



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

May 31, 2019

Ms. Paige H. Saenz  
Counsel for City of Leander  
The Knight Law Firm LLP  
223 West Anderson Lane, Suite A-105  
Austin, Texas 78752

OR2019-14415

Dear Ms. Saenz:

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# 768171.

The City of Leander (the "city"), which you represent, received two requests from different requestors for communications to or from named city employees and officials pertaining to specified entities over a specified period of time. The first requestor also requested notes from development meetings regarding a particular entity. You state the city has released some information to the second requestor. You claim some of the submitted information is not subject to the Act. You also claim the submitted information is excepted from disclosure under sections 552.101, 552.109, and 552.111 of the Government Code. Further, you state you notified one of the named individuals 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.<sup>1</sup> See Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered your arguments and reviewed the submitted information.

Initially, we note the city has not submitted information responsive to the portion of the first requestor's request seeking notes from development meetings. To the extent information

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<sup>1</sup>As of the date of this letter, we have not received any comments from the notified individual explaining why any portion of the submitted information should not be released to the requestors.

responsive to this portion of the first request existed on the date the city received the request, we assume you have released it to the first requestor. *See* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible). If you have not released any such information, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302.

Next, we note Exhibit B is not responsive to the first request because it is outside the time period specified by the first requestor. Additionally, we note Exhibit C is not responsive to the second request because it does not pertain to any of the categories of information requested by the second requestor. The city need not release non-responsive information in response to the requests.

The Act is only applicable to “public information.” *See id.* § 552.021. Section 552.002 of the Government Code defines “public information” as the following:

(a) [I]nformation that written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body;

(2) for a governmental body and the governmental body:

(A) owns the information;

(B) has a right of access to the information; or

(C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or

(3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.

*Id.* § 552.002(a). Section 552.002(a-1) also provides the following:

Information is in connection with the transaction of official business if the information is created by, transmitted to, received by, or maintained by an officer or employee of the governmental body in the officer's or employee's official capacity, or a person or entity performing official business or a governmental function on behalf of a governmental body, and pertains to official business of the governmental body.

*Id.* § 552.002(a-1). Thus, virtually all of the information in a governmental body's physical possession constitutes public information and, thus, 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 encompasses information that 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). Further, information that is written, produced, collected, assembled, or maintained by an individual officer or employee of a governmental body in the officer's or employee's official capacity may be subject to disclosure under the Act if the information pertains to official business of the governmental body. Gov't Code § 552.002(a)(3). Information is "in connection with the transaction of official business" if the information is created by, transmitted to, received by, or maintained by a person or entity performing official business or a government function on behalf of a governmental body and the information pertains to official business of the governmental body. *See id.* § 552.002(a-1). Moreover, section 552.001 of the Act provides, unless otherwise expressly provided by law, it is the policy of this state that each person is entitled 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) (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 at 2-3 (1985) (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)). Thus, if the information at issue is related to the city's business, the mere fact it is not in the city's possession does not remove the information from the scope of the Act. *See* ORD 635 at 6-8 (information maintained on a privately-owned medium and actually used in connection with transaction of official business would be subject to the Act).

The city informs us Exhibit B consists of a cellular telephone text message received by the city manager from a representative of one of the named entities. The city states the underlying content of the text message is an e-mail that was sent from a computer that is not paid for by the city and the underlying e-mail was not collected, assembled, or maintained by the city. The city also asserts the underlying e-mail does not pertain to official business of the city but, rather, pertains to a personal discussion. Thus, the city asserts Exhibit B does not consist of public information that is subject to disclosure under the Act. However, the city acknowledges the communication at issue was sent "in connection with the [c]ity taking action on a contract[.]" We reiterate 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. *See* Gov't Code § 552.002(a). Upon review, we find Exhibit B relates to the transaction of official city business. Thus, this information constitutes "information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by or for the city. *See id.* § 552.002(a). Therefore, we conclude Exhibit B is subject to the Act and the city must release it to the second requestor, unless the information falls within an exception to public disclosure under the Act.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This section 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. Upon review, we find you have failed to demonstrate any of the information in Exhibit B is highly intimate or embarrassing and not of legitimate public concern. Therefore, the city may not withhold any portion of Exhibit B from the second requestor under section 552.101 of the Government Code on that basis.

Section 552.109 of the Government Code excepts from disclosure "[p]rivate correspondence or communications of an elected office holder relating to matters the disclosure of which would constitute an invasion of privacy[.]" Gov't Code § 552.109. This office has held the test to be applied to information under section 552.109 is the same as the common-law privacy standard under section 552.101, as discussed above. *Indus. Found.*, 540 S.W.2d at 682. Upon review, we find you have failed to demonstrate any of Exhibit B constitutes highly intimate or embarrassing information that is of no legitimate concern to the public. Therefore, the city may not withhold any of Exhibit B from the second requestor under section 552.109 of the Government Code. As no further exceptions to disclosure are raised, the city must release Exhibit B to the second requestor.

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).

Section 552.111 can also encompass communications between a governmental body and a third party, including a consultant or other party with a privity of interest. See Open Records Decision No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). 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. We note a governmental body does not share a privity of interest with a third party when the governmental body and the third party are involved in contract negotiations, as the parties' interests are adverse.

Although the city asserts section 552.111 for Exhibit C, we note the communications at issue are related to negotiations between the city and one of the specified entities. The parties' interests were adverse as to the negotiations and there is no privity of interest between the city and the entity. Therefore, we find the city has failed to show the information at issue consists of internal communications containing advice, opinions, or recommendations on the policymaking matters of the city. Accordingly, the city may not withhold any portion of Exhibit C from the first requestor under section 552.111 of the Government Code. As no further exceptions to disclosure are raised, the city must release Exhibit C to the first requestor.

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,



Erin Groff  
Assistant Attorney General  
Open Records Division

EMG/gw

Ref: ID# 768171

Enc. Submitted documents

c: 2 Requestors  
(w/o enclosures)