



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 7, 2011

Ms. Tiffany Evans
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 78003-0368

OR2011-16304

Dear Ms. Evans:

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# 435697 (GC No. 18862).

The City of Houston (the "city") received a request for the appointment calendar for a named council member for 2010 and 2011, the council member's personal calendar if it reflected any official city business, and all e-mail correspondence from any person in the council member's office to any personal e-mail account maintained by the council member in 2010 through the present. You claim some of the submitted information is not subject to the Act. You claim portions of the remaining information are excepted from disclosure under sections 552.106 and 552.109 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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 date the request was received. This ruling does not address the public availability of non-responsive information, and the city is not required to release non-responsive information in response to this request.

You argue portions of the submitted information are not subject to the Act. The Act is applicable only to "public information." See Gov't Code §§ 552.002, .021. Section 552.002(a) defines "public information" as:

[I]nformation that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body; or

(2) for a governmental body and the governmental body owns the information or has a right of access to it.

Id. § 552.002(a). Thus, virtually all of the information in a governmental body's physical possession constitutes public information and, thus, is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). You state portions of the submitted information consist of personal e-mails of the named council member, which are strictly private and contain no information related to city business. You further state that portions of the submitted information reflect personal appointments and information on the council member's private calendar, which are unrelated to city business. Based on your representations and our review, we agree the information we have marked does not constitute public information for the purposes of section 552.002. *See* Open Records Decision No. 635 at 4 (1995) (section 552.002 not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). As such, the information we have marked is not subject to the Act, and the city need not release it in response to this request. However, the remaining information you have marked under section 552.002 relates to official city business. Accordingly, this information constitutes public information subject to the Act, which must be released unless the city demonstrates that it falls within an exception to public disclosure under the Act. *See* Gov't Code §§ 552.006, .021, .301, .302. Thus, we will consider the city's remaining arguments against disclosure.

You raise section 552.106 of the Government Code for portions of the remaining information. Section 552.106 of the Government Code excepts from disclosure "[a] draft or working paper involved in the preparation of proposed legislation" and "[a]n internal bill analysis or working paper prepared by the governor's office for the purpose of evaluating proposed legislation[.]" *Id.* § 552.106(a), (b). Section 552.106 ordinarily applies only to persons with a responsibility to prepare information and proposals for a legislative body. Open Records Decision No. 460 (1987). The purpose of section 552.106 is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body, and therefore, it does not except from disclosure purely factual information. *Id.* at 2. However, a comparison or analysis of factual information prepared to support proposed legislation is within the ambit of section 552.106. *Id.* A proposed budget constitutes a recommendation by its very nature and may be withheld under section 552.106. *Id.* Section 552.106 protects only policy judgments, advice, opinions, and recommendations involved in the preparation or evaluation of proposed legislation; it does not except purely factual information from public disclosure. *See* ORD 460 at 2.

We note the information at issue includes a draft of a city ordinance and correspondence to the named council member from a city employee, providing opinions and recommendations regarding the proposed ordinance, which required council approval. The information at issue constitutes proposed legislation and advice and recommendations from a city employee responsible for preparing the information for the city council's consideration. Therefore, the city may withhold the information, which we have marked, under section 552.106 of the Government Code. You assert the remaining information at issue consists of full and partial

drafts of a proposed municipal ordinance, as well as e-mail correspondence between the named council member and members of the public who may be affected by the proposed regulations. You contend the information at issue includes discussions and recommendations regarding the proposed regulations. However, the recommendations in question were submitted by members of the public, who initiated the discussion with the city council on behalf of their own interest. *See* Open Records Decision No. 429 at 5 (1985) (statutory predecessor to section 552.106 not applicable to information submitted by an entity which is not part of the process of internal deliberations, and which initiated correspondence on behalf of its own interests). Therefore, we find you have not demonstrated how the remaining information at issue constitutes recommendations, opinions, or advice for purposes of section 552.106. Accordingly, we conclude the city may not withhold any of the remaining information at issue on that basis.

Section 552.109 of the Government Code excepts from disclosure “[p]rivate correspondence or communications of an elected office holder relating to matters the disclosure of which would constitute an invasion of privacy[.]” Gov’t Code § 552.109. This office has held the test to be applied to information under section 552.109 is the same as the common-law privacy standard under section 552.101, 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). The types 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. In addition, this office has found some kinds of medical information or information indicating disabilities or specific illnesses is protected by common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we find the information you have marked constitutes highly intimate or embarrassing information that is of no legitimate concern to the public. Therefore, the city must withhold the information it has marked under section 552.109 of the Government Code.

Finally, we note the remaining information contains e-mail addresses subject to section 552.137 of the Government Code. Section 552.137 provides, “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act],” unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c).¹ Gov’t Code § 552.137(a)–(c). The city must withhold the e-mail addresses we have marked under section 552.137 of the

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

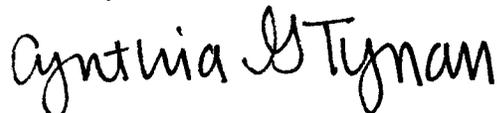
Government Code, including the personal e-mail address of the named council member, unless the owners of the e-mail addresses have affirmatively consented to its release.²

In summary, some of the submitted information, which we have marked, is not subject to the Act, and need not be released in response to the request. The city may withhold the information we have marked under section 552.106 of the Government Code. The city must withhold the information it has marked under section 552.109 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 owners of the e-mail addresses have affirmatively consented to their release. The remaining responsive 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,



Cynthia G. Tynan
Assistant Attorney General
Open Records Division

CGT/em

Ref: ID# 435697

Enc. Submitted documents

c: Requestor
(w/o enclosures)

²We note this office has 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.