



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 1, 2011

Ms. Leslie O. Haby
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283

OR2011-09383

Dear Ms. Haby:

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# 422552 (COSA# W0006000-041411).

The City of San Antonio (the "city") received a request for all correspondence between city officials and staff and United States Immigration and Customs Enforcement ("ICE") relating to ICE activities at city facilities during a specified time period. You state the city will release some of the requested information. You claim some of the submitted information is excepted from disclosure under sections 552.107, 552.108, 552.111, 552.117, 552.1175, and 552.137 of the Government Code.¹ Additionally, you provide documentation showing you have notified certain entities of their rights to submit comments to this office why

¹Although you also raise rule 503 of the Texas Rules of Evidence, we note section 552.107 of the Government Code is the proper exception to raise when asserting the attorney-client privilege in this instance. See Open Records Decision No. 676 at 1-2 (2002). Further, although you have marked some of the submitted information under section 552.106 of the Government Code, you have provided no argument regarding the applicability of this section. Therefore, we do not address section 552.106. See Gov't Code §§ 552.301(e)(1)(A), .302.

portions of the submitted information should not be released.² *See* Gov't 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 representative sample of information.³

Initially, we note some of the submitted information, which we have marked, is not responsive to the instant request for information because it was created after the city received the request. This ruling does not address the public availability of any information that is not responsive to the request and the city is not required to release such information in response to this request.

Next, we note some of the submitted information may have been the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2011-06915 (2011). In that ruling, we determined with the exception of certain information that must be withheld under sections 552.117(a)(1) and 552.137 of the Government Code, the city must release the submitted information. We have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, to the extent the submitted information is identical to the information previously requested and ruled upon by this office, we conclude the city must rely on Open Records Letter No. 2011-06915 as a previous determination and withhold or release the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the submitted information is not encompassed by the previous ruling, we will address your claimed exceptions to disclosure.

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

²As of the date of this letter, this office has not received comments from any third party explaining why any of the submitted information should not be released.

³We 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.

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 state some of the responsive information, which you have marked, consists of communications involving city attorneys, legal staff, city employees in their capacities as clients, and a prosecutor with whom the city shares a common interest. You state these communications were made in furtherance of the rendition of professional legal services to the city. You state these communications were confidential, and you state the city has not waived the confidentiality of the information at issue. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information you have marked. Accordingly, the city may generally withhold the information you have marked under section 552.107(1) of the Government Code.⁴ We note several of the individual e-mails contained in the otherwise privileged e-mail strings are communications with individuals whom you have not shown to be privileged parties. Thus, to the extent these non-privileged e-mails, which we have marked, exist separate and apart from the submitted e-mail strings, they may not be withheld under section 552.107(1).

⁴As our ruling is dispositive with respect to some of the information at issue, we need not address your remaining arguments against its disclosure.

You assert portions of the remaining responsive information, which you have marked, are excepted from public disclosure under section 552.108 of the Government Code. Section 552.108(a)(1) 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(a)(1) must reasonably explain how and why the release of the requested information 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 state the information you have marked pertains to an active criminal investigation. Based on your representation, we conclude the release of some of the information at issue would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, section 552.108(a)(1) is applicable to the information we have marked. The remaining information you have marked consists of e-mail strings and attachments between multiple government entities, and certain e-mail strings and attachments between city employees that relate to various administrative issues or announcements. You have not explained, or otherwise demonstrated, how 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 remaining information you seek to withhold. Consequently, the city may not withhold any of the remaining information at issue under section 552.108(a)(1) of the Government Code.

We note section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov’t Code § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle*. *See* 531 S.W.2d at 186-88; Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Thus, with the exception of the basic information, which must be released, the city may withhold the information we have marked under section 552.108(a)(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, 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).

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 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.

You claim some of the remaining responsive information, which you have marked, is protected by section 552.111 of the Government Code. You argue the information you have marked constitutes advice, opinion, and recommendation of city employees pertaining to policymaking functions of the city. You further explain some of the information at issue consists of draft documentation intended for release to the public in its final form. Based on your representations and our review of the information at issue, we find the city has demonstrated the applicability of section 552.111 to portions of the information at issue, which we have marked. Accordingly, the city may withhold the information we have marked under section 552.111 of the Government Code. We find the remaining information at issue is purely factual in nature, pertains to routine internal administrative or personnel matters, or does not otherwise pertain to policymaking. Further, some of the information you have marked has been shared with or was received from individuals with whom you have not demonstrated the city shares a privity of interest. Accordingly, the remaining information you have marked may not be withheld under section 552.111 of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, 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. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)). We note section 552.117 is also applicable to personal cellular telephone numbers provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). 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 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 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 employee who did not timely request under section 552.024 the information be kept confidential. Further, information may not be withheld under section 552.117(a)(1) on behalf of an individual who is not a current or former city employee.

You seek to withhold under section 552.117 employees' cellular telephone numbers, as well as the name, date of birth, telephone number, and e-mail address of citizen individuals who are not city employees. You do not inform us whether the employees whose cellular telephone numbers are at issue timely elected confidentiality for their personal information. Furthermore, you do not inform us whether a governmental body paid for the employees' cellular telephone service. Therefore, if the employees whose information is at issue timely requested confidentiality for their personal information and a governmental body does not pay for the cellular telephone service, the city must withhold the cellular telephone numbers,

which we have marked, under section 552.117(a)(1) of the Government Code. Conversely, if the employees did not timely request confidentiality or a governmental body pays for the cellular telephone service, the marked telephone numbers may not be withheld under section 552.117(a)(1) of the Government Code. The remaining information you seek to withhold does not constitute the home addresses, home telephone numbers, emergency contact information, social security numbers, or family member information of current or former city employees. Consequently, the city may not withhold any of the remaining information you have marked under section 552.117(a)(1) of the Government Code.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home address, home telephone number, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 and 552.1175 of the Government Code. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. As noted above, section 552.117 is also applicable to personal cellular telephone numbers provided the cellular telephone service is not paid for by a governmental body. *See* ORD 506 at 5-6. Accordingly, if a governmental body does not pay for the cellular telephone service of the peace officer whose cellular telephone number we have marked, the city must withhold the information we have marked under section 552.117(a)(2) of the Government Code.⁵ Conversely, if a governmental body pays for the marked cellular telephone number, the marked information may not be withheld under section 552.117(a)(2).

The remaining documents include information that may be subject to section 552.1175 of the Government Code. Section 552.1175 provides in part:

(b) Information that relates to the home address, home telephone number, emergency contact information, or social security number of [a criminal investigator of the United States as described by article 2.122(a) of the Code of Criminal Procedure], 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

⁵We note a governmental body may withhold a peace officer's home address and telephone number, personal cellular telephone and pager numbers, social security number, and family member information under section 552.117(a)(2) without requesting a decision from this office. *See* Open Records Decision No. 670 (2001); Gov't Code § 552.147(b).

- (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.

Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 3 (to be codified as an amendment to Gov't Code § 552.1175(b)). The remaining information includes cellular telephone numbers of an individual identified as an agent of ICE. If this individual is a criminal investigator of the United States as described by article 2.122(a) of the Code of Criminal Procedure who elects to restrict access to his personal cellular telephone numbers in accordance with section 552.1175(b), and a governmental body does not pay for the cellular service for the numbers at issue, then the city must withhold the cellular telephone numbers we have marked under section 552.1175 of the Government Code. However, if this individual is not a criminal investigator, does not properly elect to restrict access to these numbers, or a governmental body pays for the cellular telephone service at issue, then the cellular telephone numbers we marked may not be withheld under section 552.1175. We find the remaining information you have marked does not consist of the home address, home telephone number, emergency contact information, social security number, or family member information of an individual to whom section 552.1175 applies. Thus, the city may not withhold any of the remaining information under section 552.1175.

The remaining information contains e-mail addresses that are subject to section 552.137 of the Government Code. Section 552.137 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). *See* Gov't Code § 552.137(a)-(c). The e-mail addresses at issue are not excluded by subsection (c). Therefore, the city must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners have affirmatively consented to their public disclosure.⁶

Section 552.151 of the Government Code relates to a public employee's safety and provides:

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from the requirements of Section 552.021 if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

⁶We note Open Records Decision No. 684 (2009) is 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.

Id. § 552.151. In this instance, you have marked some of the remaining information under section 552.151 of the Government Code. However, you have not provided any argument under this section. Accordingly, we find you have failed to demonstrate release of the remaining responsive information would subject any individual to a substantial threat of physical harm. *Id.* § 552.301(e)(1)(A) (governmental body must reasonably explain how and why exception is applicable to the information at issue). Therefore, we conclude section 552.151 is not applicable to any portion of the remaining responsive information, and the city may not withhold any information under section 552.151.

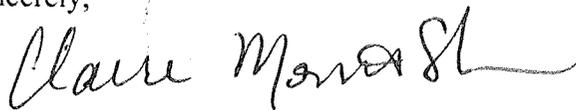
In summary, to the extent the submitted information is identical to the information previously requested and ruled upon by this office, the city must rely on Open Records Letter No. 2011-06915 as a previous determination and withhold or release the identical information in accordance with that ruling. The city may generally withhold the information you have marked under section 552.107(1) of the Government Code; however, to the extent the marked non-privileged e-mails exist separate and apart from the submitted e-mail strings, they may not be withheld under section 552.107(1). With the exception of the basic information, which must be released, the city may withhold the information we have marked under section 552.108(a)(1) of the Government Code. The city may withhold the information we have marked under section 552.111 of the Government Code. If the employees whose cellular telephone numbers we marked timely requested confidentiality for their personal information and a governmental body does not pay for the cellular telephone service, the city must withhold the marked cellular telephone numbers under section 552.117(a)(1) of the Government Code. If a governmental body does not pay for the cellular telephone service of the peace officer whose cellular telephone number we have marked, the city must withhold the information we have marked under section 552.117(a)(2) of the Government Code. The city must withhold the cellular telephone numbers we marked under section 552.1175(a)(7) of the Government Code if the individual to whom the numbers pertain is a criminal investigator as described by article 2.122(a) of the Code of Criminal Procedure, elects to restrict access to his personal cellular telephone numbers in accordance with section 552.1175(b) of the Government Code, and pays for the cellular service with his own funds. The city must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners have affirmatively consented to their public disclosure. 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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/bs

Ref: ID# 422552

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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