



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 8, 2014

Ms. Leslie O. Haby
Assistant City Attorney
Office of the City Attorney
City of San Antonio
P.O. Box 839966
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OR2014-18044

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# 538686 (COSA File Nos. W029617-070814 and W029982-071814).

The City of San Antonio (the "city") received two requests from different requestors for all documents related to a specified complaint, including audio recordings associated with the complaint. You state you will release some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107 and 552.111 of the Government Code. We have also received and considered comments from AT&T Services, Inc. ("AT&T") and counsel for an individual whose information is at issue. *See* Gov't Code § 552.304 (permitting interested third party to submit to attorney general reasons why requested information should or should not be released). We have considered the submitted arguments and reviewed the submitted representative sample of information.¹

¹We 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 that those records contain substantially different types of information than that submitted to this office.

The city asserts portions of the submitted information are excepted from disclosure under section 552.107(1) of the Government Code, which 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 assert the information you have marked constitutes or documents communications between city employees and attorneys for the city that were made for the purpose of facilitating the rendition of professional legal services to the city. You also state the communications at issue were intended to be confidential and have remained confidential. Upon review, we find you have demonstrated some of the information you have marked constitutes or documents privileged attorney-client communications. However, the information we have marked for release consists of communications between the city and parties you have not established are privileged parties. Thus, this information may not be withheld under section 552.107(1). Nevertheless, the city may generally withhold the

remaining information you have marked under section 552.107(1) of the Government Code. We further 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. If these e-mails are removed from the privileged e-mail string and stand alone, they are responsive to the request for information. Thus, to the extent these non-privileged e-mails, which we have marked, exist separate and apart from the otherwise privileged e-mail strings, they may not be withheld under section 552.107(1).

In that event, we address the information you have marked under section 552.111 and we have marked as not-privileged. Section 552.111 of the Government Code excepts from disclosure “[a]n 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, writ ref’d n.r.e.); 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 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.

Further, section 552.111 can encompass communications between a governmental body and 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), 563 at 5-6 (1990) (private entity engaged in joint project with governmental body may be regarded as its consultant), 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 argue the information at issue consists of advice, opinions, or recommendations used in policymaking decisions. However, we find the information at issue consists of communications with a third party with whom you have not demonstrated the city shares a privity of interest or common deliberative process. Thus, we find you have failed to demonstrate how the information at issue is excepted under section 552.111. Accordingly, the information at issue may not be withheld under section 552.111 of the Government Code.

The city and AT&T each assert portions of the submitted information are excepted from disclosure under the doctrine of common-law privacy. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 of the Government Code encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) 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 satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. AT&T cites to *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) to support its argument under common-law privacy for the submitted recordings. In *Ellen*, the court addressed the applicability of common-law privacy to information relating to an investigation of alleged sexual harassment in an employment context. In this instance, the information at issue does not consist of a sexual harassment

investigation in an employment context. Therefore, the common-law privacy protection afforded in *Ellen* is not applicable to the information at issue. Furthermore, we find none of the remaining information is highly intimate or embarrassing and not of legitimate public concern. Accordingly, the city may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

We understand AT&T to argue generally under section 552.101 of the Government Code that the information related to the EEOC complaint should be withheld from disclosure because the "premature disclosure of unverified information could unfairly prejudice AT&T." However, AT&T has not directed our attention to any state or federal statute, nor are we aware of any such statute, that would make this information confidential under these conditions. *See, e.g.*, Open Records Decision No. 478 at 2 (1987) (statutory confidentiality). As such, no portion of the information at issue may be withheld under section 552.101 on that basis.

AT&T also claims the information related to the EEOC complaint is confidential under federal laws applicable to the EEOC. This office has determined section 552.101 of the Government Code can encompass a federal statute or regulation enacted pursuant to statutory authority, such as section 2000e-5 of title 42 of the United States Code. *See* Open Records Decision No. 476 (1987) (addressing statutory predecessor to Gov't Code § 552.101). We also have concluded, however, that the confidentiality provisions of the federal laws applicable to the EEOC apply only when the information at issue is held by the EEOC. *See* Open Records Decision Nos. 245 at 2 (1980) (City of Rio Hondo may not withhold information under section 2000e-5 or 2000e-7 of title 42 of the United States Code), 155 at 2 (1977) (City of Austin may not withhold information under section 2000e-5), 59 at 2 (1974) (Dallas County may not withhold information under section 2000e-8). Likewise, a federal court has held that Title VII of the Civil Rights Act of 1964, section 20004 of title 42 of the United States Code, proscribes the release of information when it is held by the EEOC or EEOC employees but does not prevent an employer from releasing information. *See Whitaker v. Carney*, 778 F.2d 216, 221-22 (5th Cir. 1985). In this instance, the information at issue is held by the city and not by the EEOC or its employees. We therefore conclude the city may not withhold any of the information at issue under section 552.101 of the Government Code in conjunction with federal law.

AT&T also raises section 16.02 of the Penal Code and section 2511 of title 18 of the United States Code for some of the information at issue. Section 552.101 of the Government Code also encompasses section 2511 of title 18 of the United States Code, which provides, in pertinent part:

- (1) Except as otherwise specifically provided in this chapter any person who[:]

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication; [or]

....

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection[.]

....

shall be punished as provided in [this section.]

18 U.S.C. § 2511(1)(a), (c). In addition, section 552.101 encompasses section 16.02 of the Penal Code, which provides, in relevant part:

(b) A person commits an offense if the person:

(1) intentionally intercepts, endeavors to intercept, or procures another person to intercept or endeavor to intercept a wire, oral, or electronic communication; [or]

(2) intentionally discloses or endeavors to disclose to another person the contents of a wire, oral, or electronic communication if the person knows or has reason to know the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection[.]

Penal Code § 16.02(b)(1), (2); *see also* Crim. Proc. Code § 18.20 (defining “wire communication,” “oral communication,” and “electronic communication” for purposes of section 16.02 of the Penal Code). AT&T argues the recordings at issue were recorded without the consent of the communicating parties and, as such, are made confidential under both statutes. However, upon review, we conclude AT&T has not established either section 2511 of title 18 of the United States Code or section 16.02 of the Penal Code has been violated. Without a clear violation of section 2511(1)(a) of title 18 of the United States Code, we cannot find section 2511(1)(c) of title 18 of the United States Code is applicable in this instance. Similarly, without a clear violation of section 16.02(b)(1) of the Penal Code, we cannot find section 16.02(b)(2) of the Penal Code is applicable. Accordingly, the city may not withhold the recordings at issue under section 552.101 in conjunction with either section 2511 of title 18 of the United States Code or section 16.02 of the Penal Code.

AT&T also raises section 123.002 of the Civil Practice and Remedies Code for some of the information at issue. Section 552.101 also encompasses section 123.002(a)(2) of the Texas Civil Practice and Remedies Code. Section 123.002 provides, in pertinent part:

(a) A party to a communication may sue a person who:

...

(2) uses or divulges information that he knows or reasonably should know was obtained by interception of the communication[.]

Civ. Prac. & Rem. Code § 123.002(a)(2). We note section 123.002(a)(2) provides a cause of action for a party to a communication against an individual who uses or divulges information obtained from intercepted communications. *See id.* However, section 123.002(a)(2) does not make information confidential for the purposes of section 552.101 of the Government Code. *See Open Records Decision No. 478 at 2 (1987)* (as general rule, statutory confidentiality requires express language making information confidential); *see also Open Records Decision No. 658 at 4 (1998)* (statutory confidentiality provision must be express, and confidentiality requirement will not be implied from statutory structure). Therefore, the city may not withhold any portion of the information at issue under section 552.101 in conjunction with section 123.002(a)(2).

We note some of the remaining information consists of personal e-mail addresses subject to section 552.137 of the Government Code.² Section 552.137 of the Government Code 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). Gov’t Code § 552.137(a)–(c). Accordingly, 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 affirmatively consent to their release.

In summary, except for the information we have marked for release, the city may generally withhold the information you have marked under section 552.107 of the Government Code; however, if the non-privileged e-mails we have marked are maintained by the city separate and apart from the otherwise privileged e-mail strings in which they appear, then the city may not withhold these non-privileged e-mails. The city must withhold the information we have marked under section 552.137 of the Government Code. The remaining information must be released.

²The 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).*

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Joseph Behnke
Assistant Attorney General
Open Records Division

JB/som

Ref: ID# 538686

Enc. Submitted documents

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(w/o enclosures)

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