



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 24, 2007

Mr. Hugh Coleman
Hayes, Berry, White & Vanzant, L.L.P.
For the Town of Hickory Creek
P.O. Box 50149
Denton, Texas 76206

OR2007-11092

Dear Mr. Coleman:

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# 287828.

The Town of Hickory Creek (the "town") received a request for twenty-two categories of information pertaining to town employees. You state that you have released portions of the responsive information. You state that the town does not maintain information responsive to four of the requested categories. You claim that the submitted information pertaining to e-mails, letters, notes, and personal correspondence is excepted from disclosure under sections 552.109, 552.111, and 552.137 of the Government Code. You claim that the submitted information pertaining to complaints or investigations is excepted from disclosure under section 552.101 of the Government Code. You claim that the submitted information pertaining to a town employee's personal information is excepted under section 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.109 of the Government Code protects "[p]rivate correspondence and communications of an elected office holder relating to matters the disclosure of which would constitute an invasion of privacy [.]". See Gov't Code § 552.109. In determining whether information is excepted from disclosure by section 552.109, this office relies on the same common law privacy test applicable under section 552.101 of the Government Code. See Open Records Decision Nos. 506 (1988), 241 (1980), 212 (1978); see also Open Records Decision No. 40 (1974) (providing that statutory predecessor to section 552.109 may protect

content of information, but not fact of communication). This office has also concluded that section 552.109 protects the privacy interest of the elected officials and not the interests of their correspondents. *See* Open Records Decision Nos. 473 at 3 (1987), 332 at 2 (1982).

Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and 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. You request that the town “be allowed to withhold any correspondence/documents that may contain information considered to be covered by common law privacy or federal statute.” However, you do not identify which portions of the submitted information implicate the common law right to privacy of any of the individuals at issue. Gov’t Code § 552.301(e)(2) (stating that governmental body must properly label submitted information to indicate which exceptions apply). Furthermore, you have not provided any specific arguments as to why any portion of the submitted information is intimate or embarrassing. Moreover, all of the submitted information pertains to town business or the performance of town employees, which is clearly of legitimate concern to the public. *See* Open Records Decision Nos. 470 (1987) (public employee’s job performance does not generally constitute his private affairs), 455 (1987) (public employee’s job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). Therefore, we find that none of the submitted information implicates the privacy rights of elected officials, and thus, no portion of the submitted information may be withheld under section 552.109 of the Government Code.

Next, we turn to your claim under section 552.111. Section 552.111 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” and 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); 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 that 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). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5.

Section 552.111 can also encompass communications between a governmental body and a third-party consultant. See Open Records Decision Nos. 631 at 2 (1995) (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 assert that the town requests to withhold any documents that relate to advice given to council members from staff. However, you have not identified any of the parties to the communications as town council members or staff. Section 552.111 only protects the advice, opinion, and recommendations of governmental employees as policymakers. See ORD 615 at 5. Upon review, most of the documents are complaints submitted by citizens, town employees and officials acting in a personal capacity. In instances where the submitted information does appear to consist of advice, opinion, or recommendation, you have not explained, nor are we able to discern, how the advice, opinion, or recommendation relate to any specific town policy. Thus, you have failed to demonstrate that much of the submitted information consists of advice, opinion, or recommendations related to town policies. Therefore, the town may only withhold under section 552.111 the information on the document we have marked that on its face contains the advice of the town's attorney on a policy matter.

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses the informer's privilege, which has long been recognized by Texas courts. See *Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). It protects from disclosure the identities of persons who report activities over which the governmental body

has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. *Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978)*. The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." *Open Records Decision No. 279 at 2 (1981)* (citing *Wigmore, Evidence*, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988)*. The privilege excepts the informer's statement only to the extent necessary to protect that informer's identity. *Open Records Decision No. 549 at 5 (1990)*.

You state "this privilege recognizes the obligation of citizens to communicate their knowledge of problems to officials, and by preserving their anonymity protects them [sic]." However, you have not claimed any of the individuals at issue have reported any violation of any criminal or civil statute to any individual in a law enforcement capacity or to an administrative official having a duty of inspection or of law enforcement over the matter. Accordingly, we find that you have not established that the informers' privilege applies in this instance, and thus, none of the submitted information may be withheld under section 552.101 of the Government Code in conjunction with the common-law informer's privilege.

Next, you seek to withhold certain information under section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, 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. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is received. *See Open Records Decision No. 530 at 5 (1989)*. Therefore, the town 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 received. In this case, you do not inform us or provide documentation showing that the employees whose records are at issue timely elected confidentiality under section 552.024. Thus, if the employees timely elected to keep their personal information confidential, you must withhold this information, which we have marked, under section 552.117(a)(1) of the Government Code. The town may not withhold this information under section 552.117(a)(1) if the employees did not make a timely election to keep their information confidential.

Lastly, we turn to your argument that the submitted information also contains e-mail addresses that are excepted from disclosure under section 552.137 of the Government Code. Section 552.137 provides as follows:

(a) Except as otherwise provided by this section, 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 this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

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

(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;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

Gov't Code § 552.137(a)-(c). You do not inform us that members of the public have affirmatively consented to release of their e-mail addresses. Therefore, the town must withhold the e-mail addresses we have marked under section 552.137. However, we note that e-mail addresses that pertain to the town's attorneys and individuals who have a contractual relationship with the town may not be withheld. *See Id.* § 552.137(c)(1). Furthermore, e-mail addresses of governmental bodies may not be withheld under section 552.137. Lastly, we note that the requestor has a right of access to his own e-mail address pursuant to section 552.023 of the Government Code.

In summary, the town may withhold the information we have marked under section 552.111 of the Government Code. The information pertaining to town employees, which we have marked, must be withheld if the individuals in question timely elected to keep their personal information confidential under section 552.024 of the Government Code. The personal e-mail addresses of individuals who do not have contractual relationships with the town must

be withheld in accordance with section 552.137 of the Government Code. The remaining information must be released to the requestor.¹

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

¹We note that the submitted information contains a social security number. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "M. Alan Akin". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

M. Alan Akin
Assistant Attorney General
Open Records Division

MAA/mcf

Ref: ID# 287828

Enc. Submitted documents

c: Mr. Randy Wahl
1688 Turbeville Road
Hickory Creek, Texas 75065
(w/o enclosures)