ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 13, 2012

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

OR2012-00733

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# 442346 (Houston GC Nos. 19074, 19075, 19079, and 19080).

The Houston Emergency Center, the Houston Fire Department and the City of Houston (collectively the "city") received a request for a 9-1-1 call recording for a specified incident, a second request for the 9-1-1 call recording and transcript, a third request for the 9-1-1 recording in addition to twelve specified categories of information related to the incident and the Houston Fire Department's All Hazard Response Protocol, and a fourth request for the 9-1-1 call and all communications related to the incident. You state you will provide some of the requested information. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.[1]

Initially, we note you have submitted information that is not responsive to the instant request, which you have marked. 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.

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[1]We 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.

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 information protected by other statutes, including section 143.1214 of the Local Government Code. The city is a civil service city under chapter 143 of the Local Government Code. Section 143.1214 of the Local Government Code provides in relevant part:

> (b) The department shall maintain an investigatory file that relates to a disciplinary action against a fire fighter or police officer that was overturned on appeal, or any document in the possession of the department that relates to a charge of misconduct against a fire fighter or police officer, regardless of whether the charge is sustained, only in a file created by the department for the department's use. The department may only release information in those investigatory files or documents relating to a charge of misconduct:
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> > (1) to another law enforcement agency or fire department;
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> > (2) to the office of a district or United States attorney; or
> >
> > (3) in accordance with Subsection (c).
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> (c) The department head or the department head's designee may forward a document that relates to disciplinary action against a fire fighter or police officer to the director or the director's designee for inclusion in the fire fighter's or police officer's personnel file maintained under Sections 143.089(a)-(f) only if:
>
> > (1) disciplinary action was actually taken against the fire fighter or police officer;
> >
> > (2) the document shows the disciplinary action taken; and
> >
> > (3) the document includes at least a brief summary of the facts on which the disciplinary action was based.

Local Gov't Code § 143.1214(b)-(c). You state and provide a supporting affidavit that the Houston Fire Department's (the "department") Internal Affairs Division is conducting an ongoing investigation of alleged misconduct related to the specified incident. You also state that the information is maintained in the department's investigatory files and that the requestors are not another law enforcement agency or fire department or the office of a district or United States attorney. Further, you state that the information does not meet the requirements of section 143.1214(c) for inclusion in the firefighters' civil service personnel files because the investigation is still pending and no disciplinary actions have been taken. *See id.* § 143.1214(c); *see also* Local Gov't Code § 143.089(a)-(g). While we agree that information in an investigatory file of the department that relates to firefighter misconduct

is generally confidential under section 143.1214, we note that the information you wish to withhold under this section consists of a 9-1-1 recording and transcript, a police department incident report and a police department investigation file. Because the Houston Police Department is conducting a criminal investigation, the information at issue is also maintained independently, separate and apart from the department's personnel files. The city may not engraft the confidentiality afforded to records under section 143.1214 to records that exist independently of the internal files. Accordingly, the city may not withhold the information at issue under section 552.101 of the Government Code in conjunction with section 143.1214 of the Local Government Code. We will therefore consider your remaining arguments against disclosure.

Section 552.108(a) of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime." Gov't Code 552.108(a)(1). Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state that the requested 9-1-1 recording, transcript, police report, and investigation file relate to a pending criminal investigation by the Houston Police Department. Based upon this representation, we conclude section 552.108(a)(1) is applicable and the release 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).

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. Thus, with the exception of the basic front page offense information, you may withhold the 9-1-1 recording, transcript, police report, and investigation file from disclosure based on section 552.108(a)(1).[2]

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. 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); *see also* Open Records Decision No. 538 at 1-2 (1990).

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[2]As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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 that section 552.111 excepts 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. *See id.*; *see also City of Garland v. The 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. *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).

Section 552.111 can also encompass communications between a governmental body and a third-party, including a consultant or other party with a privity of interest. *See* Open Records Decision No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See* ORD 561 at 9.

You assert the remaining information includes "memoranda and correspondence between city officials and city employees that consist of advice, opinions and recommendations pertaining to various aspects of [the department]'s All-Hazards Response Program." You further state the communications include analysis and comments that relate to the ongoing development of the program. Based on your representations and our review, we find the city may withhold the information we have marked under section 552.111 of the Government Code. However, we find you have failed to demonstrate how the city shares a privity of interest or common deliberative process with some of the individuals in the remaining communications. Additionally, we note that some of the remaining communications consist of general administrative and purely factual information. Thus, we find you have not demonstrated how these communications consist of advice, opinions, or recommendations pertaining to policymaking matters of the city. Accordingly, we conclude the city may not withhold any of the remaining information under section 552.111 of the Government Code.

Section 552.117 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 of the Government Code.[3] Gov't Code § 552.117(a). 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). Therefore, the city may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. 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). The remaining information contains the cellular telephone number of a department employee. To the extent that the employee timely elected to keep such information confidential under section 552.024 and the cellular telephone number is paid for with personal funds, the city must withhold the information we have marked under section 552.117 of the Government Code. If the employee did not make a timely election under section 552.024 or the cellular telephone number was not paid for with personal funds, the city may not withhold the information we have marked under section 552.117 of the Government Code.

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 owner of the e-mail address consents to its release or the e-mail address falls within the scope of section 552.137(c). *See* Gov't Code § 552.137(a)-(c). Section 552.137 is not applicable to the work e-mail address of an employee of a governmental body because such an address is not that of the employee as a "member of the public" but is instead the address of the individual as a government employee. The city must withhold the e-mail address we have marked under section 552.137 of the Government Code unless the owner affirmatively consents to its public disclosure.[4]

In summary, with the exception of the basic front page offense information, the city may withhold the 9-1-1 recording, transcript, police report, and investigation file under section 552.108(a)(1). The city may withhold the information we have marked under section 552.111. To the extent the employee made a timely election under section 552.024

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[3]The 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).

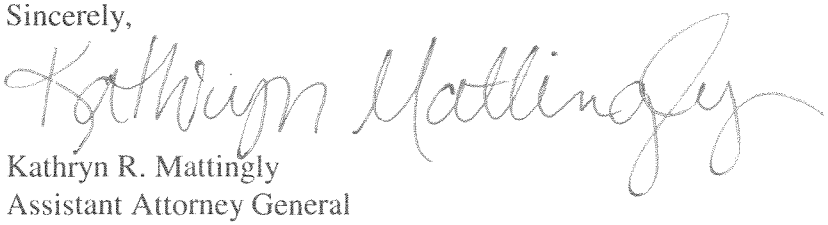
[4]We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an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

and the cellular telephone number is paid for with personal funds, the city must withhold the information we have marked under section 552.117 of the Government Code. The city must withhold the e-mail address we have marked under section 552.137 of the Government Code. 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,



Kathryn R. Mattingly
Assistant Attorney General
Open Records Division

KRM/sdk

Ref: ID# 442346

Enc. Submitted documents

c: 4 Requestors
(w/o enclosures)