



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

This ruling has been modified by court action.  
The ruling and judgment can be viewed in PDF  
format below.



KEN PAXTON  
ATTORNEY GENERAL OF TEXAS

May 5, 2017

Ms. Heather Silver  
Assistant City Attorney  
City of Dallas  
1500 Marilla Street, Room 7DN  
Dallas, Texas 75201

**The ruling you have requested has been amended as a result of litigation and has been attached to this document.**

OR2017-09707

Dear Ms. Silver:

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# 656045 (Reference# C001217-021517).

The City of Dallas (the "city") received a request for deleted e-mails from two named employees during a specified time period. You state the city will release some of the requested information. You claim some of the remaining requested information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, we note a portion of the submitted information, which we have marked, is not responsive to the instant request because it was 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.

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<sup>1</sup>We 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.

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. You raise section 552.101 in conjunction with the common-law informer’s privilege, which Texas courts have long recognized. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). The informer’s privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided the subject of the information does not already know the informer’s identity. *See* Open Records Decision No. 208 at 1-2 (1978). The informer’s privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to “administrative officials having a duty of inspection or of law enforcement within their particular spheres.” Open Records Decision No. 279 at 1-2 (1981) (citing 8 John H. Wigmore, *Evidence in Trials at Common Law*, § 2374, at 767 (J. McNaughton Rev. Ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4 (1988). However, individuals who provide information in the course of an investigation but do not make the initial report of the violation are not informants for the purposes of claiming the informer’s privilege. The privilege excepts the informer’s statement only to the extent necessary to protect that informer’s identity. Open Records Decision No. 549 at 5 (1990).

You state the marked information reveals the identities of complainants who reported possible violations of section 30-1 of the Dallas City Code to the city’s Code Compliance Department, which is charged with enforcing the city code at issue. You explain a violation of the city code at issue is a misdemeanor punishable by a fine. There is no indication the subject of the complaints knows the identities of the complainants. Based on your representation and our review, we conclude the city may withhold the information you have marked under section 552.101 of the Government Code in conjunction with the common-law informer’s privilege. *See* Open Records Decision No. 156 (1977) (name of person who makes complaint about another individual to city’s animal control division is excepted from disclosure by informer’s privilege so long as information furnished discloses potential violation of state law).

Section 552.101 of the Government Code also encompasses the doctrine of 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 satisfied. *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).

You assert the information you have marked should be withheld under section 552.101 on the basis of common-law privacy. However, we find the information at issue pertains to an individual who is not identified, and thus, whose privacy interests are protected. Accordingly, the city may not withhold the information you have marked under section 552.101 in conjunction with common-law privacy.

Section 552.107(1) of the Government Code protects information subject to 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 “to facilitate 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 only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (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: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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 and city employees 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 you have marked under section 552.107(1) of the Government Code.<sup>2</sup>

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).

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).

You generally assert the information you have marked consists of advice, opinions, and recommendations regarding matters of broad scope that affect governmental policy. Upon review, however, we find the information at issue is general administrative and purely factual information or does not pertain to policymaking. Thus, we find you have failed to demonstrate the deliberative process privilege applies to the information at issue. Accordingly, the information you have marked may not be withheld under section 552.111 of the Government Code on the basis of the deliberative process privilege.

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<sup>2</sup>As our ruling on this information is dispositive, we need not address your remaining arguments against its disclosure.

Section 552.111 of the Government Code also encompasses the attorney work product privilege found in Rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as:

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

Tex. R. Civ. P. 192.5(a). A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. Tex. R. Civ. P. 192.5; ORD 677 at 6-8. In order for this office to conclude the information was made or developed in anticipation of litigation, we must be satisfied that:

a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

*Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7.

You argue the information you have marked consists of attorney work product under section 552.111 of the Government Code. Upon review, we find the city has failed to establish the information at issue consists of material prepared, mental impressions developed, or a communication made in anticipation of litigation or for trial by or for the city or representatives of the city. *See Nat'l Tank*, 851 S.W.2d at 206 (information created in ordinary course of business constitutes work product if agency demonstrates primary motivating purpose for preparation of information was in anticipation of litigation); *see also* ORD 677 at 7. Therefore, the city may not withhold the information you have marked as attorney work product 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. *See* Gov't Code § 552.117(a)(1). Section 552.117(a)(1) also applies to the personal cellular telephone number of a current or former official or employee of a governmental body, provided the cellular telephone service is not paid by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988). 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. Therefore, to the extent the employees at issue timely requested confidentiality under section 552.024 of the Government Code, the city must withhold the information we have marked and the cellular telephone numbers you have marked under section 552.117(a)(1) of the Government Code; however, the city may only withhold the marked cellular telephone numbers if the cellular telephone service is not paid for by a governmental body. Conversely, to the extent the employees at issue did not timely request confidentiality under section 552.024 or a governmental body pays for the cellular telephone service, the city may not withhold the information under section 552.117(a)(1).


In summary, the city may withhold the information you have marked under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. The city may withhold the information you have marked under section 552.107(1) of the Government Code. To the extent the employees at issue timely requested confidentiality under section 552.024 of the Government Code, the city must withhold the information we have marked and the cellular telephone numbers you have marked under section 552.117(a)(1) of the Government Code; however, the city may only withhold the marked cellular telephone numbers if the cellular telephone service is not paid for by a governmental body. 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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](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,



Jennifer Copeland  
Assistant Attorney General  
Open Records Division

JC/sb

Ref: ID# 656045

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Cause No. D-1-GN-17-002188

CITY OF DALLAS,	§	IN THE DISTRICT COURT OF
<i>Plaintiff,</i>	§	
	§	
v.	§	TRAVIS COUNTY, TEXAS
	§	
KEN PAXTON, ATTORNEY	§	
GENERAL OF TEXAS,	§	
<i>Defendant.</i>	§	250th JUDICIAL DISTRICT

**AGREED FINAL ORDER OF DISMISSAL**

This is a cause of action under the Public Information Act (PIA), Texas Government Code chapter 552. Plaintiff City of Dallas and Defendant Ken Paxton, Attorney General of Texas, agree to dismiss this suit pursuant to PIA section 552.327 on the ground that the requestor has abandoned the request for information. *See* Tex. Gov't Code § 552.327. A court may dismiss a PIA suit under section 552.327 when all parties agree to dismissal and the Attorney General determines and represents to the Court that the requestor has voluntarily withdrawn the request for information in writing or has abandoned the request. *Id.* The Attorney General represents to the Court that the requestor, Jason Hornsby, has abandoned his request for information. Accordingly, the City of Dallas is not required to release the requested information subject to disclosure in Letter Ruling OR2017-09707. The Court is of the opinion that entry of an agreed final order of dismissal is appropriate.

It is THEREFORE, ORDERED, ADJUDGED and DECREED that this

cause is DISMISSED in all respects;

All costs of the court and attorney fees are taxed against the parties incurring the same;

All relief not expressly granted is denied; and

This order disposes of all claims between the parties and is final.

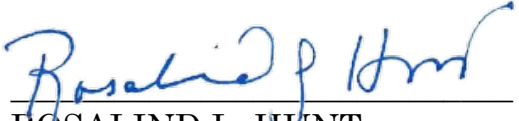
Signed this 11th day of May, 2020.

  
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JUDGE PRESIDING

AGREED AS TO FORM AND SUBSTANCE:

/s/ James B. Pinson  
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