



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 17, 2011

Mr. Ray Rodriguez  
Assistant City Attorney  
City of San Antonio  
P.O. Box 839966  
San Antonio, Texas 78283-3966

OR2011-06915

Dear Mr. Rodriguez:

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# 417689 (COSA File No. 11-0433).

The City of San Antonio (the "city") received a request for all communications during a specified time period between employees of certain city departments and the U.S. Department of Immigration and Customs Enforcement ("ICE"), and all communications during the same time period that reference "ICE activities in municipal facilities or in conjunction with city operations."<sup>1</sup> You state the city will provide some of the requested information to the requestor. You claim portions of the submitted e-mail strings and attachments are excepted from disclosure under sections 552.107, 552.108, 552.111, and 552.117 of the Government Code.<sup>2</sup> You also state, and provide documentation showing, the city notified ICE of the request for information and of its right to submit arguments to this office as to why some of the submitted information should not be released.<sup>3</sup> *See Gov't*

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<sup>1</sup>You state, and provide documentation showing, the city sought and received clarification from the requestor regarding the request. *See Gov't Code* § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

<sup>2</sup>Although you have also indicated some of the information may be excepted under sections 552.106 and 552.1175 of the Government Code, you have not provided any arguments explaining how these exceptions apply to the information at issue. Therefore, we presume you have withdrawn your claims under these exceptions. *See Gov't Code* §§ 552.301, .302.

<sup>3</sup>As of the date of this letter, we have not received any correspondence from ICE.

Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the exceptions you claim and reviewed the submitted information.

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). 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. *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 claim the e-mail strings and attachments you seek to withhold under section 552.107(1) consist of communications between attorneys for the city and city officials, and that these communications were made in furtherance of the rendition of professional legal services. You also state these communications were made in confidence and the confidentiality has been maintained. We note, however, most of the e-mail strings at issue are communications between multiple in-state and out-of-state government entities that appear to be mailing list type communications. You have not explained, or otherwise demonstrated, how all of these

parties are privileged or how these e-mails strings were communicated in furtherance of the rendition of professional legal services to the city. Furthermore, the remaining e-mail strings at issue involve communications between city employees regarding routine administrative issues. You have not demonstrated how these e-mails strings were communicated in furtherance of the rendition of professional legal services. Thus, we find you have failed to establish the applicability of the attorney-client privilege to the e-mail strings you seek to withhold. Consequently, the city may not withhold any of this information under section 552.107(1) of the Government Code.

Section 552.108(a)(1) 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 . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108 must reasonably explain how and why the release of the information at issue would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You claim the mailing list e-mail strings and attachments between multiple government entities, and certain e-mail strings and attachments between city employees, pertain to a pending criminal investigation. The information you seek to withhold relates to various administrative issues or announcements. You have not explained, or otherwise demonstrated, the e-mail strings and attachments at issue are records of a law enforcement agency or how that information pertains to a single pending criminal investigation. Therefore, we determine the city has failed to demonstrate the applicability of section 552.108(a)(1) to the information you seek to withhold. Consequently, the city may not withhold any of the e-mail strings and attachments at issue under section 552.108(a)(1) of the Government Code.

You assert the mailing list e-mail strings and attachments between multiple government entities, certain e-mail strings and attachments between city employees, and other information you have marked in various e-mails are 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 intended for public release in its final form necessarily represents the drafter's advice, opinion, and 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, including a consultant or other party with a privity of interest. 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 generally assert the information you seek to withhold, including communications between city employees regarding draft or preliminary responses to various e-mail communications, is excepted under section 552.111. You have not, however, explained how this information pertains to the city's policymaking processes. Furthermore, most of the information at issue pertains to routine administrative issues, and you have not explained how that information pertains to administrative matters of broad scope that affect the city's policy mission. Additionally, some of the e-mail strings at issue consist of communications between multiple government entities. You have not explained how these e-mail strings constitute internal city communications or how the city shares a privity of interest or common deliberative process with these various government entities. Therefore, you have failed to demonstrate how the deliberative process privilege applies to the information you

seek to withhold. Consequently, the city may not withhold that information under section 552.111 of the Government Code.

You contend some of the remaining information is excepted under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the current and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Additionally, section 552.117 encompasses personal cellular telephone numbers, provided the cellular telephone service is paid for by the employee with his or her own funds. *See* Open Records Decision No. 670 at 6 (2001) (extending section 552.117 exception to personal cellular telephone number and personal pager number of employee who elects to withhold home telephone number in accordance with section 552.024). Whether 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). The city may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made.

You seek to withhold under section 552.117 an employee's cellular telephone number, a citizen's telephone number, citizens' e-mail addresses, a citizen's name and date of birth, the e-mail strings and attachments between multiple government entities, and certain e-mail strings between city employees. With the exception of the employee's cellular telephone number, however, the information you seek to withhold does not constitute the home addresses, home telephone numbers, social security numbers, or family member information of current or former city employees. Consequently, the city may not withhold this information under section 552.117(a)(1) of the Government Code. You have not informed us whether or not the employee whose cellular telephone number is at issue timely chose to not allow public access to her personal information. Furthermore, you have not informed us whether or not she paid for her cellular telephone service. Therefore, if the employee timely requested confidentiality for her personal information and the cellular telephone number is the employee's personal cellular telephone number, the city must withhold the cellular telephone number, which we have marked, pursuant to section 552.117(a)(1) of the Government Code. If the employee did not timely request confidentiality or the marked cellular telephone number is not a personal cellular telephone number, the marked telephone number may not be withheld under section 552.117(a)(1) of the Government Code.

We note the remaining information includes e-mail addresses subject to section 552.137 of the Government Code.<sup>4</sup> This section excepts from disclosure "an e-mail address of a

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<sup>4</sup>The 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).

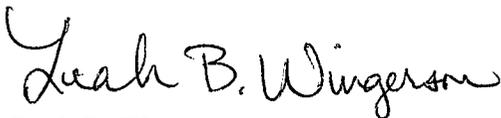
member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). The e-mail addresses 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.<sup>5</sup> *See id.* § 552.137(b).

In summary, if the employee whose cellular telephone number we have marked timely requested confidentiality for her personal information and the marked cellular telephone number is the employee's personal cellular telephone number, the city must withhold the marked number pursuant to section 552.117(a)(1) 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 address owners have consented to the release of the addresses. The city must release the remaining information.

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,



Leah B. Wingerson  
Assistant Attorney General  
Open Records Division

LBW/dls

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<sup>5</sup>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.

Ref: ID# 417689

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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(w/o enclosures)