



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

March 5, 2009

Mr. K. Jefferson Bray  
Senior Legal Advisor  
Plano Police Department  
P.O. Box 860358  
Plano, Texas 75086-0358

OR2009-02928

Dear Mr. Bray:

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# 336422.

The Plano Police Department (the "department") received seven requests from the same requestor for information pertaining to department employees. You claim that some of the requested information is not subject to the Act. You also claim that portions of the requested information are excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.111, 552.117, 552.137, and 552.147 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the

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<sup>1</sup>Although you initially raised sections 552.102, 552.109, 552.110, 552.119, 552.130, 552.132, 552.136, 552.139, 552.140, 552.142, 552.1425, and 552.148 of the Government Code as exceptions to the disclosure of some of the submitted information, you have provided no arguments regarding the applicability of these sections. Thus, we assume that you no longer urge these sections. *See* Gov't Code §§ 552.301(b), (e), .302. Although you raise section 552.1175 of the Government Code for some of the submitted information, we note that section 552.117(a)(2) of the Government Code is the applicable exception for that type of information. Further, although you raise Texas Rule of Civil Procedure 192.5, we note that, in this instance, the proper exception to raise when asserting the attorney work product privilege for information not subject to section 552.022 is section 552.111. *See* Open Records Decision Nos. 677 (2002), 676 at 6 (2002).

submitted representative sample of information.<sup>2</sup> We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (providing that any person may submit comments stating why information should or should not be released).

Initially, we must address your assertion that the requests for information were improper requests. Section 552.301(c) of the Government Code provides that "a written request includes a request made in writing that is sent to the officer for public information, or the person designated by that officer, by electronic mail or facsimile transmission." Gov't Code § 552.301(c). You argue that because the e-mail requests were made to the senior legal advisor and a sworn police public information officer of the department, instead of the custodian of records, the December 4, 2008 e-mail requests were not proper written requests, and therefore did not require the department to respond. We note, however, that although the department was not required to respond, the department did treat the requests for information as proper written requests and subsequently requested a decision from our office under the Act. Accordingly, we will rule on the submitted information.

Next, you claim that the submitted e-mails within Exhibit G are not subject to the Act. The Act is only applicable to "public information." *See* Gov't Code § 552.021. Section 552.002(a) defines public information as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." *Id.* § 552.002(a). Information that is collected, assembled, or maintained by a third party may be subject to disclosure under the Act if it is maintained for a governmental body, the governmental body owns or has a right of access to the information, and the information pertains to the transaction of official business. *See* Open Records Decision No. 462 (1987).

After reviewing the e-mails at issue, we agree that the e-mails within Exhibit G do not constitute "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by or for the department. *See* Gov't Code § 552.021; *see also* Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). Thus, we conclude that Exhibit G is not subject to the Act, and need not be released.

We note that some of the submitted information, which we have marked, is not responsive to the instant request because it was created after the time the department received the

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<sup>2</sup>We assume that 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.

request for information. The department need not release non-responsive information in response to this request, and this ruling will not address that information.

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. This exception encompasses information that other statutes make confidential. You raise section 552.101 in conjunction with the Americans with Disabilities Act of 1990 (the "ADA"). See 42 U.S.C. § 12101 *et seq.* Title I of the ADA provides that information about the medical conditions and medical histories of applicants or employees must be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. Information obtained in the course of a "fitness for duty examination" conducted to determine whether an employee is still able to perform the essential functions of his or her job is to be treated as a confidential medical record as well. See 29 C.F.R. § 1630.14(c); see also Open Records Decision No. 641 (1996). Furthermore, the federal Equal Employment Opportunity Commission (the "EEOC") has determined that medical information for the purposes of the ADA includes "specific information about an individual's disability and related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual." See Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997). Federal regulations define "disability" for the purposes of the ADA as "(1) a physical or mental impairment that substantially limits one or more of the major life activities of the individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment." 29 C.F.R. § 1630.2(g). The regulations further provide that physical or mental impairment means: (1) any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. See *id.* § 1630.2(h). Upon review of the submitted information, we conclude that the information we have marked in Exhibits C and H is confidential under section 552.101 of the Government Code in conjunction with the ADA. However, the department has failed to demonstrate the ADA is applicable to any portion of the remaining submitted information, and none of the remaining information may be withheld under section 552.101 on that basis.

You assert that some of the information included within Attachment C constitutes medical records subject to the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides the following:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b),(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See* Open Records Decision No. 598 (1991). Medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). We have marked the medical records that are confidential under the MPA. Accordingly, the department may only disclose the marked records in accordance with the MPA. Upon review, we find that none of the remaining information consists of medical records that are subject to the MPA. Thus, we conclude the department may not withhold any portion of the remaining information under section 552.101 in conjunction with the MPA

Section 552.101 also encompasses the Texas Homeland Security Act, sections 418.176 through 418.182 of chapter 418 of the Government Code. These provisions make certain information related to terrorism confidential.

Section 418.177 provides:

Information is confidential if the information:

- (1) is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity; and
- (2) relates to an assessment by or for a governmental entity, or an assessment that is maintained by a governmental entity, of the risk or vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity.

Section 418.180 provides:

Information, other than financial information, in the possession of a governmental entity is confidential if the information:

- (1) is part of a report to an agency of the United States;

(2) relates to an act of terrorism or related criminal activity; and

(3) is specifically required to be kept confidential:

(A) under Section 552.101 because of a federal statute or regulation;

(B) to participate in a state-federal information sharing agreement; or

(C) to obtain federal funding.

Gov't Code §§ 418.177, 180. The fact that information may relate to a governmental body's security concerns does not make the information *per se* confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provisions controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the Texas Homeland Security Act must adequately explain how the responsive records fall within the scope of the claimed provision. *See id.* § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies); Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection).

In this instance, you state that the information in Exhibit F "is sensitive anti-terrorism and homeland security information," and that the information at issue "relates to an act of terrorism or related criminal activity." Based on your representations and our review, we find that the Federal Bureau of Investigation homeland security alert bulletin we have marked consists of an assessment by a governmental entity of the risk or vulnerability of persons to an act of terrorism or related criminal activity. We therefore conclude that the Federal Bureau of Investigation homeland security alert bulletin in Exhibit F must be withheld under section 552.101 in conjunction with section 418.177 of the Texas Homeland Security Act.

You also state that the remaining information in Exhibit F must be withheld under section 18.180 of the Texas Homeland Security Act. However, upon review, we find that you have failed to adequately explain how the remaining information in Exhibit F falls within the scope of section 418.180. We therefore determine that the department may not withhold any of the submitted information under section 552.101 in conjunction with section 418.180 of the Texas Homeland Security Act.

Next, you seek to withhold the submitted information within Exhibit J under section 552.101 in conjunction with section 143.089(g) of the Local Government Code. You indicate that the City of Plano (the "city") is a civil service city under chapter 143 of the Local Government Code. Section 143.089 contemplates two different types of personnel files: a

file that must be maintained by the city's civil service director or the director's designee, and another file that may be maintained by the city's police department for its own use. Local Gov't Code § 143.089(a), (g). Information maintained in a police department's personnel file pursuant to section 143.089(g) is confidential and must not be released. *City of San Antonio v. Tex. Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

In cases in which a police department investigates a police officer's misconduct and takes disciplinary action against an officer, it is required by section 143.089(a)(2) to place all investigatory records relating to the investigation and disciplinary action, including background documents such as complaints, witness statements, and documents of like nature from individuals who were not in a supervisory capacity, in the police officer's civil service file maintained under section 143.089(a). *See Abbott v. City of Corpus Christi*, 109 S.W.3d 113, 122 (Tex. App.—Austin 2003, no pet.). All investigatory materials in a case resulting in disciplinary action are "from the employing department" when they are held by or in possession of the department because of its investigation into a police officer's misconduct, and the department must forward them to the civil service commission for placement in the civil service personnel file. *Id.* Such records are subject to release under the Act. *See* Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990).

However, a document relating to a police officer's alleged misconduct may not be placed in the officer's civil service personnel file if there is insufficient evidence to sustain the charge of misconduct or if the disciplinary action was taken without just cause. *See* Local Gov't Code § 143.089(b)-(c). Moreover, information that is reasonably related to a police officer's employment relationship with the police department and that is maintained in a police department's internal file under section 143.089(g) of the Local Government Code is confidential and must not be released. *See id.* § 143.089(g); *City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, pet. denied); *City of San Antonio v. Tex. Attorney General*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You seek to withhold Exhibit J under section 143.089(g) of the Local Government Code. However, Exhibit J consists of e-mails maintained by the department for purposes beyond the evaluation of police department personnel. This information is clearly maintained elsewhere than a police officer's personnel file, and the department may not engraft the confidentiality afforded to records under section 143.089(g) to other records that exist independently of departmental personnel files. Accordingly, we conclude that the department may not withhold Exhibit J under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code.

We note that some of the remaining information in Exhibits C and I is protected from public disclosure under common-law privacy. Section 552.101 encompasses common-law privacy, which protects information that (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 satisfied. *Id.* at 681-82. The types 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. In addition, this office has found that medical information or information indicating disabilities or specific illnesses is excepted from required public disclosure under common-law privacy. See Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we find that the information we have marked within Exhibits C and I are protected by common-law privacy. Accordingly, the department must withhold this information under section 552.101 of the Government Code. We do not find, however, that any portion of the remaining information is highly intimate or embarrassing information of no legitimate public interest. Therefore, none of the remaining information is confidential under common-law privacy, and the department may not withhold it on that basis.

Section 552.101 also encompasses the common-law informer's privilege, which Texas courts have long recognized. See *Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). The informer's privilege protects 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. See Open Records Decision Nos. 515 at 3 (1998), 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." See 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 the informer's identity. See Open Records Decision No. 549 at 5 (1990). You raise the informer's privilege for Exhibit K, which consists of a complaint regarding a police officer's response to a disturbance call. Although it references a hit and run, you have failed to demonstrate how the complaint reports a violation that could result in the imposition of a civil or criminal penalty by the department. Accordingly, you have not demonstrated that the informer's privilege is applicable to any portion of the submitted information. Thus, we conclude that the department may not withhold any information under section 552.101 of the Government Code in conjunction with the informer's privilege.

Next, you assert that Exhibit C is excepted from disclosure under section 552.103 of the Government Code. Section 552.103 of the Governmental Code provides as follows:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the

state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body that claims an exception to disclosure under section 552.103 of the Government Code has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The district must satisfy both prongs of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.<sup>3</sup> Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

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<sup>3</sup>Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

In support of your assertion that you anticipate litigation, you indicate that the department currently has an employee on extended medical leave, and that the wording of the request indicates the requestor may file suit against the department. However, you have failed to demonstrate that the requestor represents the employee at issue or that the requestor has taken any objective steps towards filing litigation related to this employee. You also argue that the requestor has threatened to pursue a pre-litigation deposition against the department pursuant to Rule 202 of the Texas Rules of Civil Procedure. *See* Tex. R. Civ. P. 202. However, the submitted information indicates that the threatened Rule 202 deposition pertains to the handling of a previous request by the department. You have failed to otherwise explain how the information in Exhibit C is related to the Rule 202 deposition. Accordingly, we conclude you have failed to establish that 522.103 is applicable to any portion of Exhibit C, and it may not be withheld on that basis.

You also assert that some of the submitted information is excepted from public disclosure pursuant to section 552.107 of the Government Code. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. 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 Texas 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 only to communications between or among clients, client representatives, lawyers, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* TEX. R. EVID. 503(b)(1)(A)-(E). 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 only to a confidential communication, *id.* 503(b)(1), 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, no writ). 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 state that the e-mails within Exhibits D and M constitute communications between department employees and staff of the Plano City Attorney's Office that were made for the purpose of providing legal advice to the department. You state that these communications were made in confidence and have maintained their confidentiality. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information we have marked under section 552.107. Accordingly, the department may withhold the information we have marked under section 552.107 of the Government Code. However, you have not identified a party to a communication contained in Exhibit M. Further, we note that another communication within Exhibit M indicates it is between department staff and outside parties. Thus, we conclude you have failed to establish that the e-mails we have marked for release constitute privileged communications. Accordingly, we find that you have failed to demonstrate the applicability of the attorney-client privilege to this information and it may not be withheld under section 552.107 of the Government Code. *See Tex. R. Evid. 511.*

Section 552.108(a) 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 id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state that some of the submitted information in Exhibit L relates to pending criminal investigations. Based upon this representation, we find that the release of the information we have marked 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), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). Therefore, we find that the department may withhold the information we have marked within Exhibit L under section 552.108(a)(1) of the Government Code. You have failed to explain, however, how a portion of the information you seek to withhold pertains to the detection, investigation, or prosecution of crime. *See Gov't Code § 552.301(e)(1)(A)* (providing that governmental body must provide sufficient arguments to establish applicability of claimed exceptions). Therefore, the department may not withhold the information, which we have marked for release, under section 552.108.

Next, you claim that the cellular telephone and pager numbers of police officers included in Exhibit L, are excepted from disclosure under section 552.108. Section 552.108(b)(1) excepts from required public disclosure an internal record of a law enforcement agency maintained for internal use in matters relating to law enforcement or prosecution if "release

of the internal record or notation would interfere with law enforcement or prosecution.” *Id.* § 552.108(b)(1). A governmental body that seeks to withhold information under section 552.108(b)(1) must sufficiently explain how and why the release of the information would interfere with law enforcement and crime prevention. *See id.* § 552.301(e)(1)(A); *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.) (section 552.108(b)(1) protects information that, if released, would permit private citizens to anticipate weaknesses in police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws); Open Records Decision Nos. 562 at 10 (1990), 531 at 2 (1989). In Open Records Decision No. 506 (1988), this office determined that the statutory predecessor to section 552.108(b) excepted from disclosure “cellular mobile phone numbers assigned to county officials and employees with specific law enforcement responsibilities.” *Id.* at 2. We noted that the purpose of the cellular telephones was to ensure immediate access to individuals with specific law enforcement responsibilities and that public access to these numbers could interfere with that purpose. *Id.* You assert that the release of the cellular telephone and pager numbers would interfere with law enforcement. Based on your representations and our review of the information at issue, we conclude that the department may withhold the cellular telephone and pager numbers we have marked under section 552.108(b)(1) of the Government Code.

You assert section 552.111 for information included within Exhibit N. 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 (1993), 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 No. 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.

You state that the information within Exhibit N consists of the advice, opinions, and recommendations of city employees involving city policymaking matters. Upon review of your representations and the information at issue, we agree that some of the information

included in Exhibit N consists of the advice, opinions, or recommendations of a city employee regarding policymaking matters. However, you have failed to establish that the remaining information, which consists of general factual and administrative information, consists of advice, opinions, or recommendations for purposes of section 552.111. Therefore, section 552.111 is not applicable to the remaining information in Exhibit N. Accordingly, the department may only withhold the information we have marked within Exhibit N under section 552.111 of the Government Code.

You argue that portions of the remaining information are excepted from public disclosure under section 552.117 of the Government Code. Section 552.117(a)(2) excepts from disclosure the home address and telephone number, social security number, and family member information of a peace officer, regardless of whether the peace officer made an election under sections 552.024 or 552.1175 of the Government Code. Gov't Code § 552.117(a)(2).<sup>4</sup> We note, however, that the protection afforded by section 552.117 does not extend to information relating to a deceased family member. *Cf.* Attorney General Opinions JM-229, H-917 (1976) (“We are . . . of the opinion that the Texas courts would follow the almost uniform rule of other jurisdictions that the right of privacy lapses upon death.”); Open Records Decision No. 272 (1981). You state that the information you seek to withhold under section 552.117 relates to department peace officers. Accordingly, the department must withhold the information we have marked under section 552.117 of the Government Code.

We also note that a portion of the information pertains to a former peace officer that is deceased. Because the protection afforded by section 552.117 includes “current or former” officials or employees, the protection generally does not lapse at death. Accordingly, you must withhold the information pertaining to a peace officer, which we have marked, under section 552.117(a)(2). However, section 552.117 is not applicable to any of the remaining information you have marked, and this information may not be withheld under section 552.117.

We note that a portion of the remaining information includes Texas motor vehicle record information excepted from public disclosure under section 552.130 of the Government Code. Section 552.130 excepts from disclosure information that relates to a motor vehicle operator’s or driver’s license or permit issued by an agency of this state. Gov’t Code § 552.130. Accordingly, the department must withhold the Texas motor vehicle record information we have marked under section 552.130 of the Government Code.

Next, you assert that some of the remaining information contains information that is subject to section 552.137 of the Government Code. This section 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 individual consents to its release or the

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<sup>4</sup>Section 552.117(a)(2) adopts the definition of peace officer found in article 2.12 of the Code of Criminal Procedure.

e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address. The e-mail address you have marked is not of a type specifically excluded by section 552.137(c). Thus, the department must withhold the e-mail address you have marked, along with the additional e-mail addresses we have marked, under section 552.137 of the Government Code.

You claim the social security number you have highlighted in Exhibit C is excepted from disclosure under section 552.147 of the Government Code. This section provides "[t]he social security number of a living person is excepted from" required public disclosure under the Act. *See* Gov't Code § 552.147. Therefore, the department may withhold the highlighted social security number under section 552.147.<sup>5</sup>

In summary, in conjunction with section 552.101, the department must withhold: (1) the information we have marked in Exhibits C and H under the ADA; (2) the information we have marked in Exhibit C under the MPA; (3) the Federal Bureau of Investigation homeland security alert bulletin in Exhibit F under section 418.177 of the Government Code and (4) the information we have marked within Exhibits C and I under common-law privacy. With the exception of the information we have marked for release, the department may withhold the information we have marked under section 552.107 of the Government Code. The department may withhold the information we have marked within Exhibit L under section 552.108(a)(1). The department may withhold the cellular telephone and pager numbers we have marked in Exhibit L under section 552.108(b)(1) of the Government Code. The information we have marked within Exhibit N may be withheld under section 552.111 of the Government Code. The department must withhold the information we have marked under section 552.117 of the Government Code. The Texas motor vehicle record information we have marked must be withheld under section 552.130 of the Government Code. The department must withhold the e-mail address you have marked, along with the additional e-mail addresses we have marked, under section 552.137 of the Government Code. The department may withhold the highlighted social security number under section 552.147. 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](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free,

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<sup>5</sup>We note that 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.

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 at (512) 475-2497.

Sincerely,



Christina Alvarado  
Assistant Attorney General  
Open Records Division

CA/cc

Ref: ID# 336422

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)