



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 4, 2013

Ms. Allison Bastian
Assistant City Attorney
City of Brownsville
1001 East Elizabeth Street, Suite 234
Brownsville, Texas 78520

OR2013-09199

Dear Ms. Allison Bastian:

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# 489185.

The City of Brownsville (the "city") received a request for information pertaining to (1) municipal, fire, and police services, as well as emergency medical services, provided to specified areas during specified time periods; (2) capital improvements made to specified areas during a specified time period; (3) the number, type, and response for 9-1-1 calls in specified areas during a specified time period; (4) the staffing levels of the city's police, fire, and emergency medical services departments during a specified time period; (5) correspondence between city employees, city officials, and city attorneys regarding a specified letter, inter-local agreements, and extra-territorial jurisdiction during a specified time period; (6) call logs and written responses from the city manager to all e-mails received from officials of seven specified cities during a specified time period; (7) inter-local agreements between the city and the City of San Benito that include extra-territorial jurisdiction adjustments and service plants and were adopted by the city during a specified time period; (8) the amount of property tax and ad valorem revenues the city received from specified areas, broken down by fiscal year, since 2002; (9) annexation ordinances adopted by the city in 2002; (10) agendas and minutes of city commission meetings pertaining to the specified letter; and (11) correspondence between city employees, officials, and attorneys, state legislators and their staff members, and lobbyists regarding extra-territorial jurisdiction or legislation pertaining to seven specified cities during a

specified time period. The city received a second request from a different requestor for the number of city police, fire, and emergency medical services personnel employed during a specified time period and information regarding: capital improvements made to specified areas; police, fire, and emergency services provided to the specified areas; and the amount of property tax the city received from the specified areas, all during a specified time period. You state the city does not have information responsive to portions of the first request.¹ You state the city will release some of the requested information to both requestors with the redaction of social security numbers pursuant to section 552.147(b) of the Government Code.² You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code.³ We have considered the exceptions you claim and reviewed the submitted representative sample of information.⁴ We have also received and considered comments from a representative of the first the requestor. *See Gov't Code § 552.304* (interested party may submit comments stating why information should or should not be released).

Initially, we note portions of the submitted information, which we have marked, are not responsive to the first request because they were created after the date the request was received. The city need not release nonresponsive information in response to this request, and this ruling will not address that information.

You state the city will redact the addresses and telephone numbers of 9-1-1 callers under section 772.318 of the Health and Safety Code pursuant to Open Records Decision No. 649 (1996) and Open Records Letter No. 1998-2551 (1998), which you contend are previous determinations applicable to the city. Accordingly, we must determine whether Open Records Decision No. 649 and Open Records Letter No. 1998-2551 constitute previous

¹We note the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975); *see also* Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 416 at 5 (1984).

²Section 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 under the Act. *See Gov't Code § 552.147(b)*.

³We note that although you initially raised section 552.108 of the Government Code, you make no arguments to support this exception. Therefore, we assume you have withdrawn your claim this section applies to the submitted information. *See Gov't Code §§ 552.301, .302*. You also claim some of the submitted information is protected under the attorney-client privilege based on Texas Rule of Evidence 503. In this instance, however, the information is properly addressed here under section 552.107, rather than rule 503.

⁴We assume 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.

determinations to the city. In Open Records Decision No. 673 (2001), we set forth the circumstances under which, pursuant to section 552.301(a) of the Government Code, a governmental body could rely on a ruling from this office as a previous determination. Open Records Decision No. 673 clarified the two types of previous determinations. Based on the city's arguments and our review, we understand the city to argue Open Records Decision No. 649 and Open Records Letter No. 1998-2551 are the second type of previous determination. The second type of previous determination requires that all of the following criteria be met:

1. the information at issue falls within a specific, clearly delineated category of information about which this office has previously rendered a decision;
2. the previous decision is applicable to the particular governmental body or type of governmental body from which the information is requested;
3. the previous decision concludes that the specific, clearly delineated category of information is or is not excepted from disclosure under the Act;
4. the elements of law, fact, and circumstances are met to support the previous decision's conclusion that the requested records or information at issue is or is not excepted from required disclosure; and
5. the previous decision explicitly provides that the governmental body or bodies to which the decision applies may withhold the information without the necessity of again seeking a decision from this office.

Open Records Decision No. 673 at 7-8. Open Records Decision No. 649 determined whether the City of El Paso must withhold the originating telephone numbers and addresses of 9-1-1 callers obtained from a 9-1-1 service supplier pursuant to section 772.318 of the Health and Safety Code. We note Open Records Decision No. 649 does not explicitly provide that any governmental body may withhold any information without the necessity of seeking a decision from this office. Accordingly, we find Open Records Decision No. 649 is not a previous determination, and the city may not withhold any information under section 772.318 on that basis.

Open Records Letter No. 1998-2551 explicitly provides that the City of Dallas may withhold certain information under section 772.318 of the Health and Safety Code without the necessity of seeking a decision from this office. However, this previous determination was issued to the City of Dallas, and, thus, is applicable only to the City of Dallas. Accordingly, Open Records Letter No. 1998-2551 is not a previous determination to the city, and the city may not withhold any information under section 772.318 on the basis of Open Records Letter No. 1988-2551.

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. Section 552.101 encompasses information made confidential by other statutes. 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* ORD 649. 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. Upon review, we find you have failed to demonstrate the information you have marked in the submitted Deputy Reports and Case Number Report consists of the originating telephone number or address of 9-1-1 callers furnished by a 9-1-1 service provider. Accordingly, none of the information you have marked may be withheld under section 552.101 on the basis of section 772.116, section 772.218, or section 772.318 of the Health and Safety Code.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov’t Code § 552.107(1). 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 Tex. 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 to only communications between or among clients, client representatives, lawyers, and lawyer representatives. 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 to only a confidential communication, *id.*, 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, orig. proceeding). 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 information you have marked constitutes communications between city attorneys, city employees, and city officials that were made for the purpose of facilitating the rendition of professional legal services to the city. You also state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the city may withhold the information we have marked under section 552.107(1) of the Government Code. However, the remaining information you seek to withhold consists of communications to individuals you have not demonstrated are privileged parties. Accordingly, we find you have failed to demonstrate the applicability of the attorney-client privilege to the remaining information you have marked and the city may not withhold this information under section 552.107(1).

You raise section 552.111 of the Government Code for portions of the remaining responsive information. Section 552.111 of the Government Code excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]” This section encompasses the deliberative process privilege. *See Open Records Decision No. 615 at 2 (1993)*. The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); *Open Records Decision No. 538 at 1-2 (1990)*.

In *Open Records Decision No. 615*, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See ORD 615 at 5*. A governmental body’s policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body’s policymaking functions 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* 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 also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

Section 552.111 can also encompass communications between a governmental body and a third party, including a consultant or other party with a privity of interest. *See* Open Records Decision No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). When determining if an interagency memorandum is excepted from disclosure under section 552.111, we must consider whether the entities between which the memorandum is passed share a privity of interest or common deliberative process with regard to the policy matter at issue. *See id.* For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See* ORD 561.

You state the information you have marked consists of advice, opinions, and recommendations relating to the city's policy. Upon review, we find the information we have marked is an internal communication that consists of advice, recommendations, and opinions of city employees regarding the policymaking processes of the city. Accordingly, the city may withhold the information we have marked under section 552.111. We note, however, some of the remaining information you have marked was communicated with individuals you have not demonstrated share a privity of interest with the city. Further, we find some of the remaining information you have marked is general administrative and purely factual information. Thus, we find you have failed to demonstrate how the remaining information you have marked consists of advice, opinions, or recommendations reflecting the policymaking of the city. Accordingly, the city may not withhold any of the remaining information under section 552.111.

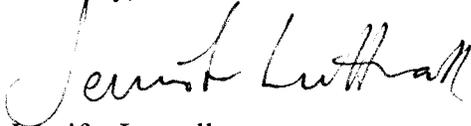
In summary, the city may withhold the information we have marked under sections 552.107(1) and 552.111 of the Government Code. The remaining responsive information must be released.

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,

A handwritten signature in cursive script, appearing to read "Jennifer Luttrall".

Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/som

Ref: ID# 489185

Enc. Submitted documents

c: Requestor
(w/o enclosures)