



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

December 14, 2010

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

OR2010-18748

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# 402876.

The City of Richardson (the "city"), which you represent, received a request for three categories of information, including a copy of all communications from the city manager to the council members on the Nortel voice messaging machine up to the date of the request. You state you have released information responsive to categories one and two of the request. You claim that portions of the submitted information are not subject to the Act. Additionally, you claim the submitted information is excepted from disclosure under sections 552.101, 552.106, 552.111, 552.117, and 552.131 of the Government Code. We have considered your arguments and reviewed the submitted information.

Initially, you argue the requested information is not subject to the Act. Section 552.021 of the Government Code provides for public access to "public information," *see id.* § 552.021, which is defined by section 552.002 of the Government Code 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). Thus, information that is collected, assembled, or maintained by a third party may be subject to disclosure under the Act if a governmental body owns or has a right of

access to the information. *See* Open Records Decision No. 462 (1987); *cf.* Open Records Decision No. 499 (1988).

You assert some of the submitted recordings refer to personal matters involving the city manager and thus, “the messages which contain information that does not relate to the official business of the city are not subject to the Act.” However, although the messages contain references to personal matters, we note the messages at issue are status updates provided to city council members by the city manager at issue. Thus, we find the submitted recordings constitute “information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business” by or for the city. Therefore, we conclude the submitted recordings are subject to the Act. Accordingly, we will address your arguments against disclosure of this information.

Next, you state the city received a previous request for information on August 18, 2010 where the requestor sought an electronic copy of audio recordings the city manager made using the city call-in-voice system in February 2009, April 2009, and May 2010.<sup>1</sup> You state the city only searched the city manager’s mail box system and determined there were no messages responsive to that time period. However, upon receipt of the instant request for information, you also searched the city council’s mail boxes and identified one recording, Voice Message11.wav, from the city manager from May 2010. Although you assert that in responding to the August 18, 2010 request for information the city “was not required to search the voice messages for all [c]ity employees,” we note a governmental body must make a good-faith effort to relate the request to responsive information that is within the governmental body’s possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). Based on your representations and our review, we note Voice Message11.wav is responsive to the requestor’s earlier request. Accordingly, we must address the city’s procedural obligations under the Act with respect to Voice Message11.wav.

Section 552.301 of the Government Code 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). Pursuant to section 552.301(e) of the Government Code, the governmental body is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). As

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<sup>1</sup>As you did not submit a copy of this request, we take our description from your brief.

previously noted, audio recording number 3 was responsive to the requestor's August 18, 2010 request. However, the city did not provide the requestor with a copy of Voice Message11.wav in response to the August 18, 2010 request, nor did the city request a ruling from this office or submit a copy or representative sample of the recording until it requested a ruling from this office for the instant request for information on October 7, 2010. Thus, we find the city failed to comply with the requirements of section 552.301 with respect to Voice Message11.wav.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that 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). A compelling reason exists when third-party interests are at stake or when information is confidential by law. Open Records Decision No. 150 (1977). You assert Voice Message11.wav is excepted from disclosure under sections 552.106, 552.111, and 552.131(b) of the Government Code. These sections, however, are discretionary in nature and serve only to protect a governmental body's interests and may be waived. *See* Open Records Decisions Nos. 677 at 10 (2002) (attorney work-product privilege under section 552.111 is not compelling reason to withhold information under section 552.302); *see also* Open Records Decisions Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general). Consequently, the city may not withhold Voice Message11.wav under sections 552.106, 552.111, and 552.131(b) of the Government Code. As you raise no further exceptions to disclosure of Voice Message11.wav, it must be released. However, we will consider your timely raised exceptions under sections 552.106, 552.111, 552.117, and 552.131 for the remaining information.

We next address your claim under section 552.111 of the Government Code for the remaining recordings as it is potentially the most encompassing. 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, recommendations, and opinions in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, and opinions that reflect 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. The 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). Moreover, 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).

You state the submitted audio recordings consist of advice, recommendations, and opinions between the city manager and city council members relating to the policymaking functions of the city council. You further assert "the purpose of these recordings was to allow the city manager to have frank and open discussions relating to various issues involving the city and to allow him to make recommendations and offer his opinions concerning city policy relating to these issues." Upon review, we agree that portions of the submitted audio recordings are subject to section 552.111 and may be withheld on that basis. You inform us the city lacks the technology to withhold the portions of the recordings subject to section 552.111. Accordingly, the city may withhold Voice Message1.wav, Voice Message2.wav, Voice Message3.wav, Voice Message4.wav, Voice Message5.wav, Voice Message6.wav, Voice Message9.wav, Voice Message10.wav, Voice Message 13.wav, Voice Message15.wav, Voice Message17.wav, Voice Message18.wav, Voice Message20.wav, Voice Message21.wav, Voice Message23.wav, Voice Message24.wav, Voice Message25.wav, Voice Message26.wav, Voice Message 27.wav, Voice Message 28.wav, and Voice Message29.wav in their entirety under section 552.111 of the Government Code. However, we find that the city has failed to demonstrate the applicability of section 552.111 of the Government Code to any portion of the remaining recordings. Accordingly, no portion of the remaining information may be withheld on this basis.

Section 552.117(a)(1) of the Government Code excepts from public disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. See Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. 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. Accordingly, to the extent the individual whose personal information is at issue in Voice Message14.wav timely elected confidentiality under

section 552.024, the city must withhold the personal information in this audio recording under section 552.117(a)(1). As previously noted, you state the city lacks the technical capability to redact the information subject to section 552.117(a)(1) in the submitted recording. Therefore, to the extent the individual at issue timely elected to keep his information confidential, the city must withhold the recording in its entirety. However, if the individual at issue did not make a timely election to keep the information confidential, then the city may not withhold this information under section 552.117(a)(1).<sup>2</sup>

In summary, the city may withhold Voice Message1.wav, Voice Message2.wav, Voice Message3.wav, Voice Message4.wav, Voice Message5.wav, Voice Message6.wav, Voice Message9.wav, Voice Message10.wav, Voice Message 13.wav, Voice Message15.wav, Voice Message17.wav, Voice Message18.wav, Voice Message20.wav, Voice Message21.wav, Voice Message23.wav, Voice Message24.wav, Voice Message25.wav, Voice Message26.wav, Voice Message 27.wav, Voice Message 28.wav, and Voice Message29.wav under section 552.111 of the Government Code. To the extent the individual whose personal information is at issue in Voice Message14.wav timely elected confidentiality under section 552.024, the city must withhold Voice Message14.wav in its entirety under section 552.117(a)(1). 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](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,



Vanessa Burgess  
Assistant Attorney General  
Open Records Division

VB/dls

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<sup>2</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure.

Ref: ID# 402876

Enc. Submitted documents

c: Requestor  
(w/o enclosures)