



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 19, 2018

Mr. Ray Rodriguez
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City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR2018-01083A

Dear Mr. Rodriguez:

This office issued Open Records Letter No. 2018-01083 (2018) on January 17, 2018. In that ruling, we noted two third parties, Creative Artist Agency, LLC (“CAA”) and William Morris Endeavor Entertainment, LLC (“WME”), argued against disclosure of information not submitted to this office for review, and the ruling did not address information beyond what the City of San Antonio (the “city”) submitted to us for our review. Since the issuance of Open Records Letter No. 2018-01083, we have received new information that affect the facts on which this ruling was based. The city explains it failed to submit CAA’s and WME’s information to this office, and now submits CAA’s and WME’s information for our review. Consequently, this decision serves as the corrected ruling and is a substitute for the decision issued on January 17, 2018, only as it pertains to CAA’s and WME’s information.¹ *See generally* Gov’t Code § 552.011 (Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act (the “Act”), chapter 552 of the Government Code). This ruling was assigned ID# 702885.

¹We note, and you acknowledge, the city failed to comply with the procedural requirements of section 552.301 of the Government Code in requesting a decision from this office. *See* Gov’t Code § 552.301(b), (e). Nonetheless, third party interests can provide a compelling reason to overcome the presumption of openness caused by failure to comply with section 552.301. *See id.* §§ 552.007, .302; Open Records Decision No. 150 at 2 (1977). Thus, we will consider whether the submitted information is excepted from disclosure under the Act, notwithstanding the city’s violation of section 552.301 in requesting this decision.

The city received two requests from different requestors for information pertaining to the city's Tricentennial Celebration Year ("Tricentennial"), including specified expenditures, request for proposals, employment information and communications pertaining to a named official, meeting minutes, and information regarding contributions submitted to the Tricentennial.² You state you will release some information. You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.104, 552.106, 552.107, 552.111, and 552.137 of the Government Code. Additionally, although you take no position as to whether the remaining submitted information is excepted from disclosure, you state release of this information may implicate the proprietary interests of multiple third parties.³ Accordingly, you state and provided documentation showing, you notified the affected third parties of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released. *See id.* § 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 Act in certain circumstances). We have received comments from CAA, CE, the commission, and WME. We have considered the submitted arguments and reviewed the submitted representative sample of information.⁴

Initially, we address the commission's assertion the information submitted is not subject to the Act. The Act is applicable only to "public information." *See* Gov't Code §§ 552.002, .021. Section 552.002 of the Government Code defines "public information" as:

²We note the city sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

³The city notified the following third parties: Aguillon & Associates LLC; Andrade Design, Inc.; Artifact Technologies, Inc.; Atkins International, LLC; BethanyEast PR & Mgmt. Consulting; Blonde Creative, LLC; CE Group, LLC ("CE"); Civic, LLC; Creative Artist Agency, LLC ("CAA"); Creative Civilization; CRE8AD8, LLC; esd Limited d/b/a.esd & associates; Forte Events Worldwide Headquarters; Garcia Baldwin, Inc. d/b/a MarketVision; GDC Marketing & Ideation; Lammert, Inc. d/b/a HPNbooks; Imagine Enterprises International, Inc. d/b/a Technisch Creative; Leo Events; Lone Star Media; Mariachi Vargas Munoz Public Relations, LLC; Mighty Studio Group, LLC; Rotech Industries, LLC; San Antonio Tricentennial Celebration Commission (the "commission"); Scoremore Shows; Slobodon Strategies; SWD Interactive, Sweb Development; The Tobin Performing Arts Center; Trinity University d/b/a Trinity University Press; TTF Entertainment; Unico Communications, Inc.; Venue Creation Resources, Inc; and William Morris Endeavor Entertainment, LLC ("WME").

⁴We 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.

(a) [I]nformation that is 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.

(a-1) 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), (a-1). Thus, virtually all the information in a governmental body's physical possession constitutes public information and is subject to the Act. *Id.*; 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. Information that is written, produced, collected, assembled, or maintained by a third party may be subject to disclosure under the Act if a governmental body owns, has a right of access to, or spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information. Gov't Code § 552.002(a); see Open Records Decision No. 462 at 4 (1987). 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 Gov't Code § 552.002(a-1).

The commission argues the submitted information is not "public information" subject to the Act because the commission is not a governmental body subject to the Act. See *id.*

§ 552.003(1)(A) (defining “governmental body”). The commission states it was formed for the purpose of aiding and acting on behalf of the city in the performance of the city’s governmental functions, including, but not limited to providing a means of assisting with planning, developing, identifying potential partners, fund-raising, managing, and financing projects involved with the city’s Tricentennial. The commission asserts it possesses the requested information for the purpose of using such information to secure funding, plan events, and acquire talent to perform at various events scheduled throughout the Tricentennial. We note, however, the information at issue relates to activities overseen by the city. We further note the information at issue is in the possession of the city, and the city has submitted this information as being subject to the Act. Thus, we find the city collected, assembled, or maintains this information in connection with the transaction of official business. Therefore, the submitted information constitutes public information subject to the Act and may only be withheld if an exception to disclosure under the Act applies.⁵

Next, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body’s notice under section 552.305(d) of the Government Code to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from the remaining third parties explaining why the submitted information should not be released. Therefore, we have no basis to conclude the remaining third parties have protected proprietary interests in the submitted information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the city may not withhold the submitted information on the basis of any proprietary interest the remaining third parties may have in the information.

Section 552.104(a) of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). The “test under section 552.104 is whether knowing another bidder’s [or competitor’s information] would be an advantage, not whether it would be a decisive advantage.” *Boeing Co. v. Paxton*, 466 S.W.3d 831, 841 (Tex. 2015). The city represents the information it marked pertains to a competitive bidding situation. The city states the information at issue reflects the details and identities of companies with which contracts are being negotiated. The city argues release of the information at issue could give an advantage to another bidder with which the city negotiates, and could result in potential bidders adjusting their submissions, which could result in the city spending more than it otherwise would have.

⁵Although the commission asserts it is not subject to the Act, we do not address this argument at this time. However, we note, the commission was created pursuant to Chapter 431 of the Transportation Code and is, therefore, subject to section 431.005 of the Transportation Code. *See Tex. Transp. Code Ann.* § 431.005

Upon review, we find the city has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the city may withhold the information it marked under section 552.104(a) of the Government Code.

CE, the commission, and WME assert all of their information at issue is protected under section 552.104 of the Government Code. As noted above, section 552.104(a) excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). A private third party may also invoke this exception, which is subject to the test discussed above. *Boeing*, 466 S.W.3d at 833. CE, the commission, and WME state they have competitors. CE states release of its information would allow competitors to unfairly adapt their pricing structures, bidding practices, and creative content and would cause substantial competitive harm to CE. The commission states its information at issue consists of information used to secure funding, plan events, and acquire talent to perform during the Tricentennial. WME states release of its information will grant other musical artists the opportunity to offer their services to potential third party purchasers under more favorable terms. For many years, this office concluded the terms of a contract and especially the pricing of a winning bidder are public and generally not excepted from disclosure. Gov’t Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision Nos. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency), 514 (1988) (public has interest in knowing prices charged by government contractors), 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). However, now, pursuant to the *Boeing* decision, section 552.104 is not limited to only ongoing competitive situations, and a third party need only show release of its competitively sensitive information would give an advantage to a competitor even after a contract is executed. *Boeing*, 466 S.W.3d at 831, 839. After review of the information at issue and consideration of the arguments, we find CE and WME established the release of their information would give advantage to a competitor or bidder. Accordingly, we conclude the city may withhold CE’s and WME’s information under section 552.104(a) of the Government Code.⁶ However, upon review, we find the commission failed to establish the applicability of section 552.104(a) of the Government Code to the remaining information. Therefore, the city may not withhold any of the remaining information under section 552.104(a) of the Government Code.

Section 552.110(b) of the Government Code protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or

⁶As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

CAA asserts its information consists of commercial information the release of which would cause the company substantial competitive harm under section 552.110(b) of the Government Code. However, upon review, we find CAA has failed to demonstrate the release of its information would result in substantial harm to its competitive position. *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative). Furthermore, we note the information at issue relates to a contract awarded to CAA. This office considers the terms of government contract awards to be a matter of strong public interest; thus, the contract awarded to a winning bidder is generally not excepted under section 552.110(b). *See* ORD 514. *See generally* Dep't of Justice Guide to the Freedom of Information Act 344-345 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Further, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); ORD 541 at 8. Consequently, the city may not withhold any of CAA's information under section 552.110(b) of the Government Code.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* Gov't Code § 552.107(1). When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate 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 marked consists of communications between city attorneys, city officials, and the attorney and employees of the commission, which you inform us is a privileged party with respect to these communications. You state the communications were made in confidence for the purpose of facilitating the rendition of professional legal services to the city and these communications have remained confidential. Upon review, we find you have demonstrated the applicability of the attorney-client privilege to most of the information at issue. Therefore, the city may generally withhold the information at issue under section 552.107(1) of the Government Code. However, we note some of the otherwise privileged e-mail strings include e-mails sent to a non-privileged party. Furthermore, if these e-mails are removed from the e-mail strings and stand alone, they are responsive to the instant request. Therefore, if the city maintains these non-privileged e-mails, which we marked, separate and apart from the otherwise privileged e-mail strings in which they appear, then this information may not be withheld under section 552.107(1). Furthermore, we find the remaining information was sent to a party you have not shown to be privileged, which we marked for release. Accordingly, the city may not withhold any portion of the remaining information at issue, which we marked for release, under section 552.107(1) 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. Section 552.101 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. This office has

also found personal financial information not relating to a financial transaction between an individual and a governmental body is generally excepted from required public disclosure under common-law privacy. See Open Records Decision Nos. 600 (1992) (finding personal financial information to include designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). We note, however, the public generally has a legitimate interest in information that relates to public employment and public employees. See Open Records Decision Nos. 542 (1990), 470 at 4 (1987), 444 at 5-6 (1986), 432 at 2 (1984). Upon review, we find the information we marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the city must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find the remaining information is not highly intimate or embarrassing information or is of legitimate public interest. Therefore, none of the remaining information may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

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 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 intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. See Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. See *id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. See *id.* at 2.

Section 552.111 can also encompass communications between a governmental body and a third party, including a consultant or other party with a privity of interest. See Open Records Decision Nos. 631 at 2 (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body's consultants). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. See ORD 561 at 9.

You seek to withhold the information you marked under section 552.111 of the Government Code. You state the information at issue consists of communications between and among employees of the city in their official policy-making capacities and communications between the city and the commission communicating in their policy-making capacities. You inform us the city shares a privity of interest with the commission with respect to the information at issue. You further state some of the information at issue consists of draft documents prepared by the city and the draft documents will be made available to the public in their final form. Based on your representations and our review of the information at issue, we find the city has demonstrated portions of the remaining information, which we marked, consist of advice, opinions, or recommendations on the policymaking matters of the city. Thus, the city may withhold the information we marked under section 552.111 of the Government Code. However, we find the remaining information at issue consists of general

administrative information that does not relate to policymaking or is purely factual in nature. Thus, we find you have failed to demonstrate how the remaining information is excepted under section 552.111. Accordingly, the remaining information may not be withheld under section 552.111 of the Government Code.

Section 552.106 of the Government Code excepts from disclosure “[a] draft or working paper involved in the preparation of proposed legislation[.]” Gov’t Code § 552.106(a). Section 552.106 of the Government Code resembles section 552.111 in that both exceptions protect advice, opinion, and recommendation on policy matters in order to encourage frank discussion during the policymaking process. *See* Open Records Decision No. 460 at 2 (1987). However, section 552.106 applies specifically to the legislative process and is narrower than section 552.111. *Id.* Therefore, section 552.106 is applicable only to the policy judgments, recommendations, and proposals of persons who are involved in the preparation of proposed legislation and who have an official responsibility to provide such information to members of the legislative body. *Id.* Section 552.106 does not protect purely factual information from public disclosure. *See id.*; *see also* Open Records Decision No. 344 at 3-4 (1982) (for purposes of statutory predecessor, factual information prepared by State Property Tax Board did not reflect policy judgments, recommendations, or proposals concerning drafting of legislation). Upon review of your arguments, we find you have not demonstrated the remaining information consists of policy judgments, recommendations, or proposals pertaining to the preparation of proposed legislation. Accordingly, the city may not withhold the remaining information under section 552.106 of the Government Code.

Section 552.101 of the Government Code also encompasses the common-law physical safety exception. The Texas Supreme Court has recognized a separate common-law physical safety exception to required disclosure. *Tex. Dep’t of Pub. Safety v. Cox Tex. Newspapers, L.P. & Hearst Newspapers, L.L.C.*, 343 S.W.3d 112, 118 (Tex. 2011). Pursuant to this common-law physical safety exception, “information may be withheld [from public release] if disclosure would create a substantial threat of physical harm.” *Id.* In applying this new standard, the court noted “deference must be afforded” law enforcement experts regarding the probability of harm, but further cautioned, “vague assertions of risk will not carry the day.” *Id.* at 119. The commission argues some of the remaining information is excepted under section 552.101 of the Government Code in conjunction with the common-law physical safety exception. The commission states the information includes detailed information regarding the coordinated efforts with the city’s police department for protection and security of all involved in the Tricentennial. Upon review, we conclude the commission has failed to demonstrate release of any of the information at issue would subject anyone to a specific risk of harm. Accordingly, the city may not withhold any of the information at issue under section 552.101 of the Government Code in conjunction with the common-law physical safety exception.

Section 552.117(a)(1) 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.⁷ *See* Gov't Code § 552.117(a)(1). Section 552.117 is applicable to cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Whether a particular 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. Accordingly, if the individuals whose information is at issue timely requested confidentiality pursuant to section 552.024 of the Government Code, the city must withhold the information we marked under section 552.117(a)(1) of the Government Code; however, the cellular telephone numbers may only be withheld if a governmental body does not pay for the cellular telephone service.

Section 552.136 of the Government Code provides, "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. *See* Open Records Decision No. 684 at 9 (2009). Upon review, the city must withhold the insurance policy numbers in the remaining information under section 552.136 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). *See* Gov't Code § 552.137(a)-(c). Section 552.137(c)(1) states an e-mail address "provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent" is not excepted from public disclosure. *Id.* § 552.137(c)(1). Upon review, we find portions of the remaining information, which you marked, consist of personal e-mail addresses. However, we note some of the e-mail addresses at issue belong to individuals who may be in a contractual relationship with the city, and, thus, such e-mail addresses may be specifically excluded by section 552.137(c)(1). Consequently, those e-mail addresses may not be withheld under section 552.137 of the Government Code and must be released. To the extent the e-mail addresses the city marked

⁷The 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).

are not specifically excluded by section 552.137(c), these e-mail addresses must be withheld under section 552.137 of the Government Code, unless the owners of the addresses affirmatively consent to their release. *See id.* § 552.137(b).

We note some of the remaining information 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 withhold the information you marked and CE's and WME's information under section 552.104(a) of the Government Code. With the exception of the information we marked for release and as non-privileged, the city may generally withhold the information you marked under section 552.107(1) of the Government Code. However, if the city maintains the non-privileged e-mails we marked separate and apart from the otherwise privileged e-mail strings in which they appear, then the city may not withhold the non-privileged e-mails under section 552.107(1) of the Government Code. The city must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. The city may withhold the information we marked under section 552.111 of the Government Code. If the individuals whose information is at issue timely requested confidentiality pursuant to section 552.024 of the Government Code, the city must withhold the information we marked under section 552.117(a)(1) of the Government Code; however, the cellular telephone numbers may only be withheld if a governmental body does not pay for the cellular telephone service. The city must withhold the insurance policy numbers in the remaining information under section 552.136 of the Government Code. To the extent the e-mail addresses the city marked are not specifically excluded by section 552.137(c), these e-mail addresses must be withheld under section 552.137 of the Government Code, unless the owners of the addresses affirmatively consent to their release. The city must release the remaining information; however, any information protected by 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.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for

providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in cursive script, appearing to read "D. Michelle Case", with a long horizontal flourish extending to the right.

D. Michelle Case
Assistant Attorney General
Open Records Division

DMC/gw

Ref: ID# 702885

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

c: 35 Third Parties
(w/o enclosures)