ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 30, 2011

Mr. Warren M. S. Ernst
Chief of the General Counsel Division
Office of the City Attorney
City of Dallas
1500 Marilla Street, Room 7BN
Dallas, Texas 75201

OR2011-12554

Dear Mr. Ernst:

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# 428474.

The City of Dallas (the "city") received a request for six categories of information pertaining to vendors in Dealey Plaza for a specified time period. You state you have released some of the requested information. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.111, 552.117, and 552.137 of the Government Code and privileged under Texas Rule of Evidence 503.[1] We have considered your arguments and reviewed the submitted representative samples of information.[2]

We first address your argument under section 552.103 of the Government Code, as it is potentially the most encompassing exception you raise. Section 552.103 provides, in part:

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[1]We note that you also claim the informer's privilege under Texas Rule of Evidence 508. The Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001); *see also* Gov't Code § 552.022(a). In this instance, section 552.022 is not applicable to the information that you seek to withhold under the informer's privilege and, therefore, we do not address your argument under rule 508.

[2]This letter ruling assumes that the submitted representative samples of information are truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

> (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.
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> . . .
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> (c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a). *See* ORD 551 at 4.

You state, and provide supporting documentation reflecting, that on the date the city received the present request for information, the city was a party to a civil lawsuit styled *Robert Groden v. City of Dallas* filed in the United States District Court for the Northern District of Texas and to an appeal of a criminal matter styled *State of Texas v. Robert Groden* in the County Criminal Court of Appeals No. 1 in Dallas. You indicate the information you have marked is related to the pending cases. Based on your representations and our review, we find the city may withhold the information we have marked under section 552.103 of the Government Code.[3]

However, we note that the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Once information has been obtained by all parties to the pending or anticipated litigation, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure

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[3]As our ruling is dispositive, we need not address the city's remaining arguments against disclosure of this information.

under section 552.103(a), and it may not be withheld on that basis. In this instance, a portion of an e-mail string you seek to withhold under section 552.103 is also marked in a duplicate of the e-mail as having been released to the requestor. The requestor is the attorney for the opposing party in both of the aforementioned cases. Thus, all parties have already seen this portion of the e-mail string, and it may not be withheld under section 552.103. We note that the applicability of section 552.103(a) ends when the litigation is concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). 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. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that 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. 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. *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 a 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 to only communications between or among clients, client representatives, lawyers, and lawyer representatives. 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 to only 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. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that 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 remaining information you have marked under section 552.107 constitutes e-mail communications among attorneys for and representatives of the city that were made for the purpose of providing legal services to the city. You indicate the communications were intended to be and remain confidential. Based on your representations and our review,

we find the city may withhold the information we have marked under section 552.107(1) of the Government Code.[4] However, we note one of the e-mails strings and one entire e-mail at issue include communications with persons that are not privileged parties. Because the submitted information demonstrates these responsive communications with non-privileged parties exist separate and apart from the privileged communications, they may not be withheld under section 552.107(1).

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. Section 552.101 encompasses the common-law right of 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. The type of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. Whether information is subject to a legitimate public interest and therefore not protected by common-law privacy must be determined on a case-by-case basis. *See* Open Records Decision No. 373 (1983). This office has found the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). Upon review, we find you have failed to establish any of the remaining information is highly intimate or embarrassing and not of legitimate concern to the public; therefore, this information is not confidential under common-law privacy, and the city may not withhold it under section 552.101 on that ground.

Section 552.101 also encompasses information protected by the common-law informer's privilege, which has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law enforcement authority, provided the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of

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[4]As our ruling is dispositive, we need not address the city's remaining arguments against disclosure of this information.

statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing 8 John H. Wigmore, *Evidence in Trials at Common Law* § 2374, at 767 (J. McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5.

You state the remaining information reveals the identity of a complainant who reported possible violations of sections 32-10 and 50-156 of the city code to the Dallas Police Department. You state that violations of these sections are Class C misdemeanors punishable by monetary fines and jail time. You do not indicate, nor does it appear, the subject of the complaint knows the identity of the complainant. Therefore, based on your representations and our review, we conclude the city may generally withhold the complainant's identifying information under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. *See* Open Records Decision No. 156 (1977) (name of person who makes complaint about another individual to city's animal control division is excepted from disclosure by informer's privilege so long as information furnished discloses potential violation of state law). However, we find some of the information you have marked does not identify an individual in his capacity as an informer; thus, this information, which we have marked for release, may not be withheld on this basis.

You raise subsections 552.108(a) and (b) of the Government Code for some of the remaining information. Section 552.108 provides:

> (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:
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> > (1) release of the information would interfere with the detection, investigation, or prosecution of crime;
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> > (2) It is information that the deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication;
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> > (3) it is information relating to a threat against a peace officer collected or disseminated under Section 411.048; or
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> > (4) it is information that:
> >
> > > (A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or
> > >
> > > (B) reflects the mental impressions or legal reasoning of an attorney representing the state.

> (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:
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> > (1) release of the internal record or notation would interfere with law enforcement or prosecution;
> >
> > (2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or
> >
> > (3) the internal record or notation:
> >
> > > (A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or
> > >
> > > (B) reflects the mental impressions or legal reasoning of an attorney representing the state.
>
> (c) This section does not except [from public disclosure] information that is basic information about an arrested person, an arrest, or a crime.

Gov't Code § 552.108. A governmental body claiming section 552.108 must reasonably explain how and why 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). Section 552.108(b)(1) is intended to protect "information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State." *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.). To prevail on its claim that section 552.108(b)(1) excepts information from disclosure, a governmental body must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. Instead, the governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. *See* Open Records Decision No. 562 at 10 (1990) (construing statutory predecessor). In addition, generally known policies and techniques may not be withheld under section 552.108. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (1989) (Penal Code provisions, common law rules, and constitutional limitations on use of force are not protected under law enforcement exception), 252 at 3 (1980) (governmental body did not meet burden because it did not indicate why investigative procedures and techniques requested were any different from those commonly known). The determination of whether the release of particular records would interfere with law enforcement is made on a case-by-case basis. *See* Open Records Decision No. 409 at 2 (1984) (construing statutory predecessor).

You inform us that the cellular telephone number you have marked is an internal telephone and/or pager number "used by [a] Dallas Police Department officer[] in the field to carry out [the officer's] law enforcement responsibilities." You contend release of this information would interfere with the ability of the officer to perform his duties. Based on your representations and our review, we find the city may withhold the cellular telephone and/or pager number you have marked under section 552.108(b)(1) of the Government Code.

You do not make any additional arguments under section 552.108 of the Government Code as to the remaining information you mark under section 552.108. Therefore, you have failed to demonstrate the applicability of section 552.108 to the remaining information. Gov't Code § 552.301(e)(1)(A) (governmental body must reasonably explain how and why exception is applicable to the information at issue). Because you have failed to demonstrate the applicability of section 552.108, the city may not withhold any of the remaining information on this basis.

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." *See* Gov't Code § 552.111. This section encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as:

> (1) [M]aterial prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
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> (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a). A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *Id.*; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that

> a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7.

As noted above, you state the city is a party in a civil case and a criminal case. We understand the information you have marked under the attorney work product privilege consists of e-mail communications between the city attorneys and city staff and discusses the civil and criminal litigation at hand. Based on your representations and our review, we conclude the city may withhold the information we have marked under the attorney work product privilege found in section 552.111 of the Government Code.

Section 552.111 of the Government Code also 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, orig. proceeding); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office reexamined 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, orig. proceeding). 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. ORD 615 at 5; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). 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). However, 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. ORD 615 at 5-6; *see also Dallas Morning News*, 22 S.W.3d at 364 (section 552.111 not applicable to personnel-related communications that did not involve policymaking). Further, section 552.111 does not generally except from disclosure facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 157; 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).

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 id.*

You contend the remaining information you have marked under the deliberative process privilege constitutes e-mail communications that contain advice, opinion, and recommendation relating to the city's policymaking processes regarding the enforcement of city ordinances. Upon review, we find some of the information constitutes policymaking advice, opinion, and recommendation among the city staff. Thus, the city may withhold this information, which we have marked, under section 552.111 on the basis of the deliberative process privilege. However, we find you have marked duplicate copies of some of the remaining information at issue as having been already released to the requestor. Additionally, some of the remaining communications have been sent to a third party you have not identified. You have not demonstrated a privity of interest or common deliberative process exists between either of these individuals and the city. Furthermore, we find the remaining communications at issue do not contain advice, opinion, or recommendation. Therefore, we conclude you have failed to demonstrate how the deliberative process privilege applies to the remaining information. Accordingly, the city may not withhold any of the remaining information under section 552.111.

Section 552.137 of the Government Code 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). Gov't Code § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, or an e-mail address maintained by a governmental entity for one of its officials or employees. The e-mail addresses you have marked and the additional e-mail addresses we have marked are not of the types specifically excluded by section 552.137(c). Therefore, the city must withhold the marked e-mail addresses under section 552.137 of the Government Code unless the owners of the addresses have affirmatively consented to their release.[5]

In summary, the city: (1) may withhold the information we have marked under section 552.103 of the Government Code; (2) may withhold the information we have marked under section 552.107(1) of the Government Code; (3) may withhold the complainant's identifying information you have marked under section 552.101 of the Government Code in conjunction with the common-law informer's privilege, with the exception of what we mark for release; (4) may withhold the cellular telephone and/or pager number you have marked under section 552.108(b)(1) of the Government Code; (5) may withhold the information we have marked under the attorney work product privilege found in section 552.111 of the

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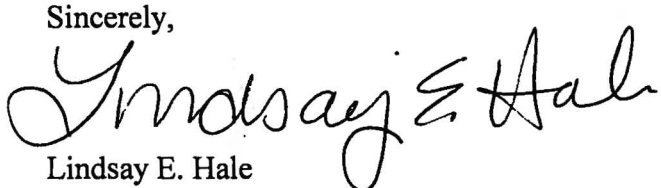
[5]We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity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

Government Code; (6) may withhold the information we have marked under the deliberative process privilege found in section 552.111 of the Government Code; and (7) must withhold the e-mail addresses you have marked and the additional e-mail addresses we have marked under section 552.137 of the Government Code unless the owners of the addresses have affirmatively consented to their release. The city must release the remaining information.[6]

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,



Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/bs

Ref: ID# 428474

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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[6]We note the requestor has a right of access under section 552.023 of the Government Code to some of his and his client's information being released. *See* Gov't Code §§ 552.023(a) (person or person's authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and is protected from public disclosure by laws intended to protect person's privacy interests), .130, .137; Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual asks governmental body to provide him with information concerning himself). Because such information is confidential with respect to the general public, if the city receives another request for this information from an individual other than this requestor or his client, the city must again seek a ruling from this office.