



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 13, 2009

Mr. Jesus Toscano, Jr  
Administrative Assistant City Attorney  
City of Dallas  
1500 Marilla Street, Room 7DN  
Dallas, Texas 75201

OR2009-09616

Dear Mr. Ernst:

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# 350029.

The City of Dallas (the "city") received a request for the following information: 1) e-mail communications to or from several named individuals regarding the convention center hotel from February 19, 2009 through May 5, 2009; 2) a list of all 9-1-1 calls made from a specified address from May 20, 2008 through May 5, 2009; and 3) all e-mail communications to or from several named individuals regarding "The Bridge (homeless assistance center)" from May 20, 2008 through May 5, 2009.<sup>1</sup> You state you will release some information to the requestor. You claim portions of the remaining requested information are excepted from disclosure under sections 552.101, 552.104, 552.107, 552.110, 552.111, 552.131, and 552.137 of the Government Code and privileged under Texas Rule of Evidence 503. You also state release of some of the requested information may implicate the proprietary interests of third parties.<sup>2</sup> You inform us, and have provided

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<sup>1</sup>You inform us, and provide documentation showing, that the city contacted the requestor who narrowed his request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

<sup>2</sup>Although you also seek to withhold some of the submitted information under section 552.305 of the Government Code, we note that section 552.305 is not an exception to disclosure. *See* Gov't Code § 552.305. Section 552.305 addresses the procedural requirements for notifying third parties that their interests may be affected by a request for information. *See id.*

documentation showing, you have notified these third parties of the request and of their opportunity to submit comments to this office as to why the requested information should not be released to the requestor.<sup>3</sup> See Gov't Code § 552.305(d); see also Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain the applicability of exception to disclose under Act in certain circumstances). We have considered the submitted arguments and reviewed the submitted representative samples of information.<sup>4</sup>

Initially, we note some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. (2009-09534). We presume that the facts and circumstances have not changed since the issuance of this prior ruling. To the extent the information at issue is identical to the information previously requested and ruled upon by this office, the city must withhold or release the information in accordance with Open Records Letter No. (2009-09534). See Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). For the information not previously requested and ruled upon by this office, we will address your arguments.

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 section encompasses information protected by other statutes, including chapter 772 of the Health and Safety Code, which authorizes the development of local emergency communication districts. Sections 772.118, 772.218, and 772.318 of the Health and Safety Code are applicable to emergency 9-1-1 districts established in accordance with chapter 772. See Open Records Decision No. 649 (1996). These sections make the originating telephone numbers and addresses of 9-1-1 callers furnished by a service supplier confidential. *Id.* at 2. Section 772.118 applies to an emergency communication district for a county with a population of more than two million. Section 772.218 applies to an emergency communication district for a county with a population of more than 860,000. Section 772.318 applies to an emergency communication district for a county with a population of more than 20,000.

We understand the city is part of an emergency communication district established under section 772.318. You have marked the addresses of 9-1-1 callers that the city seeks to

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<sup>3</sup>We understand the following third parties were notified: Citigroup Global Markets, Inc. ("Citigroup"), HVS Consulting ("HVS"), and Omni Hotels ("Omni").

<sup>4</sup>We assume the "representative samples" of records submitted to this office are 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.

withhold. We conclude the city must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 772.318 of the Health and Safety Code to the extent it was furnished by a 9-1-1 service supplier. If the marked addresses were not provided by a 9-1-1 service supplier, the marked information may not be withheld under section 552.101 in conjunction with section 772.318.

Section 552.101 also encompasses common-law privacy, which protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy encompasses the specific types of information that are held to be intimate or embarrassing in *Industrial Foundation*. *See id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). 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. This office has found that the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps) and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). Upon review, we determine that the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the city must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. However, we find some of the information you have marked to withhold pertains to individuals who are not identified. Thus, this information does not implicate any individual's privacy interest. You also seek to withhold, on privacy grounds, an indication that a named individual is a sex offender. The submitted information reflects that the individual was being required to register as a sex offender with the Texas Department of Public Safety ("DPS"). We note that even though it may be intimate or embarrassing, information is not protected by common-law privacy if it is a matter of legitimate public interest. *See Indus. Found.*, 540 S.W.2d at 685 (whether matter is of legitimate interest to public can be considered only in context of each particular case); Open Records Decision No. 579 at 7 (1990). Because the DPS's database of registered sex offenders is available to the public, we believe that whether a particular individual is, in fact, a sex offender is a matter of legitimate public interest. *See* Crim. Proc. Code art. 62.005. Accordingly, the city may not withhold any of the remaining information under section 552.101 in conjunction with common-law privacy.

Next, you claim portions of the remaining information pertaining to the convention center hotel project are excepted from disclosure under section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage

to a competitor or bidder.” Gov’t Code § 552.104. The purpose of section 552.104 is to protect a governmental body’s interests in competitive bidding situations. *See* Open Records Decision No. 592 at 8 (1991). Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a bidder will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). Moreover, section 552.104 does not except from disclosure information relating to competitive bidding situations once a contract has been executed. Open Records Decision Nos. 306 (1982), 184 (1978).

You explain the information in Exhibits E and F pertains to the city’s Requests for Proposal (“RFP”) for a Master Developer for the convention center hotel and the city’s RFP for Hotel Operator of Dallas Convention Center Hotel. You inform us that although the city is currently negotiating with finalists with respect to each RFP, the city is still in negotiations and no agreements “have been approved, finalized or executed” for either RFP. You argue that release of the information at issue would result in an advantage to other proposers and “hinder the city’s ability to receive the best possible offer.” You further argue that until the city completes its negotiations and executes final agreements with respect to these RFPs, the information at issue should remain exempt from disclosure. Based on your arguments and our review of the information at issue, we agree release of this information would give advantage to a competitor or bidder. Therefore, the city may withhold Exhibits E and F under section 552.104 of the Government Code.<sup>5</sup> We note the city may no longer withhold this information under section 552.104 once the negotiations have concluded and the related contract has been executed.

Next, section 552.111 of the Government Code, which you raise for Exhibits C, G, H, and I, excepts from public 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 section encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of this exception 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 section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, and opinions that reflect 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

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<sup>5</sup>As our ruling on this issue is dispositive, we need not address your remaining arguments against disclosure of this information.

personnel. *Id.*; see also *City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (Gov't Code § 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). Moreover, 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 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 that is 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.

Section 552.111 can also encompass communications between a governmental body and a third-party consultant. 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), 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.

You state Exhibit G consists of e-mails discussing, and revealing portions of, draft studies conducted by HVS. You inform us the city hired HVS to, among other things, analyze the developers' projections in connection with the convention center hotel project. You assert these draft studies contain the opinions of HVS, prepared at the city's request. You also assert the e-mails at issue, and the draft studies they pertain to, relate to general policy issues and reflect the policymaking processes of the city. You state the final version of these studies will be used by the city council in deciding how to proceed with financing for the convention center hotel project, and these reports will be released to the public in their final form. Next, you explain that the information in Exhibit H pertains to discussions of policy issues surrounding the financing of the convention center hotel project. You also explain that the e-mail communications in Exhibit I contain drafts of a briefing to the Dallas City Council Economic Development Committee pertaining to the convention center hotel project. You state Exhibit I relates to general policy issues and reflects the policymaking processes of the city with regard to the project. Based on your representations and our

review, we conclude the city may withhold Exhibits G, H, and I under section 552.111 of the Government Code.<sup>6</sup> Although you also assert that Exhibit C is excepted from disclosure under section 552.111, we note that Exhibit C consists of purely administrative or factual information or information pertaining to routine personnel matters. Therefore, the city may not withhold any of the remaining information under section 552.111 of the Government Code.

Next, you assert Exhibit J is excepted from required public disclosure under section 552.107 of the Government Code. Section 552.107(1) protects information that comes within the attorney-client privilege.<sup>7</sup> 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 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). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* 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 only to a confidential communication, 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).

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<sup>6</sup>As our ruling on this issue is dispositive, we need not address your remaining arguments against disclosure of this information.

<sup>7</sup>You also argue Exhibit J is privileged under rule 503 of the Texas Rules of Evidence. We note that as this information is not subject to section 552.022 of the Government Code, rule 503 does not apply in this instance. *See* Open Records Decision No. 676 at 4 (2002).

You assert Exhibit J constitutes confidential communications between city attorneys, outside legal counsel, and a city department. You state these e-mail communications were made for the purpose of rendering or seeking professional legal services for the city. You also indicate these communications were confidential when made and have remained confidential. Based on these representations and our review of the information at issue, we agree the information in Exhibit J constitutes privileged attorney-client communications. Therefore, the city may withhold Exhibit J pursuant to section 552.107 of the Government Code.

Finally, you raise section 552.137 of the Government Code for the information you have marked in Exhibits B and D. Section 552.137 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 member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). See Gov't Code § 552.137(a)-(c). Section 552.137 is not applicable to an e-mail address that a governmental entity maintains for one of its officials or employees. Therefore, except for the information we have marked for release, the city must withhold the e-mail addresses you have marked in Exhibits B and D under section 552.137 of the Government Code, unless the owners of the e-mail addresses at issue consented to their release.

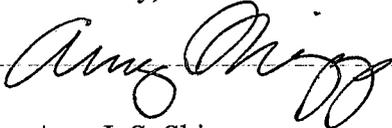
In summary, to the extent any portion of the submitted information was ruled upon in Open Records Letter No. (2009-9534), the city must continue to rely on that ruling as a previous determination and withhold or release the identical information in accordance with that ruling. The city must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 772.318 of the Health and Safety Code to the extent it was furnished by a 9-1-1 service supplier. The city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The city may withhold Exhibits E and F under section 552.104 of the Government Code. The city may withhold Exhibits G, H, and I under section 552.111 of the Government Code and Exhibit J under section 552.107 of the Government Code. Except for the information we have marked for release, the city must withhold the e-mail addresses you have marked in Exhibits B and D under section 552.137 of the Government Code, unless the owners of the e-mail addresses at issue consented to their release. The remaining information must be released to the requestor.

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, 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,



Amy L.S. Shipp  
Assistant Attorney General  
Open Records Division

ALS/fl

Ref: ID# 350029

Enc. Submitted documents

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(w/o enclosures)

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