



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 19, 2010

Ms. Bridget Chapman  
Assistant City Attorney  
City of Georgetown  
P.O. Box 409  
Georgetown, Texas 78627-0409

OR2010-10687

Dear Ms. Chapman:

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# 386986.

The City of Georgetown (the "city") received a request for all e-mails sent and received by a named city council member over a specified time period, as well as all e-mails between the named city council member and a named city attorney. You state you do not maintain some of the information responsive to the request.<sup>1</sup> You claim portions of the requested information are not subject to the Act. Additionally, and alternatively, you claim portions of the requested information are excepted from disclosure under sections 552.101, 552.103, 552.105, 552.106, 552.107, 552.108, 552.111, 552.131, 552.133 and 552.137 of the Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>3</sup>

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<sup>1</sup>We note that the Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

<sup>2</sup>We note although you initially raised sections 552.102, 552.109, 552.116, 552.127, and 552.131 of the Government Code, you have not submitted any arguments to support these exceptions. Therefore, we assume you have withdrawn your claim that these sections apply to the submitted information. *See Gov't Code* § 552.301.

<sup>3</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.

Initially, we address your contention that portions of the submitted information are not subject to the Act. The Act is only applicable to "public information." See Gov't Code § 552.021. Section 552.002(a) defines public information as "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." *Id.* § 552.002(a). Information that is collected, assembled, or maintained by a third party may be subject to disclosure under the Act if it is maintained for a governmental body, the governmental body owns or has a right of access to the information, and the information pertains to the transaction of official business. See Open Records Decision No. 462 (1987).

You state the information in the named city council member's personal e-mail account is not subject to disclosure under the Act to the extent such information does not relate to the transaction of official city business. Upon review, we find the entirety of the information at issue was created in connection with the transaction of official business. Therefore, these e-mails constitute "public information" as defined by section 552.002(a). Thus, the information at issue is subject to the Act and must be released, unless it falls within the scope of an exception to disclosure. Gov't Code §§ 552.002(a)(1), .021.

Next, we must address the city's obligations under the Act. 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. *Id.* § 552.301. Section 552.301(b) requires a governmental body ask for a decision from this office and state which exceptions apply to the requested information by the tenth business day after receiving the request. *Id.* § 552.301(b). The city states, and the submitted documents reflect, the city received the request for information on April 30, 2010. Accordingly, the tenth business day after the receipt of the request was May 14, 2010. Although you timely raised sections 552.101, 552.103, 552.106, 552.107, 552.108, 552.111, 552.131, and 552.137 of the Government Code, you did not raise sections 552.105 and 552.133 of the Government Code until May 21, 2010. Thus, with respect to sections 552.105 and 552.133, the department failed to comply with the procedural requirements mandated by section 552.301(b).

A governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption the requested information is public and must be released 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 (Tex. App.—Austin 1990, no writ); see also Open Records Decision No. 630 (1994). The presumption information is public under section 552.302 can generally be overcome by demonstrating the information is confidential by law or third-party interests are at stake. See Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Section 552.105 is a discretionary exception that protects a governmental body's interests and may be waived. See Gov't Code § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary

exceptions generally), 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions), 564 (1990) (statutory predecessor to Gov't Code § 552.105 subject to waiver). In failing to comply with section 552.301, the city has waived its claim under section 552.105. Therefore, the city may not withhold any of the submitted information under section 552.105 of the Government Code. However, because section 552.133 of the Government Code can provide a compelling reason to overcome the presumption of openness, we will consider the applicability of this section to the submitted information. We will also consider the applicability of your timely-raised exceptions.

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 information protected by other statutes. You claim portions of the submitted information are protected under the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d-1320d-8. At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 ("Privacy Rule"); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, except as provided by parts 160 and 164 of the Code of Federal Regulations. *See id.* § 164.502(a). This office has addressed the interplay of the Privacy Rule and the Act. In Open Records Decision No. 681 (2004), we noted section 164.512 of title 45 of the Code of Federal Regulations provides a covered entity may use or disclose protected health information to the extent such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted the Act "is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public." *See* ORD 681 at 8; *see also* Gov't Code §§ 552.002, .003, .021. We, therefore, held the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. *See Abbott v. Tex. Dep't of Mental Health & Mental Retardation*, 212 S.W.3d 648 (Tex. App.—Austin 2006, no pet.); ORD 681 at 9; *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Thus, because the Privacy Rule does not make information subject to disclosure under the Act confidential, the city may withhold protected health information from the public only if the information is confidential under other law or an exception in subchapter C of the Act applies.

We understand you to claim Exhibit 3 contains confidential medical records. Section 552.101 encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(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(a)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Although you contend the MPA is applicable to portions of Exhibit 3, you have not demonstrated any of the information at issue constitutes a communication between a physician and a patient or a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician for the purposes of the MPA. *See* Occ. Code § 159.002(a)-(c). We therefore conclude the city may not withhold any of the information at issue on the basis of the MPA.

We also understand you to claim Exhibit 3 contains confidential mental health records. Section 552.101 also encompasses section 611.002 of the Health and Safety Code, which provides in part:

(a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b); *see also id.* § 611.001 (defining "patient" and "professional"). Sections 611.004 and 611.0045 provide for access to information that is made confidential by section 611.002 only by certain individuals. *See id.* §§ 611.004, .0045; Open Records Decision No. 565 (1990). Although you contend section 611.002 is applicable to portions of Exhibit 3, you have not demonstrated any of the information at issue consists of communications between a patient and a professional or records of the identity, diagnosis,

evaluation, or treatment of a patient created or maintained by a professional for purposes of section 611.002. We therefore conclude the city may not withhold any of the information at issue under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code.

We also understand you to raise section 552.101 of the Government Code in conjunction with section 773.091 of the Health and Safety Code, which provides in relevant part:

(a) A communication between certified emergency medical services personnel or a physician providing medical supervision and a patient that is made in the course of providing emergency medical services to the patient is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) Records of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

Health & Safety Code § 773.091(a)-(b). Upon review, we find Exhibit 3 does not contain a communication between certified emergency medical services personnel or a physician providing medical supervision and a patient that was made in the course of providing emergency medical services to the patient. *See id.* § 773.091(a). It also does not contain a record of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that was created by the emergency medical services personnel or physician or maintained by an emergency medical services provider. *See id.* § 773.091(b). Accordingly, none of the information at issue is confidential under section 773.091, and the city may not withhold it under section 552.101 on that basis.

We also understand you to claim portions of Exhibit 3 contain confidential personal information in utility customer accounts. Section 552.101 also encompasses section 182.052 of the Utilities Code, which provides in relevant part the following:

(a) Except as provided by Section 182.054, a government-operated utility may not disclose personal information in a customer's account record, or any information relating to the volume or units of utility usage or the amounts billed to or collected from the individual for utility usage, if the customer requests that the government-operated utility keep the information confidential. However, a government-operated utility may disclose information related to the customer's volume or units of utility usage or amounts billed to or collected from the individual for utility usage if the primary source of water for such utility was a sole-source designated aquifer.

(b) A customer may request confidentiality by delivering to the government-operated utility an appropriately marked form provided under Subsection (c)(3) or any other written request for confidentiality.

Util. Code § 182.052(a)-(b). "Personal information" under section 182.052(a) means an individual's address, telephone number, or social security number, but does not include the individual's name. *See id.* § 182.051(4); *see also* Open Records Decision No. 625 (1994) (construing statutory predecessor). Upon review, we find you have not demonstrated any portion of Exhibit 3 consists of personal information in a customer's account record or information relating to the volume or units of utility usage or the amounts billed to or collected from the individual for utility usage. Accordingly, the information at issue is not confidential under section 182.052, and the city may not withhold any portion of it under section 552.101 on that basis.

Section 552.101 also encompasses section 261.201 of the Family Code, which provides, in part:

(a) Except as provided by Section 261.203, the following information is confidential, is not subject to public release under [the Act], and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). We understand you to assert portions of Exhibit 3 pertain to allegations of child abuse or neglect. However, upon review, we find you have failed to demonstrate how any portion of the information at issue consists of a report of alleged or suspected abuse or neglect or files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under chapter 261 of the Family Code. *See id.* § 261.001(1), (4) (defining "abuse" and "neglect" for purposes of chapter 261). Accordingly, the city may not withhold any portion of Exhibit 3 under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code.

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. *See 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 satisfied. *See id.* at 681-82. 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 workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *See id.* at 683. This office has found personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure. *See* Open Records Decision Nos. 600 (1992), 545 (1990). Upon review, we find no portion of Exhibit 3 constitutes information that is highly intimate or embarrassing and not of legitimate public interest. Therefore, none of this information may be withheld under section 552.101 in conjunction with common-law privacy.

We understand you to assert some of the information in Exhibit 3 is excepted from public disclosure under constitutional privacy, which is also encompassed by section 552.101 of the Government Code. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7. The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. ORD 455 at 4. The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* at 7. The scope of information protected is narrower than that under the common-law doctrine of privacy; constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985)). Upon review, we find the city has not demonstrated how any of the information at issue falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the city may not withhold any of the information at issue under section 552.101 on the basis of constitutional privacy.

Section 552.101 also encompasses 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). 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 (1988). 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).

We also understand you to claim portions of Exhibit 3 contain the identity of an individual who reported a violation or possible violation of the law to officials charged with the duty of enforcing the law. Upon review, however, we find you have not demonstrated Exhibit 3 reveals the identity of an informer. Thus, none of the information at issue may be withheld under section 552.101 based on the informer's privilege.

You claim Exhibit 4 is excepted from disclosure under section 552.103 of the Governmental Code, which provides 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). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (1) litigation was 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). A 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 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.* When the governmental body is the prospective plaintiff in litigation, the evidence of anticipated litigation must at least reflect that litigation involving a specific matter is "realistically contemplated." See Open Records Decision No. 518 at 5 (1989); see also Attorney General Opinion MW-575 (1982) (investigatory file may be withheld if governmental body's attorney determines that it should be withheld pursuant to Gov't Code § 552.103 and that litigation is "reasonably likely to result"). In Open Records Decision No. 638 (1996), this office stated a governmental body has met its burden of showing that litigation is reasonably anticipated when it received a notice of claim letter and the

governmental body represents that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act ("TTCA"), Civ. Prac. & Rem. Code, ch. 101. If that representation is not made, the receipt of the claim letter is a factor that we will consider in determining, from the totality of the circumstances presented, whether the governmental body has established that litigation is reasonably anticipated. *See* Open Records Decision No. 638 at 4 (1996). Additionally, concrete evidence to support a claim 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. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). This office has also found that a pending EEOC complaint indicates litigation is reasonably anticipated. *See* Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982), 281 at 1 (1981). On the other hand, this office has determined if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

You assert, prior to the city's receipt of the request, the city was involved in eight pending lawsuits with named individuals. Thus, based on your representations and our review, we find litigation was pending with these individuals on the date the city received the request for information. Furthermore, you assert the city also anticipated litigation with respect to twelve other named individuals or entities on the date the city received the present request. You indicate, and the submitted information reflects, prior to the date of the request, the city planned to initiate eminent domain proceedings against several of the named individual. You also indicate several individuals filed complaints with the EEOC against the city prior to receipt of the present request. Further, you indicate, and the submitted information reflects, the city received several notice of claim letters prior to the date of the request. You do not affirmatively represent to this office that the claim letters are in compliance with the TTCA. However, we note the claim letters, on their face, state they are in compliance with the TTCA. Based on your arguments and our review of the information at issue, we find the city reasonably anticipated litigation with respect to several of the named individuals on the date this request was received. However, you do not inform us of any objective steps the remaining parties have made towards initiating litigation against the city. *See* Gov't Code § 552.301(e)(1)(A). Accordingly, you have failed to demonstrate the city anticipated litigation with respect to the remaining parties.

You assert the information in Exhibit 4 is related to the subject matter of the pending and anticipated litigations. Upon review, we find portions of Exhibit 4 relate to the pending and anticipated litigations for purposes of section 552.103(a). We note, however, the opposing parties and potential opposing parties to the litigations or potential litigations have seen or had access to most of the information that is subject to section 552.103. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Therefore, if the opposing party or potential opposing party has seen or had access to information relating to litigation or anticipated litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure

under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Accordingly, the information in Exhibit 4 the opposing parties and potential opposing parties to the litigations have seen or had access to may not be withheld under section 552.103 of the Government Code. Further, the city has failed to demonstrate the remaining information in Exhibit 4 is related to any of the pending or anticipated litigations for purposes of section 552.103. Therefore, the city may only withhold the information we have marked under section 552.103 of the Government Code. We note the applicability of this exception ends once the litigation has been concluded or is no longer pending. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We next address your argument for portions of Exhibit 6 under section 552.106 of the Government Code. Section 552.106(a) excepts from disclosure “[a] draft or working paper involved in the preparation of proposed legislation.” Gov’t Code § 552.106(a). Section 552.106 ordinarily applies only to persons with a responsibility to prepare information and proposals for a legislative body. *See* Open Records Decision No. 460 at 1 (1987). 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. *Id.* at 2. 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 does not except purely factual information from disclosure. *Id.* at 2. However, a comparison or analysis of factual information prepared to support proposed legislation is within the scope of section 552.106. *See id.* at 2.

In this instance, you generally assert the information you have marked in Exhibit 6 concerns the deliberative processes of a governmental body relevant to the enactment of legislation and reflects policy judgments, recommendations and proposals prepared by persons with some official responsibility to prepare them for the legislative body. Upon review, we find you have failed to demonstrate the information you have marked in Exhibit 6 constitutes advice, opinions, and recommendations for purposes of section 552.106. We therefore conclude none of the information at issue may be withheld pursuant to section 552.106 of the Government Code.

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 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 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 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 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 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 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 assert the information you have marked in Exhibit 7 contains information within the scope of the attorney-client privilege. We understand you to claim the information consists of confidential communications between city attorneys and city staff made in furtherance of the rendition of legal services. Upon review, we agree most of Exhibit 7 constitutes privileged attorney-client communications. Accordingly, the city may withhold the information we have marked in Exhibit 7 under section 552.107 of the Government Code. However, you have failed to identify several of the parties to the remainder of the communications at issue in Exhibit 7. Accordingly, we find you have failed to demonstrate the applicability of the attorney-client privilege to these communications. Therefore, the city may not withhold the remaining information at issue in Exhibit 7 under section 552.107 of the Government Code.

Section 552.108 of the Government Code provides the following:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

- (1) release of the information would interfere with the detection, investigation, or prosecution of crime;
- (2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication;

- (3) it is information relating to a threat against a peace officer collected or disseminated under Section 411.048; or
  - (4) it is information that:
    - (A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or
    - (B) reflects the mental impressions or legal reasoning of an attorney representing the state.
- (b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:
- (1) release of the internal record or notation would interfere with law enforcement or prosecution;
  - (2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or
  - (3) the internal record or notation
    - (A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or
    - (B) reflects the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a), (b). A governmental body claiming subsection 552.108 must reasonably explain how and why this exception is applicable to the information that the governmental body seeks to withhold. *See id.* §§ 552.108, .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). You generally seek to withhold the information you have submitted in Exhibit 8 under section 552.108. However, you make no arguments explaining how section 552.108 is applicable to the information at issue. Therefore, you have failed to demonstrate the applicability of section 552.108 to the information at issue. Gov't Code § 552.301(e)(1)(A) (governmental body must reasonably explain how and why exception is applicable to the information at issue). Consequently, none of the remaining information may be withheld on that basis.

Section 552.111 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 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. *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 consultant. *See* Open Records Decision Nos. 631 at 2 (1995) (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, 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 claim the information in Exhibit 9 consists of advice, opinions, and recommendations between the city manager, the city council, and the city’s mayor concerning the status of various city matters. Based upon your representations and our review of the information at

issue, we agree the city may withhold the information we have marked under section 552.111 of the Government Code. However, we note portions of the remaining information you have marked consists of either general administrative information that does not relate to policymaking or information that is purely factual in nature. Further, we note portions of the remaining information at issue consist of communications with third parties. We find the city has not established privity of interest or common deliberative process with these parties. Accordingly, the deliberative process privilege of section 552.111 is not applicable to this information and the city may not withhold any portion of the remaining information at issue on that basis.

Section 552.111 of the Government Code also encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as:

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5. A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *Id.*; ORD 677 at 6-8. In order for this office to conclude the information was made or developed in anticipation of litigation, we must be satisfied: (a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation there was a substantial chance litigation would ensue; and (b) the party resisting discovery believed in good faith there was a substantial chance litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation. *See Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7. The second prong of the work product test requires the governmental body to show the documents at issue contain the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both prongs of the work product test is confidential under rule 192.5, provided the information does not fall within the purview of the exceptions to the privilege enumerated in rule 192.5(c). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ)

As previously stated, a governmental body bears the burden of establishing the applicability of the work product privilege to information it seeks to withhold under section 552.111 of the Government Code. You state the city objects to disclosure of information made or developed for trial or in anticipation of litigation and prepared or developed by or for the city or the city's representatives. However, upon review, we find you have failed to adequately demonstrate how any of the information at issue was created or developed for trial or in anticipation of litigation. Consequently, you have failed to demonstrate the applicability of section 552.111 of the Government Code to any of the remaining information in Exhibit 9. *See* Gov't Code § 552.301(e)(1)(A). Thus, the city may not withhold any of the remaining information at issue under the attorney work product exception of section 552.111 of the Government Code.

Section 552.131 of the Government Code relates to economic development information and provides in part:

(a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

(1) a trade secret of the business prospect; or

(2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].

Gov't Code § 552.131(a)-(b). Section 552.131(a) excepts from disclosure only "trade secret[s] of [a] business prospect" and "commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." *Id.* We note section 552.131(a) is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address your arguments under section 552.131(a) and none of the submitted information may be withheld on that basis. *See* Gov't Code § 552.131; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3(1990).

Section 552.131(b) protects information about a financial or other incentive that is being offered to a business prospect by a governmental body or another person. *See* Gov't Code § 552.131(b). Section 552.131(b) protects the interests of governmental bodies, not third parties. You state the city has not made any agreement with any business prospect concerning any of the listed projects. Upon review, however, we find the city has not established the information at issue reveals financial or other incentives that are being offered to a business prospect. Therefore, the city may not withhold any portion of Exhibit 10 under section 552.131(b) of the Government Code.

Section 552.133 of the Government Code excepts from disclosure a public power utility's information related to a competitive matter. Section 552.133 (b) provides:

Information or records are excepted from the requirements of Section 552.021 if the information or records are reasonably related to a competitive matter, as defined in this section. Excepted information or records include the text of any resolution of the public power utility governing body determining which issues, activities, or matters constitute competitive matters. Information or records of a municipally owned utility that are reasonably related to a competitive matter are not subject to disclosure under this chapter, whether or not, under the Utilities Code, the municipally owned utility has adopted customer choice or serves in a multiply certificated service area. This section does not limit the right of a public power utility governing body to withhold from disclosure information deemed to be within the scope of any other exception provided for in this chapter, subject to the provisions of this chapter.

*Id.* § 552.133(b). Section 552.133(a)(3) defines a "competitive matter" as a matter the public power utility governing body in good faith determines by vote to be related to the public power utility's competitive activity, and the release of which would give an advantage to competitors or prospective competitors. *See id.* § 552.133(a)(3). However, section 552.133(a)(3) also provides thirteen categories of information that may not be deemed competitive matters. The attorney general may conclude that section 552.133 is inapplicable to the requested information only if, based on the information provided, the attorney general determines the public power utility governing body has not acted in good faith in determining that the issue, matter, or activity is a competitive matter or that the information requested is not reasonably related to a competitive matter. *Id.* § 552.133(c).

We understand the city to be an electric utility provider. You inform us, and provide documentation showing, that city council passed a resolution pursuant to the predecessor of section 552.133 and section 552.133 in which the city council determined that "any and all documents as it pertains to the negotiation of power agreements and the purchase of any percentage of ownership in any power plant as well as the compilation of data for individual power construction projects is a competitive matter as contemplated by sections 551.086 and 552.133 of the Government Code." You assert the information you have marked in Exhibit 11 comes within the scope of the city council's resolution. Upon review, we

determine the information you have marked relates to competitive matters in accordance with the submitted resolution. The information at issue is not among the thirteen categories of information that section 552.133(a)(3) expressly excludes from the definition of competitive matter. Furthermore, we have no evidence the city council failed to act in good faith. *See id.* § 552.133(c). Therefore, the city must withhold the information you have marked in Exhibit 11 pursuant to section 552.133 of the Government Code.

Section 552.137 of the Government Code 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). *Id.* § 552.137(a)-(c). We note section 552.137 does not apply to a government employee or official’s work e-mail address because such an address is not that of the employee or official as a “member of the public” but is instead the address of the individual as a governmental employee or official. We also note section 552.137 is not applicable to the general e-mail address of a business or organization. Therefore, the city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners have affirmatively consented to their public release.<sup>4</sup>

In summary, the city may withhold the information we have marked in Exhibit 4 under section 552.103 of the Government Code. The city may withhold the information we have marked in Exhibit 7 under section 552.107 of the Government Code. The city may withhold the information we have marked in Exhibit 9 under section 552.111 of the Government Code. The city must withhold the information you have marked in Exhibit 11 under section 552.133 of the Government Code. The city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners have affirmatively consented to their public release. The 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](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

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<sup>4</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 an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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,



Adam Leiber  
Assistant Attorney General  
Open Records Division

ACL/jb

Ref: ID# 386986

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)