



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 22, 2011

Ms. Tiffany N. Evans
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2011-18922

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# 439942 (GC No. 19002).

The City of Houston (the "city") received a request for e-mails sent and received by four named individuals during specified time periods. You claim the submitted information is excepted from disclosure under sections 552.107, 552.111, 552.136, and 552.137 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we note some of the submitted information, which we have marked, is subject to section 552.022 of the Government Code. Section 552.022(a) provides:

¹Although you do not explicitly raise sections 552.136 and 552.137 of the Government Code, you have marked information you seek to withhold under these exceptions. Thus, we understand you to raise these sections.

²We 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 those submitted to this office.

Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by 552.108;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

(4) the name of each official and the final record of voting on all proceedings in a governmental body[.]

Gov't Code § 552.022(a)(1), (3), (4). Although you assert the information we marked is excepted from disclosure under sections 552.107 and 552.111, these sections are discretionary in nature and do not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). Therefore, the city may not withhold the information we have marked pursuant to section 552.022 under sections 552.107 or 552.111 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will consider your attorney-client privilege claim under rule 503 of the Texas Rules of Evidence for the information that is subject to section 552.022 of the Government Code. Additionally, we will consider your assertion of sections 552.107 and 552.111 for the information not subject to section 552.022 of the Government Code.

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if it is 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).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ). Upon review, we find you have not demonstrated how the information we marked under section 552.022 consists of attorney-client privileged communications. Accordingly, the city may not withhold this information under rule 503 of the Texas Rules of Evidence. As the city raises no other exceptions for this information, it must be released. We turn next to the information not subject to section 552.022 of the Government Code.

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. ORD 676 at 6–7. The elements of the privilege under section 552.107(1) are the same as those discussed for rule 503. 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 generally state the information submitted as Exhibit 2 consists of e-mail communications between attorneys for the city and employees of the city. You state these communications were made for the rendition of legal services, and they were intended to be and have remained confidential. However, we note you have not identified any of the parties to these communications, and we are unable to assume all of the parties are privileged. *See* ORD 676 at 8 (governmental body must inform this office of identities and capacities of individuals to whom each communication at issue has been made; this office cannot necessarily assume that communication was made among only categories of individuals identified in rule 503); *see generally* Gov't Code § 552.301(e)(1)(A). Nonetheless, we are able to determine from the face of the documents that some of the parties are privileged.

Upon review, we find you have generally demonstrated the attorney-client privilege for most of the information submitted as Exhibit 2. However, we find some of the emails were shared with third parties who you have not identified, and who we are unable to discern as privileged parties. Additionally, some of the information does not consist of communications with an attorney and does not involve the rendition of legal services. Accordingly, we find this information, which we have marked for release, is not protected by the attorney-client privilege and the city may not withhold it under section 552.107 of the Government Code. Thus, with the exception of the information we have marked for release, the city may withhold the remaining information in Exhibit 2 under section 552.107(1) of the Government Code.

Section 552.111 of the Government Code 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.” Gov't Code § 552.111. Section 552.111 encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of this exception 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 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, orig. proceeding). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, opinions, recommendations, 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 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 Nos. 631 at 2 (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body's consultants). 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 state some of the information submitted as Exhibit 3 was shared with a named third-party consultant to develop an updated sales tax revenue forecast for the city. You also state some of the information consists of drafts developed and shared with other unidentified third parties to generate a reimbursement agreement with the city and JP Morgan Chase Bank. Upon review, we find the information we have marked consists of advice, opinion and recommendations on policymaking matters and is protected by the deliberative process privilege. The city may withhold this information under section 552.111 of the Government Code. As to the drafts we have marked, you have not stated, and we are unable to ascertain from the documents, whether they will be released to the public in their final form. If the

marked drafts will be released in their final form, the city may withhold them under section 552.111 of the Government Code. However, if they will not be released to the public in their final form, the city may not withhold them under section 552.111 of the Government Code. As to the remaining information, we find some of it was shared with third parties who you have not identified as sharing a privity of interest. We further find some of the remaining information pertains to routine administrative matters, is purely factual information, or does not consist of advice, opinion or recommendations. Accordingly, the city may not withhold the remaining information in Exhibit 3 under section 552.111 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”³ 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. This office has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992) (finding personal financial information to include designation of beneficiary of employee’s retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). Upon review, we find the information we have marked is highly intimate and embarrassing and of no legitimate public interest. The city must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.117 of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Gov’t Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee who made a request for confidentiality under

³The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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. We note section 552.117 also encompasses a personal cellular telephone or pager number, unless the cellular or pager service is paid for by a governmental body. *See* Open Records Decision No. 506 at 5–7 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Therefore, to the extent the individuals whose social security numbers you have marked timely requested confidentiality under section 552.024, the city must withhold this information under section 552.117(a)(1) of the Government Code.⁴ We have also marked cellular telephone numbers. To the extent these employees made timely elections under section 552.024 and the cellular telephone numbers are paid for with personal funds, the city must withhold the information we marked under section 552.117(a)(1) of the Government Code. If the individuals at issue did not make a timely election under section 552.024 or the cellular telephone service was not paid for with personal funds, the city may not withhold the information we marked under section 552.117(a)(1) of the Government Code.

Section 552.136(b) of the Government Code provides, “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). The city must withhold the bank account and routing numbers we have marked under section 552.136 of the Government Code. You have not demonstrated the remaining information you have marked is confidential under section 552.136 of the Government Code, and it may not be withheld on that basis.

Section 552.137 of the Government Code provides:

(a) [A]n 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 this chapter.

...

(c) Subsection (a) does not apply to an e-mail address:

⁴Regardless of the applicability of section 552.117 of the Government Code, the city may withhold a living person's social security number under section 552.147 of the Government Code without seeking a ruling from this office. Gov’t Code § 552.147(b).

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent[.]

Id. § 552.137(a), (c). We note section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. We have marked e-mail addresses that might be subject to section 552.137 of the Government Code. However, we are unable to determine whether some of these e-mails are of the type excluded by subsection (c). If the e-mail addresses we have marked are not excluded by subsection (c), then the city must withhold them under section 552.137 of the Government Code, unless the individuals have affirmatively consented to their release. If any of the e-mail addresses we have marked are excluded by subsection (c), then the city may not withhold those e-mail addresses under section 552.137 of the Government Code.⁵

In summary, the city must release the information we have marked pursuant to section 552.022 of the Government Code. With the exception of the information we have marked for release, the city may withhold the remaining information in Exhibit 2 under section 552.107 of the Government Code. With the exception of any draft that will not be released to the public in final form, the city may withhold the information we have marked in Exhibit 3 under section 552.111 of the Government Code. The city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the individuals whose social security numbers you have marked timely requested confidentiality under section 552.024, the city must withhold this information under section 552.117(a)(1) of the Government Code. The city also must withhold the cellular telephone numbers we have marked under section 552.117 of the Government Code, to the extent these employees made timely elections under section 552.024 and the cellular telephone numbers are paid for with personal funds. The city must withhold the information we marked under section 552.136 of the Government Code. If the e-mail addresses we have marked are not excluded by subsection 552.137(c), then the city must withhold them under section 552.137 of the Government Code, unless the individuals have affirmatively consented to their release. The remaining information must be released.

⁵We 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.

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,



Neal Falgoust
Assistant Attorney General
Open Records Division

NF/agn

Ref: ID# 439942

Enc. Submitted documents

c: Requestor
(w/o enclosures)