respect to portions of the submitted information. Section 552.107(1) 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 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 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, and lawyer representatives. See TEX. R. EVID. 503(b)(1)(A)-(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. See *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 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 have marked portions of the submitted information, which you state contain attorney notes that are privileged. We understand the communications at issue were made for the purpose of facilitating the rendition of professional legal services. You also indicate the confidentiality of the communications at issue has been maintained. Upon review of the information at issue, we find portions of the information at issue, which we have marked, consist of attorney-client communications. Accordingly, the city may withhold the information we have marked under section 552.107.<sup>2</sup> However, we find you have failed to demonstrate how the remaining information you have marked constitutes communications between or among clients, client representatives, lawyers, and lawyer representatives. Accordingly, no portion of the remaining information you have marked may be withheld on that basis.

You claim section 552.111 of the Government Code for portions of the remaining information. Section 552.111 excepts from disclosure “an interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. 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

---

<sup>2</sup>As our ruling is dispositive with respect to this information, we need not address your remaining arguments against its disclosure.

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).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *see* ORD 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).

Section 552.111 can also encompass communications between a governmental body and a third party, including a consultant or other party with a privity of interest. *See* Open Records Decision No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). For section 552.111 to apply, 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 state the information you have marked consists of interoffice memoranda. Upon review of the remaining information at issue, we find a portion of it contains advice, recommendations, and opinions relating to policymaking. Accordingly, the city may withhold the information we have marked under section 552.111 of the Government Code. However, we find the remaining information you have marked consists of information that is purely factual or that is related to general administrative matters, and does not consist of advice, opinion, or recommendation. Thus, we conclude you have failed to demonstrate the applicability of section 552.111 to the remainder of the information at issue, and the city may not withhold any of the remaining information on that basis.

Next, you claim sections 552.101 and 552.102 of the Government Code for portions of the remaining information. Section 552.101 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 common-law privacy. Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *See* Gov't

Code § 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 the test to be applied to information claimed to be protected under section 552.102(a) is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Bd.*, 540 S.W.2d 668 (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.

Common-law privacy encompasses certain types of personal financial information. This office has determined financial information that relates only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. See Open Records Decision Nos. 600 at 9-12 (1992) (employee's designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pre-tax compensation to group insurance, health care or dependent care), 545 at 4 (1990) (attorney general has found kinds of financial information not excepted from public disclosure by common-law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body), 373 at 4 (1983) (determination of whether public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis). This office has determined a public employee's net salary is protected by common-law privacy. See Attorney General Opinion GA-0572 at 4 (2007) (stating net salary necessarily involves disclosure of information about personal financial decisions). On the other hand, a public employee's gross salary is a matter of legitimate public interest and is therefore not protected by common-law privacy. *Id.*; see also Gov't Code § 552.022(a)(2); Open Records Decision Nos. 602 at 5, 342 at 3. Upon review, we find portions of the remaining information at issue, which we have marked, are highly intimate or embarrassing and not of legitimate public interest. Accordingly, the city must withhold the information we have marked under section 552.101 in conjunction with common-law privacy and section 552.102(a). However, we find you have failed to demonstrate how any portion of the remaining information you have marked is highly intimate or embarrassing and of no legitimate concern to the public. Accordingly, no portion of the remaining information may be withheld under section 552.101 or section 552.102(a) on that basis.

Next, you claim section 552.116 of the Government Code for portions of the remaining information. Section 552.116 provides:

- (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, a school district, or a joint board operating under Section 22.074, Transportation Code,

including any audit relating to the criminal history background check of a public school employee, is excepted from the requirements of Section 552.021. If information in an audit working paper is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 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, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution 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. You make a general assertion that portions of the remaining information are excepted from disclosure under section 552.116. However, you do not state an audit, as defined by section 552.116, was conducted, and you do not provide this office the authorization for any audit. Thus, upon review, we find you have failed to demonstrate how the remaining information you have marked consists of information "prepared or maintained in conducting an audit or preparing an audit report" within the meaning of section 552.116(b)(2). Accordingly, we conclude the city may not withhold the remaining information you have marked under section 552.116 of the Government Code.

We note portions of the remaining information may be subject to section 552.117 of the Government Code.<sup>3</sup> Section 552.117(a)(1) excepts from disclosure the home address, home telephone number, social security number, and family member information of a current or former official of a governmental body who requests this information be kept confidential under section 552.024. *See id.* § 552.117(a)(1). 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)*. We are unable to determine whether the

---

<sup>3</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)*.

official whose information is at issue has timely elected to keep her personal information confidential. Therefore, to the extent the official at issue timely elected to keep her personal information confidential, the city must withhold the personal information we have marked under section 552.117(a)(1) of the Government Code. Conversely, to the extent the involved official did not make a timely election under section 552.024, the city may not withhold any portion of the information we have marked under section 552.117(a)(1).

Section 552.136 of the Government Code states, “[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.” Gov’t Code § 552.136(b). Accordingly, the city must withhold the routing and bank account numbers we have marked under section 552.136 of the Government Code.

We note the submitted information contains an e-mail address that is 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). We note the requestor has a right to his own e-mail address under section 552.137(b). *Id.* § 552.137(b). The e-mail address at issue is not excluded by subsection (c). Therefore, the city must withhold the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner has affirmatively consented to its public disclosure.

We note a portion of the remaining information appears to be protected by copyright. A custodian of public records must comply with 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).* Accordingly, the information at issue may only be released in accordance with copyright law.

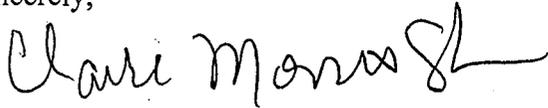
In summary, to the extent the submitted information is identical to that previously ruled upon by this office, the city must continue to rely on Open Records Letter No. 2010-07575 as a previous determination and withhold or release the identical information in accordance with that ruling. The city may withhold the information we have marked under sections 552.107 and 552.111 of the Government Code. The city must: (1) withhold the information we have marked under sections 552.101 and 552.102(a) of the Government Code in conjunction with common-law privacy; (2) withhold the personal information we have marked under section 552.117(a)(1) of the Government Code, to the extent the official at issue timely elected to keep her personal information confidential; (3) withhold the routing and bank account numbers we have marked under section 552.136 of the Government Code; and (4)

withhold the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner has affirmatively consented to its public disclosure. The remaining information must be released, but any copyrighted information may be released only in accordance with copyright law.

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,



Claire V. Morris Sloan  
Assistant Attorney General  
Open Records Division

CVMS/jb

Ref: ID# 381607

Enc. Submitted documents

c: Requestor  
(w/o enclosures)