



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 15, 2010

Mr. Warren M. S. Ernst
Chief of the General Counsel Division
City of Dallas
1500 Marilla Street, Room 7DN
Dallas, Texas 75201

OR2010-15737

Dear Mr. Ernst:

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# 396851.

The City of Dallas (the "city") received a request for several categories of information pertaining to candidates, rankings, and meetings conducted by the Judicial Nominating Committee ("JNC") regarding the selection of municipal judges.¹ You claim the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, 552.122, and 552.136 of the Government Code and privileged under Texas Rule of Evidence 503. We have considered your arguments and reviewed the submitted information.²

We first note the submitted information includes court-filed documents subject to section 552.022 of the Government Code. Section 552.022(a) provides for required public

¹You inform us the city requested and received clarification of the request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

²We 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.

disclosure of "information that is also contained in a public court record[,]" unless the information is expressly confidential under other law. Gov't Code § 552.022(a)(17). The city seeks to withhold the court-filed documents under section 552.103 of the Government Code, which is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 439, 475-76 (Tex. App.—Dallas, 1999, no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not other law that makes information expressly confidential for the purposes of section 552.022(a)(17). Therefore, the marked court-filed documents may not be withheld under section 552.103. As the city claims no other exception to the disclosure of the marked court-filed documents, they must be released.

You claim the remaining information is excepted from disclosure under section 552.103 of the Government Code, which provides in part:

(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 sufficient to establish the applicability of section 552.103 to the information it seeks to withhold. To meet this burden, the governmental body must demonstrate that: (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

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 more than mere conjecture. *Id.* This office has found a pending complaint with the Equal Opportunity Employment Commission (the "EEOC") indicates litigation is reasonably anticipated. *See* Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982), 281 at 1 (1981).

You state, and have provided documentation demonstrating, that a named employee of the city filed discrimination claims against the city with the EEOC prior to the city's receipt of the instant request for information. Based on your representations and documentation and our review of the submitted information, we find that the city reasonably anticipated litigation on the date of its receipt of this request for information. You also generally allege the submitted information is related to the anticipated litigation and its release would jeopardize the city's position in the potential litigation. On review, we agree some of the submitted information is related to the anticipated litigation for purposes of section 552.103. Therefore, section 552.103 is generally applicable to that information. We note the remaining information at issue consists of documents relating to the city's judicial nominating committee and nomination of municipal judges. You have not explained how the remaining information is related to the discrimination claim filed with the EEOC. Thus, we find you have not demonstrated the remaining information is related to the anticipated litigation for purposes of section 552.103. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must submit written comments demonstrating applicability of claimed exceptions to information at issue). We therefore conclude the city may not withhold any of the remaining information under section 552.103.

We also note the opposing party to the anticipated litigation has already seen or had access to some of the information that relates to the litigation. 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 (1990). Thus, once the opposing party to anticipated litigation has seen or had access to information relating to the litigation, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, the information relating to the anticipated litigation the opposing party has seen or to which she has had access may not be withheld under section 552.103 of the Government Code. The city may withhold the remaining information relating to the litigation, which we have marked, under section 552.103.³ We note the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Next, we address your other exceptions to disclosure of the remaining information. 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

³As our ruling is dispositive, we need not address your remaining arguments against its disclosure.

Code § 552.101. This exception encompasses the doctrine of common-law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *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 elements of this test must be established. *Id.* at 681-82. The types of information considered to be intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* include information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from disclosure under common law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps).

We note the submitted information is related to public employees and public employment. The behavior of a public employee in the workplace and the conditions for his or her continued employment are generally matters of legitimate public interest that are not protected by common-law privacy. *See* Open Records Decision No. 438 (1986). Likewise, information about a public employee's qualifications, disciplinary action, and background is generally not protected by common-law privacy. *See* Open Records Decision Nos. 444 at 5-6 (1986) (public has interest in public employee's qualifications and performance and the circumstances of his resignation or termination), 405 at 2-3 (1983) (public has interest in manner in which public employee performs his job), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former sections 552.101 or 552.102), 208 at 2 (1978) (information relating to complaint against public employee and disposition of the complaint is not protected under either the constitutional or common-law right of privacy). We find you have not demonstrated any portion of the remaining information is highly intimate or embarrassing and not a matter of legitimate public concern. We therefore conclude the city may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.107(1) of the Government Code 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. 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 contend a portion of the remaining information, which you have marked, consists of a confidential attorney-client communication made to facilitate the rendition of professional legal services to the city. You indicate the information at issue has not been released to non-privileged parties. Based on your representations and our review, we find the remaining information you have marked is protected by the attorney-client privilege. We therefore conclude the city may withhold the remaining marked information under section 552.107(1) of the Government Code.

Section 552.111 of the Government Code 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 section 552.111 excepts from disclosure only those internal communications that consist of

advice, recommendations, and opinions 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) (Gov't Code § 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 Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); 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).

You generally state the remaining information you have marked under section 552.111 is excepted from disclosure. Beyond this general assertion, you have provided no arguments explaining how the information at issue consists of advice, opinion, or recommendations reflecting the city's policymaking processes. We therefore conclude the city may not withhold any of the remaining information you have marked under section 552.111 of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address, home telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code §§ 552.024, .117(a)(1). We note section 552.117(a)(1) encompasses personal cellular telephone numbers and home facsimile numbers, provided the official or employee pays for the cellular telephone service or facsimile number with his or her personal funds. *See* Open Records Decision No. 506 at 5-6 (1988) (Gov't Code § 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). We also note a post office box number is not a "home address" for purposes of section 552.117(a)(1). *See* Open Records Decision No. 622 at 4 (1994) (legislative history makes clear that purpose of Gov't Code § 552.117 is to protect public employees from being harassed at home). Whether a particular item of information is protected by section 552.117 must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not

timely request under section 552.024 that the information be kept confidential. We note the remaining information at issue includes information relating to nominees for the position of judge. *See* ORD 455 at 2 (statutory predecessor to Gov't Code § 552.117 not applicable to employment applicants). We are unable to determine if each of these individuals is a current or former official or employee of the city. Accordingly, we will rule conditionally. Thus, the city must withhold the information we have marked under section 552.117(a)(1) to the extent the marked information pertains to current or former city officials or employees who timely requested confidentiality for the information under section 552.024 of the Government Code. Cellular telephone numbers and home facsimile numbers may only be withheld, however, if the official or employee concerned paid for the cellular telephone service or facsimile number with his or her personal funds.

Section 552.122 of the Government Code excepts from disclosure "a test item developed by a . . . governmental body[.]" Gov't Code § 552.122(b). In Open Records Decision No. 626 (1994), this office determined the term "test item" in section 552.122 includes "any standard means by which an individual's or group's knowledge or ability in a particular area is evaluated," but does not encompass evaluations of an employee's overall job performance or suitability. ORD 626 at 6. The question of whether specific information falls within the scope of section 552.122(b) must be determined on a case-by-case basis. *Id.* Traditionally, this office has applied section 552.122 where release of "test items" might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Section 552.122 also protects the answers to test questions when the answers might reveal the questions themselves. *See* Attorney General Opinion JM-640 at 3 (1987); ORD 626 at 8.

You have marked interview questions the city seeks to withhold under section 552.122. On review, we conclude the city may withhold question number three and the answer to that question under section 552.122. We find you have not demonstrated that the remaining information you have marked evaluates an individual's or group's knowledge or ability in a particular area. We therefore conclude the remaining marked information does not constitute test items for purposes of section 552.122(b) and may not be withheld under section 552.122 of the Government Code.

Section 552.136 of the Government Code provides that "[n]otwithstanding any other provision of [the Act], 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). Section 552.136(a) defines "access device" as "a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to . . . obtain money, goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument." *Id.* § 552.136(a). Although you state the information you have marked under section 552.136

consists of employees' identification numbers, we note the marked information consists of e-mail addresses. You have not demonstrated the marked e-mail addresses constitute access devices for purposes of section 552.136. We therefore conclude the city may not withhold any of the remaining information under section 552.136 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 owner of the e-mail address consents to its release or the e-mail address falls within the scope of section 552.137(c).⁴ *See id.* § 552.137(a)-(c). We note section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address a governmental entity maintains for one of its officials or employees. We have marked information that does not fall within the scope of section 552.137 and must be released. The city must withhold the rest of the e-mail addresses you have marked, along with the additional e-mail addresses we have marked, under section 552.137 of the Government Code, unless the owner of an e-mail address has affirmatively consented to its public disclosure.⁵

In summary: (1) the city may withhold the information we have marked under section 552.103 of the Government Code; (2) the city may withhold the remaining information you have marked under section 552.107(1) of the Government Code; (3) the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code to the extent the information pertains to current or former city officials or employees who timely requested confidentiality for the information under section 552.024 of the Government Code, including the cellular telephone and home facsimile numbers of officials or employees who paid for the cellular telephone service or facsimile numbers with their personal funds; (4) the city may withhold interview question number three and the answer to that question under section 552.122 of the Government Code; and (5) except for the information we have marked for release, the city must withhold the e-mail addresses you have marked and the additional e-mail addresses we have marked under section 552.137 of the Government Code, unless the owner of an e-mail address has affirmatively consented to its public disclosure. The rest of the submitted 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.

⁴This office will raise section 552.137 on behalf of a governmental body, as this section is a mandatory exception. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

⁵We 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.

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,



Paige Lay
Assistant Attorney General
Open Records Division

PL/tp

Ref: ID# 396851

Enc. Submitted documents

c: Requestor
(w/o enclosures)