



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 10, 2014

Mr. John A. Haislet
Assistant City Attorney
Legal Department
City of College Station
P.O. Box 9960
College Station, Texas 77842

OR2014-20459

Dear Mr. Haislet:

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# 540774.

The City of College Station (the "city") received a request for (1) information related to a specified ordinance, including copies of all drafts and amendments, materials made available to city council members, city council staff, city staff, or officials, communications between city staff or officials, and any materials related to meetings or discussions involving city staff or officials; (2) information during a specified time period related to payday loans or other short-term consumer loans, car title loans, deferred presentment transactions or loans, credit access businesses, payday lenders, title lenders, or similar businesses; and (3) information during a specified time period related to any communications between city staff or officials with any person or entity not employed by the city regarding the specified ordinance, payday loans or other short-term consumer loans, car title loans, deferred presentment transactions or loans, credit access businesses, payday lenders, title lenders, or similar businesses. You state some information was released to the requestor. You claim the submitted information is excepted from disclosure under sections 552.106, 552.107, and 552.111 of the

Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note portions of the submitted information contain the minutes of city council meetings. The minutes of a governmental body's public meetings are specifically made public under provisions of the Open Meetings Act (the "OMA"), chapter 551 of the Government Code. *See* Gov't Code § 551.022 (minutes and tape recordings of open meeting are public records and shall be available for public inspection and copying on request to governmental body's chief administrative officer or officer's designee). In this instance, the submitted minutes are draft minutes. We note the minutes of a public meeting of a governmental body are public records when entered, are public in whatever form they exist, and public access may not be delayed until formal approval is obtained. Open Records Decision No. 225 (1979). Accordingly, we find section 551.022 is applicable to some of the submitted information. Although you raise sections 552.106, 552.107, and 552.111 of the Government Code as exceptions to disclosure of this information, we note as a general rule, the exceptions to disclosure found in the Act are not applicable to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the submitted minutes from open meetings of the city council may not be withheld under section 552.106, section 552.107, or section 552.111 of the Government Code. Therefore, the submitted minutes of the public meetings must be released pursuant to section 551.022 of the Government Code.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* 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 the information at issue constitutes or documents a communication. *Id.* at 7. Second, the governmental body must demonstrate the communication was made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. *See* 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. *See 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 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

¹We 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.

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.” *See 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 the communication has been maintained. Section 552.107(1) generally excepts an entire communication that a governmental body has demonstrated as being 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) (attorney-client privilege extends to entire communication, including facts contained therein).

You claim the remaining information consists of communications between city attorneys and city employees that were made for the purpose of facilitating the rendition of professional legal services to the city. You state these communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to some of the submitted information. Thus, the city may generally withhold the information we have marked under section 552.107(1) of the Government Code.² We note some of the privileged e-mail strings we have marked include e-mails received from or sent by individuals you have not demonstrated are privileged parties. If these e-mails are removed from the privileged e-mail strings and stand alone, they are responsive to the request for information. Therefore, if the non-privileged e-mails we have marked are maintained by the city separate and apart from the otherwise privileged e-mail strings in which they appear, then the city may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code. Further, the remaining information contains e-mails with individuals you have not demonstrated are privileged, or you have not demonstrated the information consists of privileged attorney-client communications. Thus, the remaining information at issue may not be withheld under section 552.107(1) of the Government Code.

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[.]” Gov’t Code § 552.111. This exception 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, writ ref’d n.r.e.); *Open Records Decision No. 538 at 1-2 (1990)*.

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

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 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. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); 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).

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, including a consultant or other party with a privity of interest. 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), 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body's consultants). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body

and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See* ORD 561 at 9.

You claim the remaining information consists of advice, opinions, and recommendations relating to policymaking matters of the city. You further state some of the information consists of draft documents. We understand some of the draft documents will be released in final form. Thus, the city may withhold the draft documents we have marked in their entirety under section 552.111 of the Government Code.³ However, you do not explain whether the remaining draft documents will be released in their final forms. For the remaining draft documents, we must rule conditionally. Accordingly, to the extent the remaining draft documents we have marked will be released to the public in their final forms, the city may withhold them in their entirety under section 552.111. If the remaining draft documents will not be released to the public in their final forms, then the city may not withhold them in their entirety under section 552.111. In this case, we find portions of the remaining draft documents constitute advice, opinions, or recommendations. Thus, to the extent the remaining draft documents will not be released in final form, the city may withhold the information we noted under section 552.111 of the Government Code within the remaining draft documents. Further, we find the remaining information we have marked consists of advice, opinions, and recommendations pertaining to a policymaking matter. Accordingly, the city may withhold the remaining information we have marked under section 552.111.⁴ However, we find some of the remaining information at issue consists of either general administrative information that does not relate to policymaking or information that is purely factual in nature. We also note some of the remaining information was communicated with individuals you have failed to demonstrate share a privity of interest or common deliberative process with the commission. Accordingly, the remaining information may not be withheld under section 552.111 of the Government Code.

Section 552.106 of the Government Code excepts from disclosure “[a] draft or working paper involved in the preparation of proposed legislation.” Gov’t Code § 552.106(a). The purpose of section 552.106 is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body. *See* ORD 615 at 2. Therefore, section 552.106 is applicable only to the policy judgments, recommendations, and proposals of persons who are involved in the preparation of proposed legislation and who have an official responsibility to provide such information to members of the legislative body. *See id.* at 1; *see also* Open Records Decision No. 429 at 5 (1985) (statutory predecessor not applicable to information relating to governmental entity’s efforts to persuade other governmental entities to enact particular ordinances). We note sections 552.111 and 552.106 are similar in that they both protect advice, opinion, and recommendation on policy matters in order to encourage frank discussion during the

³As our ruling is dispositive, we need not address your remaining argument against disclosure.

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policymaking process. Open Records Decision No. 460 at 3 (1987). However, section 552.106 is narrower than section 552.111 in that it applies specifically to the legislative process. *Id.*

You assert the remaining information is excepted from disclosure under section 552.106 because it pertains to the proposed city ordinance. However, upon review, we find you have not demonstrated how the remaining information constitutes advice, opinion, analysis, or recommendations for purposes of section 552.106. Accordingly, the city may not withhold the remaining information under section 552.106 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."⁵ Gov't Code § 552.101. This section encompasses common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) 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 demonstrated. *See id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). Upon review, we find the information we marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the city must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Section 552.117 is applicable to cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for the information is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, a governmental body must withhold information under section 552.117(a)(1) on behalf of a current or former official or employee only if the individual made a request for confidentiality under section 552.024 prior to the

⁵The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

date on which the request for information was made. Accordingly, if the individuals whose information is at issue timely requested confidentiality pursuant to section 552.024, the city must withhold the information we have marked under section 552.117(a)(1); however, the cellular telephone number may only be withheld if a governmental body does not pay for the cellular telephone service.

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). Gov’t Code § 552.137(a)-(c). The e-mail addresses we have marked are not of a type excluded by subsection (c). Accordingly, the city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless their owners affirmatively consent to their release.

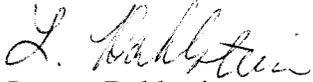
In summary, the minutes of the public meetings must be released pursuant to section 551.022 of the Government Code. The city may withhold the information we have marked under section 552.107(1) of the Government Code; however, the city must release the non-privileged e-mails we have marked if the city maintains them separate and apart from the otherwise privileged e-mail strings in which they appear. The city may withhold the draft documents we have marked in their entirety under section 552.111 of the Government Code. To the extent the remaining draft documents we have marked will be released to the public in their final forms, the city may withhold them in their entirety under section 552.111. If the remaining draft documents will not be released to the public in their final forms, then the city may withhold the information we marked under section 552.111 of the Government Code within the remaining draft documents. Further, the city may withhold the remaining information we marked under section 552.111 of the Government Code. The city must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. If the individuals whose information is at issue timely requested confidentiality pursuant to section 552.024, the city must withhold the information we have marked under section 552.117(a)(1); however, the cellular telephone number may only be withheld if a governmental body does not pay for the cellular telephone service. The city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless their owners affirmatively consent to their release. The city must release the remaining information.

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.texasattorneygeneral.gov/open/>

[orl_ruling_info.shtml](#), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Lauren Dahlstein
Assistant Attorney General
Open Records Division

LMD/som

Ref: ID# 540774

Enc. Submitted documents

c: Requestor
(w/o enclosures)