



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 22, 2010

Mr. Joe Gorfida, Jr.
Nichols, Jackson, Dillard, Hager & Smith, L.L.P.
For City of Richardson
1800 Lincoln Plaza
500 North Akard Street
Dallas, Texas 75201

OR2010-17679

Dear Mr. Gorfida:

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# 400959.

The City of Richardson (the "city"), which you represent, received a request for all information, including a specified voice mail message recording, pertaining to the detention of and legal settlement by a named assistant district attorney. You claim the submitted correspondence, settlement agreement, incident inspection report, and audio and video recordings are excepted from disclosure under sections 552.101, 552.107, 552.108, 552.111, 552.1175, and 552.130 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note you have not submitted information responsive to the requested voice mail message recording. To the extent information responsive to that part of the request existed

¹Although you cite to section 552.117 of the Government Code for a portion of the information you seek to withhold, we note section 552.1175 of the Government Code is the correct exception for the substance of your argument. Furthermore, although you also raise sections 552.102 and 552.103 of the Government Code as exceptions to disclosure of the submitted information, you have provided no arguments regarding the applicability of these sections. We, therefore, assume you no longer assert section 552.102 or section 552.103. See Gov't Code §§ 552.301(b), (e), .302.

on the date the city received the request, we assume you have released it. If you have not released any such information, you must do so at this time. *See Gov't Code* §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, we must address the city's obligations under the Act. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(b) of the Government Code, the governmental body must request a ruling from this office and state the exceptions to disclosure that apply within ten business days after receiving the request. *See Gov't Code* § 552.301(b). The city states it received the request for information on September 3, 2010. Accordingly, the city's ten-business-day deadline was September 20, 2010. Although the city's request for a ruling and claims under sections 552.101, 552.107, 552.108, 552.111, and 552.1175 of the Government Code were timely submitted to this office on September 20, 2010, the city did not raise its claim under section 552.130 of the Government Code until September 24, 2010. Consequently, we find the city failed to comply with the procedural requirements of section 552.301 with respect to its claim under section 552.130 of the Government Code.

Generally, a governmental body's failure to comply with section 552.301 results in the waiver of its claims under the exceptions at issue, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Because section 552.130 of the Government Code can provide a compelling reason to withhold information, we will consider the applicability of this exception, along with your timely-raised claims under sections 552.101, 552.107, 552.108, 552.111, and 552.1175 of the Government Code.

The submitted information contains a signed settlement agreement. Section 552.022(a) of the Government Code provides, in part,

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(18) a settlement agreement to which a governmental body is a party.

Gov't Code § 552.022(a)(18). The city is a party to the submitted signed settlement agreement, which is subject to section 552.022(a)(18) and must be released unless it is expressly confidential under other law. You seek to withhold the settlement agreement under sections 552.101 and 552.108 of the Government Code. Section 552.108, however, is a discretionary exception that protects a governmental body's interests and may be waived. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 586 (1991) (governmental body may waive section 552.108). As such, section 552.108 does not make information confidential for the purposes of section 552.022. Consequently, the city may not withhold the submitted settlement agreement, which we have marked, under section 552.108 of the Government Code. However, because information subject to section 552.022(a)(18) may be withheld under section 552.101, we will consider your claims under this section for the submitted settlement agreement, along with your claims under sections 552.101, 552.107, 552.108, 552.111, and 552.1175 for the remaining submitted information.

You assert portions of the submitted information, including portions of the settlement agreement, are confidential under both common-law and constitutional privacy. 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. This section encompasses the doctrines of common-law and constitutional privacy. 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. This office has found the public has a legitimate interest in information relating to employees of governmental bodies and their employment qualifications and job performance. *See* Open Records Decision Nos. 542 at 5 (1990), 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). The submitted information pertains to the arrest of an assistant district attorney and subsequent settlement of civil claims against the city. You state the individual was arrested and quickly released without charges being filed against him because it was found the individual had been incorrectly identified as a suspect in the case being investigated. You argue the individual's identifying information and details regarding the arrest should be withheld under common-law privacy. Although the existence and details of the arrest may be intimate or embarrassing, we find there is a legitimate public interest in this information because it directly relates to the job performance of the city police officers involved in the arrest. We also find there is a legitimate public interest in this information because it relates to a claims settlement involving the expenditure of public funds by the city. Thus, we find you have failed to demonstrate the applicability of common-law privacy to the information you seek

to withhold. Consequently, the department may not withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy.

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. Open Records Decision No. 455 at 4 (1987). 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. *Id.* 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.* The scope of information protected is narrower than under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). In this instance, you have not provided any arguments explaining how the information at issue pertains to the zones of privacy. Furthermore, we find the public's need to know information relating to the job performance of government employees generally outweighs an individual's privacy interests for purposes of constitutional privacy. Thus, we find you have not demonstrated how any portion of the information you seek to withhold falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Accordingly, none of the information at issue, including the information in the settlement agreement, may be withheld under section 552.101 of the Government Code in conjunction with constitutional privacy. As you have not claimed any other exceptions to disclosure for the settlement agreement, it must be released.

You claim some of the submitted information is protected by the attorney-client privilege. 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, and lawyer representatives. See TEX. R. EVID. 503(b)(1)(A)-(E). Thus, a governmental body must inform this office of the identities and capacities of the

individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state the information at issue consists of communications between the city’s attorney, city officials, the city’s insurance carrier, and/or an attorney representing an individual who made legal claims against the city. You contend the communications were made in furtherance of the rendition of professional legal services to the city. You also state the communications were made in confidence, and indicate confidentiality has been maintained. Based on your representations and our review of the information at issue, we find you have demonstrated the applicability of the attorney-client privilege to the portions of the information you seek to withhold that consist of communications between the city’s attorney, city officials, and the city’s insurance carrier. Thus, the city may withhold this information, which we have marked, under section 552.107(1) of the Government Code.² The remaining information you seek to withhold consists of letters between the city’s attorney and the attorney representing an individual who made legal claims against the city. You have not explained, or otherwise demonstrated, how the opposing party’s attorney is a privileged party. Therefore, we find you have failed to establish the applicability of the attorney-client privilege to the remaining information you seek to withhold. Consequently, none of this information may be withheld under section 552.107(1) of the Government Code.

Section 552.108(a)(2) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . 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[.]” Gov’t Code § 552.108(a)(2). Section 552.108(a)(2) is applicable only if the information at issue relates to a concluded criminal case that did not result in a conviction or deferred adjudication. A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information the governmental body seeks to withhold. *See id.*

²As our ruling for this information is dispositive, we need not address your remaining arguments against disclosure for this information.

§ 552.301(e)(1)(A); see *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You assert most of the remaining information pertains to a concluded criminal investigation conducted by the city's police department that did not result in a conviction or deferred adjudication. We note, however, some of this information consists of correspondence between the city's attorney, city officials, and/or the opposing party's attorney regarding the opposing party's claims and subsequent settlement agreement. You have not demonstrated, and these documents do not reflect, how this information pertains to the investigation of the criminal incident. Consequently, this information may not be withheld under section 552.108(a)(2) of the Government Code. Based on your representations and our review, however, we agree section 552.108(a)(2) is applicable to the remaining information you seek to withhold, which we have marked, and may be withheld on that basis.³

You claim some of the remaining information is excepted from disclosure under the deliberative process privilege encompassed by section 552.111 of the Government Code. See Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. See *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. See ORD 615 at 5. 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 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.

This office has also concluded a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter's advice, opinion, and

³As our ruling for this information is dispositive, we need not address your remaining arguments against disclosure for portions of this information.

recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

Section 552.111 can also encompass communications between a governmental body and a third-party consultant. *See* Open Records Decision No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). For section 552.111 to apply, the governmental body must identify the third-party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third-party unless the governmental body establishes it has a privity of interest or common deliberative process with the third-party. *See* ORD 561 at 9.

You contend the information you seek to withhold pertains to the city's interest in limiting its liability concerning claims made against the city. Based on your arguments, we find you have sufficiently demonstrated how the information pertains to the city's policymaking processes. You assert the information at issue consists of the advice, recommendations, and opinions of the city's attorney, city officials, and/or the opposing party's attorney regarding the policy issues. Based on your arguments and our review, we find you have established the deliberative process privilege is applicable to a portion of the information, which we have marked, pertaining to communications between city officials. Accordingly, the city may withhold the marked information under section 552.111 of the Government Code. Some of the remaining information you seek to withhold does not contain any advice, recommendations, or opinions. The remainder of the information at issue consists of an e-mail with an attached draft settlement agreement, and other correspondence, between the city's attorney and the opposing party's attorney regarding the claims and resulting settlement agreement. You have not explained, or otherwise demonstrated, how the city shares a privity of interest or common deliberative process with the opposing party's attorney. Consequently, the remaining information you seek to withhold is not excepted under the deliberative process privilege and may not be withheld under section 552.111 of the Government Code.

The remaining information contains a district attorney employee's personal information. Section 552.1175 of the Government Code provides in relevant part:

(a) This section applies only to:

...

(5) employees of a district attorney, criminal district attorney, or county or municipal attorney whose jurisdiction includes any criminal law or child protective services matters[.]

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

~~Gov't Code § 552.1175(a)(5), (b). We have marked the information that may be excepted under section 552.1175. To the extent the individual whose information we have marked is still a district attorney employee and he elects to restrict access to his personal information in accordance with section 552.1175, the city must withhold the marked information under section 552.1175 of the Government Code. If the individual is no longer a district attorney employee or does not elect to restrict access to his information, the marked information may not be withheld under section 552.1175 of the Government Code.~~

We note the remaining information includes e-mail addresses subject to section 552.137 of the Government Code, which 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).⁴ *See id.* § 552.137(a)-(c). The e-mail addresses at issue are not specifically excluded by section 552.137(c). As such, these e-mail addresses, which we have marked, must be withheld under section 552.137 of the Government Code, unless the owners of the addresses have affirmatively consented to their release.⁵ *See id.* § 552.137(b).

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

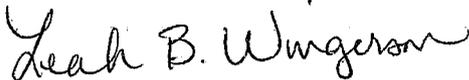
⁵We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

In summary, the city may withhold the information we have marked under sections 552.107(1), 552.108(a)(2), and 552.111 of the Government Code. To the extent the individual whose information we have marked is still a district attorney employee and he elects to restrict access to his personal information in accordance with section 552.1175, the city must withhold the marked information under section 552.1175 of the Government Code. The city must withhold the marked e-mail addresses under section 552.137 of the Government Code. 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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

Ref: ID# 400959

Enc. Submitted documents

c: Requestor
(w/o enclosures)