



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

June 16, 2017

Ms. Elizabeth Reynolds  
Paralegal  
Office of the City Attorney  
City of Dallas  
1500 Marilla Street, Room 7DN  
Dallas, Texas 75201

OR2017-13349

Dear Ms. Reynolds:

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# 660291 (ORR C002026 & C002027).

The City of Dallas (the "city") received two requests from the same requestor seeking e-mails during a specified time period between several named city employees and T-Mobile, USA, Inc. ("T-Mobile"), regarding the city's 9-1-1 call center. The city states it will withhold e-mail addresses of members of the public under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).<sup>1</sup> The city states it will release some of the requested information. The city claims some of the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code.<sup>2</sup> Additionally, the city states release of the submitted information may implicate the proprietary interests of T-Mobile. Accordingly, the city states, and provides documentation showing, it notified T-Mobile of the request for information and of the right to submit arguments to this office as to why the submitted information should not be released. *See*

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<sup>1</sup>Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

<sup>2</sup>We note in a letter dated May 24, 2017, we asked the city to provide additional information pursuant to section 552.303 of the Government Code. *See id.* § 552.303(c)-(d) (if attorney general determines that information in addition to that required by section 552.301 is necessary to render decision, written notice of that fact shall be given to governmental body and requestor, and governmental body shall submit necessary additional information to attorney general not later than seventh calendar day after date of receipt of notice). We have received and considered the information submitted by the city on May 31, 2017, pursuant to that request.

Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from T-Mobile. We have reviewed the submitted arguments and the submitted information.

Initially, we must address the city's obligations under section 552.301 of the Government Code, which prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. *See* Gov't Code § 552.301. Pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). The city received the requests for information on March 16, 2017. The city does not inform us it was closed for any business days between March 16, 2017, and April 6, 2017. Accordingly, the city was required to provide the information required by section 552.301(e) by April 6, 2017. The city timely submitted some of the requested information at issue. However, the city provided additional responsive information required by section 552.301(e) through this office's electronic filing system on April 26, 2017, and May 31, 2017. Although the city stated its original submission was a representative sample of the requested information, we find that information is not representative of all the types of information to which the requestor seeks access. Accordingly, we conclude the city failed to comply with the procedural requirements mandated by section 552.301 of the Government Code with respect to the information submitted on April 26, 2017, and May 31, 2017.

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 requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342 (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). The city claims section 552.101 of the Government Code for some of the information at issue. Because section 552.101 can provide a compelling reason to overcome the presumption of openness, we will address the city's argument under this exception against release of the information. Further, the need of a third party to withhold information can provide a compelling reason sufficient to overcome the presumption of openness. *See* Open Records Decision No. 586 (1991). Because the city informs us T-Mobile objects to the release of some of the information at issue, we will consider whether the city may withhold the information at issue on behalf of T-Mobile. We will also consider the submitted arguments against disclosure of the information that was submitted timely.

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 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).

The city states some of the submitted information, which it marked, consists of communications involving attorneys for the city and city employees and officials in their capacities as clients. The city states these communications were made in furtherance of the rendition of professional legal services to the city. The city states these communications were intended to be, and have remained, confidential. Based on these representations and our review, we find the city has demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the city may withhold the information it marked 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).

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.

The city states some of the remaining information consists of suggested edits to a draft of a policymaking document. The city also states some of the remaining information consists of a draft of a policymaking document that will be made available to the public in its final form. Based on these representations and our review of the information, we find the city may withhold the information at issue, which the city marked, under section 552.111 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.” Gov’t Code § 552.101. As part of the Texas Homeland Security Act (the “HSA”), sections 418.176 through 418.182 were added to chapter 418 of the Government Code. These provisions make confidential certain information related to terrorism. The city and T-Mobile assert the remaining information is made confidential by the HSA. Section 418.176 of the HSA provides, in relevant part,

(a) Information is confidential if the information is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity and:

(1) relates to staffing requirements of an emergency response provider, including law enforcement agency, a fire-fighting agency, or an emergency services agency; [or]

(2) relates to a tactical plan of the provider[.]

Gov’t Code § 418.176(a)(1)-(2). Section 418.177 provides,

Information is confidential if the information:

(1) is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity; and

(2) relates to an assessment by or for a governmental entity, or an assessment that is maintained by a governmental entity, of the risk or vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity.

*Id.* § 418.177. 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.

*Id.* § 418.181. The fact that information may relate to a governmental body’s security concerns 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 a claimed provision. As with any exception to disclosure, an entity asserting one of the confidentiality provisions of the HSA must adequately explain 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).

Upon review, we find some of the information at issue, which we have marked, relates to staffing requirements of the city's emergency response provider or to a tactical plan of the city's emergency response provider that was collected, assembled, or maintained for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity. Thus, the city must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code. However, we find the city and T-Mobile have not demonstrated any of the remaining information relates to staffing requirements or to a tactical plan of the city's emergency response provider. Moreover, the city and T-Mobile have not demonstrated any portion of the remaining information was collected, assembled, or is maintained by or for the city for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity and relates to an assessment of the risk or vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity. Additionally, we understand the city to assert, and we agree, the city's 9-1-1 call center is critical infrastructure for the purposes of section 418.181 of the Government Code. *See 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). However, the city and T-Mobile have not demonstrated the remaining information identifies the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. Consequently, we find the city may not withhold any of the information at issue under section 552.101 of the Government Code in conjunction with section 418.176, section 418.177, or section 418.181 of the Government Code.

Section 552.101 of the Government Code also encompasses information made confidential by other statutes. We understand the city and T-Mobile claim the remaining information is confidential under section 771.061 of the Health and Safety Code. Section 771.061 makes confidential "[i]nformation that a service provider of telecommunications service is required to furnish to a governmental entity in providing computerized 9-1-1 service" and information "that a service provider, third party, or other entity voluntarily furnishes at the request of a governmental entity in providing 9-1-1 service[.]" Health & Safety Code § 771.061(a). The city indicates it operates a 9-1-1 system. T-mobile argues the submitted information was used for the purpose of providing computerized 9-1-1 service and was obtained from third-party telecommunications services providers. Upon review, we find some of the remaining information consists of information that was required to be furnished to the city by a telecommunications service provider or information that was voluntarily furnished by a service provider at the request of the city in providing computerized 9-1-1 service. This information, which we have marked, is confidential under section 771.061 of the Health and Safety Code and the city must withhold it under section 552.101 of the Government Code.<sup>3</sup>

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<sup>3</sup>As our ruling is dispositive for this information, we need not address the remaining argument against its disclosure.

However, the city and T-Mobile have failed to demonstrate any portion of the remaining information was furnished to the city by a telecommunications service provider in providing computerized 9-1-1 service. Accordingly, the remaining information is not confidential under section 771.061 of the Health and Safety Code and the city may not withhold the remaining information under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses section 771.0711 of the Health and Safety Code, which makes confidential “[i]nformation that a wireless service provider is required to furnish to a governmental entity in providing 9-1-1 service[.]” Health & Safety Code § 771.0711(h). As previously noted, the city and T-Mobile have failed to demonstrate any portion of the remaining information was furnished to the city by a wireless service provider. Thus, the remaining information is not confidential under section 771.0711, and the city may not withhold it under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses information made confidential by other statutes, such as 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* Open Records Decision No. 649 (1996). 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 3.3 million. Section 772.218 applies to an emergency communication district for a county with a population of more than 1.5 million. Section 772.318 applies to an emergency communication district for a county with a population of more than 20,000.

We understand the city is part of an emergency communication district established under section 772.218 of the Health and Safety Code. The submitted information contains telephone numbers and addresses of 9-1-1 callers. Provided the information at issue was furnished by a service supplier, we find the city must generally withhold the telephone numbers and addresses we have marked under section 552.101 of the Government Code in conjunction with section 772.218 of the Health and Safety Code.<sup>4</sup> We note, however, to the extent the marked addresses are the addresses of a cellular telephone antenna and are not the originating addresses of 9-1-1 callers, this information is not made confidential by section 772.218 and may not be withheld under section 552.101 of the Government Code on that basis. Furthermore, we find the remaining information at issue does not contain the originating telephone number or address of a 9-1-1 caller furnished by a service supplier. Accordingly, the city may not withhold any portion of the remaining information under section 552.101 of the Government Code in conjunction with chapter 772 of the Health and Safety Code.

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<sup>4</sup>As our ruling is dispositive for this information, we need not address the remaining argument against its disclosure.

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. The doctrine of common-law privacy protects a compilation of an individual's criminal history, which is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted individual has significant privacy interest in compilation of one's criminal history). Furthermore, we find a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. Upon review, we find some of the remaining information, which we have marked, satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, the city must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.139 of the Government Code provides, in relevant part:

(a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report;

(2) any other assessment of the extent to which data processing operations, a computer, a computer program, network, system, or system interface, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use[.]

Gov't Code § 552.139(a), (b)(1)-(2). Section 2059.055 of the Government Code provides, in pertinent part:

(b) Network security information is confidential under this section if the information is:

- (1) related to passwords, personal identification numbers, access codes, encryption, or other components of the security system of a state agency;
- (2) collected, assembled, or maintained by or for a governmental entity to prevent, detect, or investigate criminal activity; or
- (3) related to an assessment, made by or for a governmental entity or maintained by a governmental entity, of the vulnerability of a network to criminal activity.

*Id.* § 2059.055(b). T-Mobile contends the remaining information “concerns, at least in part,” the city’s computer systems. Upon review, we find T-Mobile has not demonstrated the remaining information relates to the city’s computer network security, or to the design, operation, or defense of the city’s computer network as contemplated in section 552.139(a). Further, T-Mobile has not demonstrated the remaining information consists of a computer network vulnerability report or assessment as contemplated by section 552.139(b). Accordingly, the city may not withhold any of the remaining information under section 552.139 of the Government Code.

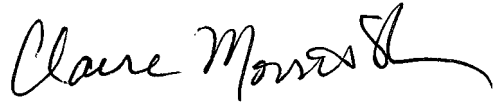
In summary, the city may withhold the information it marked under section 552.107(1) of the Government Code and may withhold the information it marked under section 552.111 of the Government Code. The city must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code. The city must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 771.061 of the Health and Safety Code. To the extent the information we marked consists of the originating telephone numbers and addresses of 9-1-1 callers, the city must withhold the telephone numbers and addresses we marked under section 552.101 of the Government Code in conjunction with section 772.218 of the Health and Safety Code. The city must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. 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](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,

A handwritten signature in black ink that reads "Claire Morris Sloan". The signature is written in a cursive style with a long, sweeping tail on the final letter.

Claire V. Morris Sloan  
Assistant Attorney General  
Open Records Division

CVMS/som

Ref: ID# 660291

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Third Party  
(w/o enclosures)