



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 11, 2011

Mr. B. Chase Griffith  
Brown & Hofmeister, L.L.P  
740 East Campbell Road, Suite 800  
Richardson, Texas 75081

OR2011-05026

Dear Mr. Griffith:

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# 414290.

The City of McKinney (the "city"), which you represent, received a request for all 2009 e-mails between the city manager and the city council. You state you have released some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.104, 552.105, 552.107, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note portions of Exhibit B-4 contain an employee's personal information. Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code.<sup>1</sup> See Gov't Code § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for information. See Open Record Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or

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<sup>1</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

former 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 information. Thus, if the employee timely elected to keep his personal information confidential, the city must withhold the information we marked in blue under section 552.117(a)(1) of the Government Code. However, the city may not withhold this information under section 552.117(a)(1) if the employee did not make a timely election to keep the information confidential.

You raise section 552.101 of the Government Code for portions of Exhibit B-4. This section 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 the doctrine of common-law privacy, which protects information if it (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. You claim portions of the e-mails in Exhibit B-4 contain medical information that is protected by common-law privacy. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 455 (1987) (prescription drugs, illnesses, operations and procedures, and physical handicaps). Although common-law privacy protects some medical information, it does not protect all medically related information. *See* Open Records Decision No. 478 (1987). Individual determinations are required. *See* Open Records Decision No. 370 (1983). Upon review, we find the information in Exhibit B-4 that identifies specific medical conditions is of no legitimate public interest. Accordingly, the city must withhold the medical information we marked in green in Exhibit B-4 under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the information we marked in blue is not protected under section 552.117(a)(1) of the Government Code, the city must withhold the medical information we marked in red in Exhibit B-4 under section 552.101 in conjunction with common-law privacy. To the extent the information we marked in blue in Exhibit B-4 is excepted under section 552.117(a)(1), that person's privacy is protected by our markings under that exception and the medical information we marked in red in Exhibit B-4 must be released.

Section 552.101 also encompasses the doctrine of constitutional 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. *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 (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. 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)). We find the city has failed to demonstrate how any of the remaining information in Exhibit B-4 falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Accordingly, we conclude the city may not withhold any information in Exhibit B-4 under section 552.101 of the Government Code in conjunction with constitutional privacy. As you raise no other exceptions to disclosure for Exhibit B-4, the remaining information must be released.

You claim the e-mails in Exhibit B-2 are excepted from disclosure under section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations, including where the governmental body may wish to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 at 8 (1991) (statutory predecessor to section 552.104 designed to protect interests of governmental body). Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). Section 552.104 does not except information relating to competitive bidding situations once a contract has been awarded. Open Records Decision Nos. 306 (1982), 184 (1978) (section 552.104 no longer applicable when bidding had been completed and contract is in effect).

You state the city will seek proposals and bids relating to the development and/or sale of a particular parcel of property. However, you have not provided any arguments explaining how releasing these e-mails will compromise this bidding process. Therefore, we conclude the city may not withhold the e-mails in Exhibit B-2 under section 552.104 of the Government Code. As you raise no further exceptions for Exhibit B-2, it must be released.

You raise section 552.105 of the Government Code for Exhibit B-5. This section excepts from disclosure information relating to:

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Gov't Code § 552.105. Section 552.105 is designed to protect a governmental body's planning and negotiating position with regard to particular transactions. *See* Open Records Decision Nos. 564 (1990), 357 (1982), 310 (1982). Information excepted from disclosure under section 552.105 that pertains to such negotiations may be excepted from disclosure so

long as the transaction relating to that information is not complete. *See* ORD 310. A governmental body may withhold information “which, if released, would impair or tend to impair [its] ‘planning and negotiating position in regard to particular transactions.’” ORD 357 at 3 (quoting Open Records Decision No. 222 (1979)). The question of whether specific information, if publicly released, would impair a governmental body’s planning and negotiating position with regard to particular transactions is a question of fact. Accordingly, this office will accept a governmental body’s good-faith determination in this regard, unless the contrary is clearly shown as a matter of law. *See* ORD 564.

You state the e-mails in Exhibit B-5 are discussions providing a valuation of properties the city has preliminary plans to include in its public works projects and lists potential areas for the future growth of said projects. You also state that release of this information would harm the city’s bargaining position with respect to the properties at issue by enabling a land owner to determine how the city values the property, thereby strengthening the landowner’s bargaining position against the city. Based on your representations and our review, we conclude the city may withhold Exhibit B-5 under section 552.105 of the Government Code.

You claim the e-mail strings in Exhibit B-1 are excepted from disclosure under section 552.107(1) of the Government Code. This section 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). 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 represent that the e-mail strings in Exhibit B-1 are communications between attorneys representing the city and the city's officials and employees. You also represent these communications were made for the purpose of facilitating the rendition of professional legal services. You state these communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the city may withhold the e-mail strings in Exhibit B-1 under section 552.107(1) of the Government Code.

You raise section 552.108 of the Government Code for Exhibit B-6. This section provides in part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

(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 [required public disclosure] if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

Gov't Code § 552.108(a)(1), (b)(1). By its terms, section 552.108 applies only to the records of a law enforcement agency or a prosecutor. The e-mails in Exhibit B-6 are not the records of a law enforcement agency. Thus, the e-mails are not excepted under section 552.108(b)(1). However, section 552.108(a)(1) may be invoked by the proper custodian of information relating to an investigation or prosecution of criminal conduct. *See Open Records Decision No. 474 at 4-5 (1987)*. Where a governmental body possesses information relating to a pending case of a law enforcement agency, the governmental body may withhold the information under section 552.108(a)(1) if (1) it demonstrates that the information relates to the pending case and (2) this office is provided with a representation from the law enforcement agency that it wishes to have the information withheld. You state the e-mails in Exhibit B-6 relate to a case that is open and pending. However, you have not provided any representation from a law enforcement agency that the e-mails at issue relate to an open and pending case, and that this law enforcement agency wishes to withhold this

information under section 552.108. Accordingly, the city may not withhold the e-mails in Exhibit B-6 under section 552.108(a)(1) of the Government Code. As you raise no other exceptions for this information, Exhibit B-6 must be released.

Lastly, you claim Exhibit B-3 is excepted from disclosure under section 552.111 of the Government Code, which 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, 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. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); 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 explain that the placement of certain individuals on various city governmental boards and committees is an administrative matter of broad scope that affects the city's policy mission. You state the e-mails in Exhibit B-3 contain advice, opinions, and recommendations regarding the placement of certain appointees to the boards and committees. Based on your representations and our review, we agree in this instance that portions of the e-mails consist of advice, opinions, recommendations, and other material reflecting the city's policymaking process. Therefore, the city may withhold this information, which we marked, under

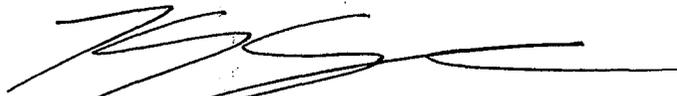
section 552.111 of the Government Code. However, we find the remainder of the information in Exhibit B-3 consists of facts that are severable from the advice, opinions, and recommendations. Thus, as you raise not further exceptions to disclosure, the remaining information in Exhibit B-3 must be released.

In summary, if the employee timely elected to keep his personal information confidential, the city must withhold the information marked in blue in Exhibit B-4 under section 552.117(a)(1) of the Government Code. If the employee did not make a timely election, the city may not withhold this information under section 552.117(a)(1). The city must withhold the information we marked in green in Exhibit B-4 under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the information we marked in blue is not protected under section 552.117(a)(1) of the Government Code, the city must withhold the information we marked in red in Exhibit B-4 under section 552.101 in conjunction with common-law privacy. To the extent the information we marked in blue in Exhibit B-4 is excepted under section 552.117(a)(1), that person's privacy is protected by our markings under that exception and the information we marked in red in Exhibit B-4 may be released. The city may withhold Exhibit B-5 under section 552.105 of the Government Code. Exhibit B-1 may be withheld under section 552.107(1) of the Government Code. Lastly, the city may withhold the information we marked in Exhibit B-3 under section 552.111 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](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,



Kenneth Leland Conyer  
Assistant Attorney General  
Open Records Division

KLC/eeg

Ref: ID# 414290

Enc. Submitted documents

c: Requestor  
(w/o enclosures)