



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 2, 2009

Ms. Cheryl K. Byles
Assistant City Attorney
City of Fort Worth
1000 Throckmorton Street, 3rd Floor
Fort Worth, Texas 76102

OR2009-15505

Dear Ms. Byles:

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# 358671 (FW PIR No. 4935-09).

The City of Fort Worth (the "city") received a request for e-mails sent or received by a named city employee during a specified period of time. You state that Texas-issued motor vehicle information will be redacted pursuant to previous determinations issued in Open Records Letter Nos. 2007-00198 (2007) and 2006-14726 (2006). *See* Gov't Code § 552.301 (a); Open Records Decision No. 673 at 7-8 (2001). You claim a portion of the submitted information is not subject to the Act. You also claim that some of the remaining information is excepted from disclosure under sections 552.101, 552.104, 552.107, 552.111, 552.117, 552.136, and 552.137 of the Government Code.¹ We have considered your arguments and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information).

We first note that some of the submitted information, which we have marked, is not responsive to the instant request because it does not pertain to an e-mail sent or received by the named individual or it was created outside of the time period specified in the request.

¹We note that although we understand you to raise sections 552.108 and 552.110 of the Government Code, you make no arguments to support these exceptions. Therefore, we assume you have withdrawn your claim that these sections apply to the submitted information.

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

Next, we address your contention that some of the submitted e-mails are not public information subject to the Act. The Act is only applicable to "public information." *See id.* § 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).

Upon review of your arguments and the information at issue, we agree that some of the submitted e-mails, which we have marked, are purely personal, and thus 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 city. *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 these e-mails are not subject to the Act, and need not be released in response to this request.

Next, you acknowledge that for a portion of the submitted information, the city failed to meet the deadlines prescribed by section 552.301 of the Government Code. *See* Gov't Code § 552.301(e). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See City of Dallas v. Abbott*, 279 S.W.3d 806, 811 (Tex. App.—Amarillo 2007, pet. granted); *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). The presumption that information is public under section 552.302 can generally be overcome by demonstrating that the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). We note that you raise sections 552.101 and 552.137 of the Government Code for the untimely submitted information. Because these exceptions can provide compelling reasons to withhold information under the Act, we will address your arguments under these exceptions for the untimely submitted information. We will also address your arguments for the timely submitted 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 section encompasses common-law privacy, which protects information if it (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). 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), 545 (1990); and personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 545, 523 (1989) (individuals's mortgage payments, assets, bills, and credit history). We have marked portions of the remaining information that are confidential under common-law privacy. Accordingly, the information we have marked must be withheld under section 552.101 of the Government Code. However, you have not demonstrated how any of the remaining information at issue is highly intimate or embarrassing and not of legitimate public interest. Therefore, the city may not withhold any portion of the remaining information under section 552.101 in conjunction with common-law privacy.

Section 552.101 also encompasses information that is made confidential by other statutes. You raise section 552.101 in conjunction with section 418.181 of the Government Code. Sections 418.176 through 418.182 were added to chapter 418 of the Government Code as part of the Texas Homeland Security Act (the "HSA"). Section 418.181 provides:

Those documents or portions of documents in the possession of a governmental entity are confidential if they identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism.

Gov't Code § 418.181. The fact that information may relate to a governmental body's security measures does not make the information *per se* confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation of a statute's key terms is not sufficient to demonstrate the applicability of the claimed provision. As with any exception to disclosure, a claim under section 418.181 must be accompanied by an adequate explanation of how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You state a portion of the submitted documents relate to the city's water supply and wastewater treatment plants. You assert and we agree that the city's water supply and wastewater treatment plants are part of the city's critical infrastructure for purposes of section 418.181. *See generally id.* § 421.001 (defining "critical infrastructure" to include all public or private assets, systems, and functions vital to security, governance, public health and safety, economy, or morale of state or nation). You state release of the information at issue could potentially provide a terrorist with the ability to determine where the greatest damage to water lines is. Upon review of the submitted information, we find that a portion of the submitted information would identify details of particular vulnerabilities of critical infrastructure to an act of terrorism. Therefore, the city must withhold the information we have marked under section 552.101 in conjunction with section 418.181 of the Government Code. However, upon review of your arguments and the remaining information at issue, we conclude you have failed to establish that releasing general e-mail communications and training course syllabi reveals the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. Thus, you have not demonstrated that any of the remaining information is made confidential under section 418.181 of the Government Code. *See Open Records Decision Nos.* 542 (1990) (stating that governmental body has burden of establishing that exception applies to requested information), 532 (1989), 515 (1988), 252 (1980). We therefore determine that the city may not withhold any of the remaining information under section 552.101 in conjunction with section 418.181.

You also raise section 552.101 in conjunction with section 182.052 of the Utilities Code provides in relevant part the following:

- (a) Except as provided by Section 182.054, a government-operated utility may not disclose personal information in a customer's account record, or any information relating to the volume or units of utility usage or the amounts billed to or collected from the individual for utility usage, if the customer requests that the government-operated utility keep the information confidential. However, a government-operated utility may disclose information related to the customer's volume or units of utility usage or amounts billed to or collected from the individual for utility usage if the primary source of water for such utility was a sole-source designated aquifer.
- (b) A customer may request confidentiality by delivering to the government-operated utility an appropriately marked form provided under Subsection (c)(3) or any other written request for confidentiality.

Util. Code § 182.052(a)-(b). "Personal information" under section 182.052(a) means an individual's address, telephone number, or social security number, but does not include the individual's name. *See id.* § 182.051(4); *see also* Open Records Decision No. 625 (1994) (construing statutory predecessor). Water service is included in the scope of utility services covered by section 182.052. Util. Code § 182.051(3). Section 182.054 of the Utilities Code

provides six exceptions to the disclosure prohibition found in section 182.052. *See id.* § 182.054.

You state that the information you have marked is that of individual customers who timely requested confidentiality under section 182.052. You do not indicate that any of the exceptions to confidentiality under section 182.054 apply in this instance. We understand that the primary source of water for the city's utility services is not a sole-source designated aquifer. Based on your representations and our review of the submitted information, we agree that the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 182.052 of the Utilities Code. However, the remaining information you seek to withhold does not consist of personal information in a customer's account record, nor information relating to the volume or units of utility usage or the amounts billed to or collected from the individual for utility usage; this information is not confidential under section 182.052, and the city may not withhold any portion of it under section 552.101 on that basis.

You argue that portions of the remaining responsive e-mails are excepted from disclosure under section 552.104 of the Government Code. Section 552.104 of the Government Code 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, including where the governmental body may wish to withhold information in order to obtain more favorable offers. *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). However, 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).

In this instance, you state the e-mails you have marked contain references to projects the city either plans to bid out, is currently bidding out, or has a bid out on, and release of the information at issue would harm future negotiations. However, despite your general assertion, we conclude the information at issue does not reflect the city is engaging in any particular competitive bidding situation and you have not sufficiently explained the applicability of section 552.104 to each piece of information you seek to withhold under this exception. *See* Open Records Decision No. 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative to withhold information under predecessor statute). Accordingly, we conclude that the city may not withhold any of the remaining information under section 552.104 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 pet). 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 the portions of the submitted e-mails you have marked constitute communications between and amongst city staff, outside consultants, and city attorneys that were made for the purpose of providing legal advice to the city. 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 some of the information at issue, which we have marked, and the city may

withhold this information under section 552.107 of the Government Code.² However, we find you have failed to demonstrate how the remaining e-mails at issue consist of communications between privileged parties made for the purpose of facilitating the rendition of professional legal services to the city. Accordingly, the remaining information at issue may not be withheld under section 552.107.

You assert that some of the remaining responsive information is excepted from disclosure under the deliberative process privilege encompassed by section 552.111 of the Government Code. *See* Gov't Code § 552.111; *see also* Open Records Decision No. 615 at 2 (1993). Section 552.111 of the Government Code 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. 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* Open Records Decision 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. The 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 that are severable from advice, opinions, and recommendations. *See* Open Records Decision No. 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 also has concluded that 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

²As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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 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), 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). 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. We note that a governmental body does not have a privity of interest or common deliberative process with a private party with which the governmental body is engaged in contract negotiations. *See id.* (section 552.111 not applicable to communication with entity with which governmental body has no privity of interest or common deliberative process).

You state the information at issue reveals advice, opinions, and recommendations pertaining various city policymaking matters. You also indicate that the information at issue includes communications between the city and third parties pertaining to policymaking in which the parties share a privity of interest or common deliberative process. Further, you state that some of the submitted information consists of draft documents prepared by city staff that necessarily reflect the advice, opinion, and recommendations of the drafter. You indicate that the draft documents are intended for release in their final form. Based on your representations and our review of the information at issue, we find that you have established that the deliberative process privilege is applicable to a portion of the information at issue, which we have marked. Therefore, the city may withhold the marked information under section 552.111 of the Government Code. However, we find the remaining information consists of either general administrative information that does not relate to policymaking or information that is purely factual in nature. Thus, you have failed to demonstrate, and the information does not reflect on its face, that this information reveals advice, opinions, or recommendations that pertain to policymaking. Accordingly, we find that none of the remaining information is excepted from disclosure under section 552.111, and it may not be withheld on that basis.

Section 552.117(a)(1) of the Government Code 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 this information be kept confidential under section 552.024 of the Government Code. Gov't Code §§ 552.117(a)(1), .024. Additionally, section 552.117 encompasses personal cellular telephone numbers, provided the cellular telephone service is paid for by the employee with his or her own funds. Open Records Decision No. 670 at 6 (2001) (extending section 552.117(a)(1) exception to personal cellular telephone number and personal pager number of employee who elects to withhold home telephone number in accordance with 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 made. Open Records Decision No. 530 at 5 (1989). The city may only withhold information under section 552.117(a)(1) on behalf of former or current employees who have made a request for confidentiality under section 552.024 prior to the date on which the request for information was made. You do not inform this office that the employees whose information is at issue elected to keep their personal information confidential before the city received the instant request for information. We must therefore rule conditionally. If the employees whose personal information we have marked timely elected to withhold their personal information under section 552.024, the city must withhold the marked information under section 552.117(a)(1) of the Government Code; however, the city may only withhold a personal cellular telephone number if the cellular service was paid for with the employee's own funds. If the employees did not timely elect confidentiality, the city may not withhold the marked information under section 552.117(a)(1).

Section 552.136 states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b). An access device number is one that may be used to (1) obtain money, goods, services, or another thing of value; or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument. *Id.* The city must withhold the information we have marked under section 552.136. However, you have failed to demonstrate how the remaining information you have marked are access device numbers for purposes of section 552.136. Thus, this remaining information may not be withheld under section 552.136 of the Government Code.

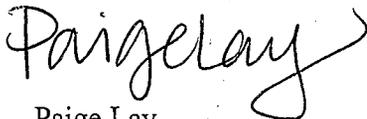
Section 552.137 of the Government Code states that "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its public disclosure. *Id.* § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. We have marked a representative sample of the types of e-mail addresses that must be withheld under section 552.137, unless the owner of an e-mail address has consented to its disclosure.

In summary, the information we have marked pursuant to section 552.002 of the Government Code is not subject to the Act. The city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with: (1) common-law privacy, (2) section 418.181 of the Government Code, and (3) section 182.052 of the Utilities Code. The city may withhold the information we have marked under sections 552.107 and 552.111 of the Government Code. If the employees whose personal information we have marked timely elected to withhold their personal information under section 552.024, the city must withhold the marked information under section 552.117(a)(1) of the Government Code. The city must withhold the information we have marked under section 552.136 of the Government Code as well as the types of personal e-mail addresses that we have marked under section 552.137 of the Government Code, unless the owner of an e-mail address has consented to its disclosure. The remaining responsive 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, 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, toll free, at (888) 672-6787.

Sincerely,



Paige Lay
Assistant Attorney General
Open Records Division

PL/eeg

Ref: ID# 358671

Enc. Submitted documents

cc: Requestor
(w/o enclosures)