



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 18, 2012

Mr. George E. Hyde
Ms. Erin A. Higginbotham
Denton, Navarro, Rocha & Bernal
2500 West William Cannon, Suite 609
Austin, Texas 78745

OR2012-20366

Dear Mr. Hyde and Ms. Higginbotham:

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# 473978.

The City of El Paso (the "city"), which you represent, received two requests from the same requestor for e-mails and text messages between a named individual and eight other named individuals during a specified time period and e-mails and text messages regarding the downtown ballpark between eight named individuals during a specified time period. You state the city does not possess any responsive text messages.¹ You claim the requested information is either not subject to the Act or is excepted from disclosure under sections 552.101, 552.104, 552.105, 552.107, 552.109, 552.111, and 552.137 of the Government Code. We have considered your arguments and reviewed the submitted representative sample of information.²

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

²We 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 those records contain substantially different types of information than those submitted to this office.

You inform us Exhibit D was the subject of previous requests for information, in response to which this office issued Open Records Letter No. 2012-19216 (2012). Additionally, we note Exhibits D-1 and D-5 and the information we have marked in Exhibits D-2 and D-3 are also subject to Open Records Letter No. 2012-19216. In that ruling, we found some information was not subject to the Act; the city may withhold some information under sections 552.105 and 552.107 of the Government Code; must withhold the information we marked under section 552.117(a)(1) of the Government Code to the extent the individuals whose information we marked timely elected to keep such information confidential; must withhold the marked e-mail addresses under section 552.137 of the Government Code, unless the owners affirmatively consent to their release; and must release the remaining information. As we are unaware of any change in the relevant law, facts, and circumstances on which the previous ruling was based, then the city may continue to rely on Open Records Letter No. 2012-19216 as a previous determination and withhold or release Exhibits D, D-1, and D-5, the information we marked in Exhibits D-2 and D-3, and any other additional responsive information, to the extent it is identical to the information submitted in that ruling.³ See Open Records Decision No. 673 (2001) (governmental body may rely on prior ruling as a previous determination when (1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D); (2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; (3) the prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and (4) the law, facts, and circumstances on which the prior ruling was based have not changed since the issuance of the ruling). To the extent any of the remaining information is not the same as the information previously ruled upon, we will address your arguments.

Next, you state the information at issue is not subject to the Act. The Act is applicable only to “public information.” See Gov’t Code §§ 552.002, .021. Section 552.002(a) defines “public information” as consisting of

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). Thus, virtually all the information in a governmental body’s physical possession constitutes public information and is subject to the Act. *Id.* § 552.002(a)(1); see Open Records Decision Nos. 549 at 4 (1990), 514 at 1–2 (1988). The Act also

³As such, we do not address your arguments for this information.

encompasses information a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2); *see* Open Records Decision No. 462 at 4 (1987). Moreover, section 552.001 of the Act provides it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees. *See* Gov't Code § 552.001(a).

We further note the characterization of information as “public information” under the Act is not dependent on whether the requested records are in the possession of an individual or whether a governmental body has a particular policy or procedure that establishes a governmental body’s access to the information. *See* Open Records Decision No. 635 at 3-4 (1995) (finding information does not fall outside definition of “public information” in Act merely because individual member of governmental body possesses information rather than governmental body as whole); *see also* Open Records Decision No. 425 (1985) (concluding, among other things, information sent to individual school trustees’ homes was public information because it related to official business of governmental body) (overruled on other grounds by Open Records Decision No. 439 (1986)). Furthermore, this office has found that information in a public official’s personal e-mail account and home telephone records may be subject to the Act where the public official uses the personal e-mail account and home telephone records to conduct public business. *See* ORD 635 at 6-12 (appointment calendar owned by a public official or employee is subject to the Act when it is maintained by another public employee and used for public business).

You assert the city did not collect, assemble, or maintain the information at issue pursuant to any law or ordinance nor did it have a right of access to the information, until it was voluntarily provided by the individuals named in the request. However, we note the information at issue pertains to the transaction of official city business. We reiterate that information is within the scope of the Act if it relates to the official business of a governmental body and is maintained by a public official or employee of the governmental body.⁴ *See* Gov't Code § 552.002(a). A governmental body may not circumvent the applicability of the Act by conducting official business in a private medium. *See* ORDs 635

⁴As you rely, in part, on *Keever v. Finlan*, 988 S.W.2d 300 (Tex. App.— Dallas 1999, pet. dismissed), we have carefully reviewed that opinion. It reflects that Finlan had included a request for certain election-related records in a letter addressed directly to Keever as a school board trustee. *Id.* at 304. The court framed “[t]he dispositive inquiry [a]s whether Finlan was entitled to a writ of mandamus against Keever.” *Id.* at 305. It specifically declined to consider whether the requested records were subject to the Public Information Act. *Id.* (“whether the records are public information is an issue we need not decide”). The court held that mandamus did not lie under the Act to compel disclosure of the requested records by Keever, as he was neither a governmental body nor the custodian of records for the school district. *Id.* Here, in contrast, the request for information was addressed to the city itself, and the threshold question is whether the submitted information represents public information that the city must release to the requestor unless an exception to disclosure is applicable.

at 12, 425 at 2. Thus, the submitted e-mails are subject to the Act. Accordingly, we will address the exceptions you raise for the information at issue.

Next, we note Exhibit D-2 contains a completed report and Exhibit D-3 contains completed appraisals. Section 552.022(a)(1) of the Government Code provides for required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[.]” unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov’t Code § 552.022(a)(1). We have marked this information, which is subject to section 552.022(a)(1). Although you assert the information we have marked in Exhibit D-2 is excepted from disclosure under sections 552.107 and 552.111 of the Government Code, these sections are discretionary and do not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 10-11 (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 470 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver). Therefore, pursuant to section 552.022(a)(1), the city may not withhold the marked information in Exhibit D-2 under sections 552.107 or 552.111. Additionally, you seek to withhold the information we have marked in Exhibit D-3 under section 552.105 of the Government Code. However, section 552.105 is discretionary in nature and does not make information confidential under the Act. *See* Open Records Decision Nos. 665 at 2 n.5 (discretionary exceptions generally), 564 (1990) (statutory predecessor to section 552.105 subject to waiver). Consequently, the city may not withhold the information we have marked in Exhibit D-3 under section 552.105. We note, however, the Texas Supreme Court has held the Texas Rules of Evidence are “other law” within the meaning of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will consider your claim under Texas Rule of Evidence 503 for the information we have marked in Exhibit D-2. Additionally, we note some of the marked information in Exhibit D-3 is subject to section 552.130 of the Government Code.⁵ Because section 552.130 makes information confidential under the Act, we will address the applicability of this section to the marked information in Exhibit D-3. We will also address your arguments under sections 552.105 and 552.107 for the information not subject to section 552.022(a)(1).

Texas Rule of Evidence 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

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).

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if it is 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).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state the completed report we have marked in Exhibit D-2 constitutes an attorney-client privileged communication. Upon review, however, we find you have failed to demonstrate how this report consists of or documents communications between privileged parties made for the purpose of facilitating the rendition of professional legal services. Therefore, this information does not constitute privileged attorney-client communication and may not be withheld under rule 503 of the Texas Rules of Evidence.

Section 552.105 of the Government Code excepts from disclosure information relating to "appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property." Gov't Code § 552.105(2). Section 552.105 is designed to protect a governmental body's planning and negotiating position with respect to particular transactions. Open Records Decision Nos. 564 at 2 (1990), 357 (1982), 310

(1982). Information that is excepted from disclosure under section 552.105 that pertains to such negotiations may be excepted from disclosure so long as the transaction relating to that information is not complete. *See* ORD 310. But the protection offered by section 552.105 is not limited solely to transactions not yet finalized. This office has concluded that information about specific parcels of land obtained in advance of other parcels to be acquired for the same project could be withheld where release of the information would harm the governmental body's negotiating position with respect to the remaining parcels. *See* ORD 564 at 2. A governmental body may withhold information "which, if released, would impair or tend to impair [its] 'planning and negotiating position in regard to particular transactions.'" ORD 357 at 3 (quoting Open Records Decision No. 222 (1979)). The question of whether specific information, if publicly released, would impair a governmental body's planning and negotiating position with regard to particular transactions is a question of fact. Accordingly, this office will accept a governmental body's good-faith determination in this regard, unless the contrary is clearly shown as a matter of law. *See* ORD 564.

You state the city has made a good-faith determination the remaining information in Exhibit D-3 relates to the appraisal or purchase price of real property the city intends to purchase. You explain release of this information would harm the city's negotiating position with respect to the acquisition of the properties at issue. Based on your representations and our review, we conclude the city may withhold the remaining information in Exhibit D-3 under section 552.105 of the Government Code.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. Gov't Code § 552.107. The elements of the privilege under section 552.107(1) are the same as those discussed for rule 503. 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. *See* ORD 676 at 6-7. 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 claim the remaining information in Exhibit D-2 and all of Exhibit D-6 is protected by section 552.107(1) of the Government Code. You state this information consists of communications involving city employees, officials, and attorneys and outside counsel for the city. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the city and we understand these communications have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information we have marked in Exhibit D-2 and the entirety of Exhibit D-6. Accordingly, the city may withhold

Exhibit D-6 and the information we have marked in Exhibit D-2 under section 552.107(1).⁶ However, we note the remaining information at issue in Exhibit D-2 was sent to or received by non-privileged parties or consists of communications which you failed to demonstrate constitutes or documents communications between privileged parties made for the purpose of facilitating the rendition of professional legal services. Accordingly, the city may not withhold the remaining information at issue in Exhibit D-2 under section 552.107 of the Government Code.

Next, we address your argument under section 552.111 of the Government Code for the remaining information at issue in Exhibit D-2. Section 552.111 excepts from 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 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, no writ); *see also* 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 only those internal communications that consist of advice, opinions, recommendations 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. *See 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* 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

⁶As our ruling for this information is dispositive, we need not address your remaining arguments against its release.

which governmental body has privity of interest or common deliberative process). 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 id.*

You state the remaining information at issue in Exhibit D-2 consists of internal communications containing advice, recommendations, and opinions reflecting policymaking matters of the city. Based on your representations and our review, we find the city may withhold the information we have marked under section 552.111 of the Government Code. However, we note some of the remaining information at issue consists of communications with non-privileged parties. Furthermore, we find the remaining information at issue to be general administrative information or purely factual in nature. You have not demonstrated the remaining information at issue contains advice, opinion, or recommendations pertaining to policymaking. Consequently, the city may not withhold any of the remaining information at issue in Exhibit D-2 under section 552.111 of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See Open Records Decision No. 530 at 5 (1989)*. Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. We note section 552.117 also encompasses a personal cellular telephone or pager number, unless the cellular or pager service is paid for by a governmental body. *See Open Records Decision No. 506 at 5-7 (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). Therefore, to the extent the individual whose cellular telephone number we have marked in Exhibit D-2 timely requested confidentiality under section 552.024, the city must withhold the marked cellular telephone number under section 552.117(a)(1) of the Government Code, but only if the cellular service is not paid for by a governmental body.

Section 552.130 of the Government Code excepts from disclosure information relating to a motor vehicle title or registration issued by an agency of this state or another state or country. Gov't Code § 552.130(a)(2). Accordingly, the city must withhold the depictions of license

plates in the photographs in Exhibit D-2 and the information we marked subject to section 552.022(a)(1) in Exhibit D-3 under section 552.130 of the Government Code.

Section 552.137 of the Government Code 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). *Id.* § 552.137(a)-(c). The e-mail addresses we have marked in Exhibits D-2 and D-4 are not of a type specifically excluded by section 552.137(c). Therefore, the city must withhold the marked e-mail addresses under section 552.137 of the Government Code, unless the owners affirmatively consent to their release.⁷

We note some of the remaining information at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the city may continue to rely on Open Records Letter No. 2012-19216 as a previous determination and withhold or release Exhibits D, D-1, and D-5, the information we marked in Exhibits D-2 and D-3, and any other additional responsive information, to the extent it is identical to the information submitted in that ruling. The city may withhold the information we have marked under sections 552.105, 552.107, and 552.111 of the Government Code. To the extent the individual whose cellular telephone number we have marked timely requested to keep such number confidential, the city must withhold it under section 552.117(a)(1), provided the cellular telephone service is not paid for by a governmental body. The city must withhold the license plate numbers under section 552.130 of the Government Code. The city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code. The remaining information must be released, but any information subject to copyright may only be released in accordance with copyright law.

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.

⁷Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision

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,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/ag

Ref: ID# 473978

Enc. Submitted documents

c: Requestor
(w/o enclosures)