



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 15, 1997

Ms. Lan P. Nguyen
Assistant City Attorney
Legal Department
City of Houston
P.O. Box 1562
Houston, Texas 77251-1562

OR97-1108

Dear Ms. Nguyen:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 105726.

The City of Houston (the "city") received a request for information relating to the Houston Fire Department's investigation of the death of a volunteer fire fighter. You state that the city is making available much of the information requested, but assert that a portion of the information is excepted from disclosure pursuant to section 552.111 of the Government Code.

Initially, you state that there exists no document directly responsive to item number 3 of the request. Chapter 552 of the Government Code does not require a governmental body to make available information which did not exist at the time the request was received. Open Records Decision No. 362 (1983); *see* Open Records Decision No. 452 (1986) (document not within chapter 552's purview if it does not exist when governmental body receives a request for it). Nor is a governmental body required to prepare new information to respond to a request for information. Open Records Decision No. 605 (1992), 572 (1990), 416 (1984). However, a governmental body has a duty to make a good faith effort to relate a request for information to information the governmental body holds. Open Records Decision No. 561 (1990) at 8. If the city holds information from which the requested information can be obtained, it must provide that information to the requestor unless it is otherwise excepted from disclosure. You have provided information you deem responsive to item number 3 of the request and thus we will address your argument under section 552.111.

Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision

No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. The exception also protects drafts of a document that has been or will be released in final form and any comments on the draft because they necessarily represent the advice and opinions of the drafter as to the form and content of the final document. *See* Open Records Decision No. 559 (1990). Section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. Open Records Decision No. 615 (1993) at 4-5. While certain information in the submitted documents contain advice or opinions related to the policy functions of the Houston Fire Department, or are drafts of documents that will be released in final form, most of the information contained in these documents is purely factual or investigatory in nature and thus not protected by section 552.111. *See id.* at 4 (noting that federal courts interpreting exemption 5 of federal Freedom of Information Act, upon which section 552.111 is based, found that privilege did not apply to "investigatory or other factual" information.) We have marked that portion of the submitted information that may be withheld from required public disclosure under section 552.111. (See yellow tags). The remaining information must be released, with the following exceptions.

We note certain documents submitted to this office contain the addresses and home telephone numbers of city firefighters. Section 552.117(1) of the Government Code requires that the department withhold its employees' and former employees' home addresses, telephone numbers, and social security numbers, and information that reveals whether the employee or former employee has family members, but only to the extent that the employees and former employees have elected to keep this information confidential in compliance with section 552.024. *See* Open Records Decision No. 530 (1989) (employee must make election prior to receipt of open records request). Section 552.117(2) requires that the city withhold its peace officers' home addresses, telephone numbers, and social security numbers, and information that reveals whether the peace officer has family members, without regard to whether an election was made under section 552.024. In this regard, we note that Art. 2.12(7) of the Code of Criminal Procedure provides that each member of an arson investigating unit commissioned by a city, a county, or the state is a peace officer for purposes of that statute. Thus, to the extent any of the firefighters whose addresses, telephone numbers or social security numbers appear in the information to be released are peace officers, the city must withhold this information. Otherwise, it must withhold this information if the employee has made the election under section 552.024.¹ We have marked

¹If the firefighters are not peace officers and have not made the election under section 552.024, we note federal law may prohibit disclosure of the employees' social security numbers. A social security number is excepted from required public disclosure under section 552.101 of the act in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). We note that the federal statute provides that the law requiring the maintenance of the employee's social security number must have been enacted on or after October 1, 1990. In other words, the fact that the social security number was obtained after October 1, 1990 by itself does not dispose of the issue. Based on the information you have

representative samples of the types of information to be withheld under section 552.117. (See red tags).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/ch

Ref.: ID# 105726

Enclosures: Marked documents

cc: Mr. Steve Bivens
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provided, we are unable to determine whether the social security numbers are confidential under this federal statute. We note, however, that section 552.352 of the Open Records Act imposes criminal penalties for the release of confidential information.

100

