



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 16, 2010

Mr. Richard Bilbie
Assistant City Attorney
City of Harlingen
P.O. Box 2207
Harlingen, Texas 78551

OR2010-08803

Dear Mr. Bilbie:

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# 382846.

The City of Harlingen (the "city") received a request for all correspondence between a named individual and city council members or city staff from January 1, 2009 to May 30, 2009 and January 1, 2010 and May 30, 2010. You state the city is releasing some information to the requestor. You claim the submitted e-mails are not subject to the Act. You also claim the submitted e-mails are excepted from disclosure under sections 552.101, 552.104, 552.106, 552.109, 552.111, and 552.137 of the Government Code. We have considered your arguments and reviewed the submitted information.

The requestor seeks, in part, all correspondence sent from January 1, 2010 to May 30, 2010. The request was received by the city on March 26, 2010. You assert, and we agree, the Act does not require the city to release information that did not exist when it received a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983). Therefore, information that was created or received by the city after March 26, 2010 is not responsive to the request. This decision does not address the public availability of that information, and the city need not release that information in response to this request.

You claim the submitted e-mails, which were sent to and from the mayor's personal e-mail account, are not public information subject to the Act. The Act is applicable to "public information," as defined by section 552.002 of the Government Code. Section 552.002(a) provides that "public information" consists of

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov't Code § 552.002(a). Thus, virtually all information in a governmental body's physical possession constitutes public information and is subject to the Act. *Id.*; see Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body in connection with the transaction of official business, and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2); see Open Records Decision No. 462 at 4 (1987).

You state the e-mails are not in the physical possession of the city but are instead stored on a third party server. You also state that because no city funds are expended in maintaining the mayor's e-mail account, the e-mails are not collected, assembled, or maintained by the city in connection with the transaction of official business. The determination of whether information is subject to the Act is not based solely on the location of the information or the number of individuals who have possession or access to the information. See Open Records Decision No. 635 at 3-4 (1995) (finding information does not fall outside definition of "public information" in Act merely because individual member of governmental body possesses information rather than governmental body as whole). The determination is based on whether the information meets the definition of public information as established in section 552.002. In Open Records Decision No. 425 (1985), this office found information sent to school trustees' homes was public information even though it was not in the physical possession of the school district because the information related to official business of the district and the trustees received the information in their official capacities. See Open Records Decision No. 425 at 1-3 (overruled on other grounds by Open Records Decision No. 439 (1986)). We observed that to conclude the information received by the trustees' at their homes in their official capacities was not public information would wreak havoc on the Act because it would allow governmental bodies to circumvent disclosure requirements simply by removing information from their administrative offices and placing that information in the hands of individual officials and employees. *Id.* at 2. We further observed the legislature could not have intended governmental bodies to escape the Act's disclosure requirements in this manner. *Id.* The e-mails at issue are communications between the

mayor and consultants hired by the city pertaining to legislative affairs involving the city. Thus, the e-mails pertain to the transaction of official business of the city. You acknowledge the mayor received these e-mails in his official capacity. As information collected and maintained by the mayor in his official capacity, the e-mails are maintained by the city in connection with the transaction of official business. *Id.* (stating once trustees received information in official capacity, information was now maintained by governmental body within express terms of statutory predecessor to section 552.002). Therefore, we find these e-mails are subject to the Act, and we will accordingly, address your arguments against their disclosure.

You generally assert information exchanged between the city and its lobbyist revealing negotiations with parties on matters affecting the city 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." Gov't Code § 552.101. You analogize the information at issue to the audit working papers which this office determined were confidential in Open Records Decision No. 640 (1996). In that decision, this office determined the audit working papers must be withheld pursuant to a specific confidentiality statute in the Insurance Code. *See* Open Records Decision No. 640 at 4. In the present instance, you have not cited any law which would make the submitted communications confidential, nor are we aware of any such law. Therefore, we have no basis to conclude this information is confidential under section 552.101.

You also assert the mayor's e-mails are private under section 552.101 of the Government Code in conjunction with common-law privacy and section 552.109 of the Government Code. Section 552.101 encompasses the doctrine of common-law privacy. Section 552.109 excepts from public disclosure "[p]rivate correspondence or communications of an elected office holder relating to matters the disclosure of which would constitute an invasion of privacy[.]" Gov't Code § 552.109. This office has held the test to be applied to information under section 552.109 is the same as the common-law privacy standard under section 552.101. We will, therefore, consider the applicability of common-law privacy under section 552.101 together with your claim under section 552.109.

Common-law privacy 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). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. The e-mails at issue do not contain any personal information of the mayor, but instead pertain solely to the legislative affairs of the city. Thus, the public has a legitimate interest in these e-mails and they may not be withheld under section 552.101 or section 552.109.

You also assert the submitted e-mails are excepted from disclosure under section 552.104 of the Government Code. Section 552.104 excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. This exception protects information from disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* Open Records Decision No. 463 (1987). The e-mails at issue pertain to numerous unrelated topics. You have not identified any specific competitive matter in which the city is involved related to these e-mails. Thus, you have not explained how release of these e-mails will harm the city's interests in a particular competitive situation. Accordingly, we conclude you have not established the applicability of section 552.104 to the e-mails, and none of them may be withheld on that basis.

You also assert the e-mails are excepted from disclosure under section 552.111 of the Government Code, which excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." 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 that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995). 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.

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 id.* at 9.

Most of the submitted e-mails contain purely factual information regarding legislative actions and scheduling of meetings. We agree, however, a small portion of the e-mails, which we marked, constitute advice, opinions, recommendations, or other material reflecting the policymaking processes of the city and may be withheld under section 552.111.¹ As you have not demonstrated how the remaining information constitutes advice, opinions, or recommendations about a policymaking decision, it may not be withheld under section 552.111.

You also assert the submitted e-mails are excepted from disclosure under section 552.106 of the Government Code. Section 552.106 excepts from disclosure “[a] draft or working paper involved in the preparation of proposed legislation” and “[a]n internal bill analysis or working paper prepared by the governor’s office for the purpose of evaluating proposed legislation.” Gov’t Code § 552.106(a)-(b). The purpose of section 552.106 is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body. *See* Open Records Decision No. 460 at 1-2 (1987). Therefore, section 552.106 is applicable only to the policy judgments, recommendations, and proposals of persons who are involved in the preparation of proposed legislation and who have an official responsibility to provide such information to members of the legislative body. *Id.* at 2. Section 552.106 only protects policy judgments, advice, opinions, and recommendations involved in the preparation or evaluation of proposed legislation; it does not except purely factual information from public disclosure. *See id.*

You have not established how the city’s officials or consultants have an official responsibility to the Texas Legislature to provide policy judgments, recommendations, and proposals to its members on the issues discussed in the e-mails. *See* Open Records Decision No. 429 at 5 (1985) (statutory predecessor to section 552.106 not applicable to information relating to governmental entity’s efforts to persuade other governmental entities to enact particular ordinances). Furthermore, you have not explained how this factual information constitutes advice, opinions, and recommendations for purposes of section 552.106. Therefore, none of the remaining information may be withheld pursuant to section 552.106.

Finally, you assert section 552.137 of the Government Code is applicable to the e-mail addresses. 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

¹As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

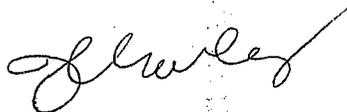
type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to an e-mail address "provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent[.]" *Id.* § 552.137(c)(1). Some of the e-mail addresses at issue belong to individuals who have a contractual relationship with the city, and are thereby specifically excluded by section 552.137(c). We marked the e-mail addresses which do not appear to be of a type specifically excluded by section 552.137(c). If the e-mail addresses we marked belong to individuals who have a contractual relationship with the city, they must be released. If these e-mail addresses do not belong to individuals who have a contractual relationship with the city, they must be withheld under section 552.137, unless the city receives consent for their release.² *See id.* § 552.137(b).

In summary, the city may withhold the information we marked under section 552.111 of the Government Code. To the extent the e-mail addresses we marked do not belong to individuals who have a contractual relationship with the city, they must be withheld under section 552.137. The remaining information must be released.

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, toll free, at (888) 672-6787.

Sincerely,



Jessica Eales
Assistant Attorney General
Open Records Division

JCE/eeg

²We 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 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.

Ref: ID# 382846

Enc. Submitted documents

c: Requestor
(w/o enclosures)