ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 14, 2009

Mr. James P. Allison
Allison, Bass & Associates, L.L.P.
A.O. Watson House
402 West 12th Street
Austin, Texas 78701

OR2009-00578

Dear Mr. Allison:

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# 331062.

The Victoria County Department of Information Technologies (the "county"), which you represent, received a request for all e-mails sent and received by two named individuals for a specified time period. The Victoria County District Attorney (the "district attorney") has submitted arguments and states that it has released some responsive information to the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released). The district attorney explains that one of the named individuals was terminated and, therefore, there are no responsive e-mails sent or received by this individual after a particular date. The county and the district attorney claim that some of the submitted information is not subject to the Act. The county claims that portions of the submitted information are excepted from disclosure under sections 552.101, 552.103, 552.108, 552.111, and 552.137 of the Government Code. The district attorney claims that portions of the information at issue are excepted from disclosure under sections 552.103, 552.108, and 552.111 of the Government Code.[1] We have considered the submitted arguments and reviewed the submitted information.[2]

[1]The district attorney asserts that some responsive e-mails have been deleted and thus, the county is not in possession of these e-mails. However, the county does not make this same claim. Furthermore, the county has submitted responsive e-mails. Therefore, we address the submitted arguments for the submitted responsive e-mails.

[2]We assume that 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.

We first address the county's and the district attorney's assertion that the district attorney, not the county, is not the "proper custodian" of the district attorney's e-mails. The county cites to section 552.201(a) of the Government Code, which states that "[e]ach elected county officer is the officer for public information and the custodian, as defined by Section 201.003, Local Government Code, of the information created or received by that county officer's office." *Id.* § 552.201. We note, however, that section 552.002 of the Government Code defines public information as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." *Id.* § 552.002. In this instance, the county maintains the district attorney's e-mails in connection with the transaction of official county business. Therefore, the county is a proper custodian for the e-mails at issue. Thus, we determine the county is obligated to respond to the request as provided under the Act.

Next, the county argues that the submitted draft by-laws contained in Exhibit L are not public information subject to disclosure under the Act[3]. The Act only applies to public information as defined by section 552.002 of the Government Code. *See id.* §§ 552.021, .002. The county argues the submitted draft by-laws "have nothing to do with a governmental body and constitute private writings" and "are not public information because they belong to a private non-profit[.]" Based on these representations and our review of the information at issue, we agree that submitted draft by-laws do not relate to the transaction of official county or district attorney business, and therefore do not constitute public information of the county or district attorney. Consequently, the county is not required to disclose information that is not public information under the Act. *See* Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving de minimis use of state resources).

Next, the county and the district attorney state that some of the responsive information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2008-13196 (2008). We note, however, that Open Records Letter No. 2008-13196 was issued to the district attorney. The instant request for information was received by the county. Therefore, because the governmental body in this instance is not the same as in Open Records Letter No. 2008-13196, the county may not rely on that ruling as a previous determination. *See* Open Records Decision No. 673 (2001) (governmental body may rely on prior ruling as previous determination when 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D); 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and 4) the law, facts, and circumstances on which the prior ruling was based have not

[3]We also note that the district attorney makes a similar argument for its submitted Samples D-15 through D-20.

changed since the issuance of the ruling). Accordingly, we will address the arguments with regard to the submitted information that is subject to 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." Gov't Code § 552.101. This exception encompasses information that other statutes make confidential. The county raises section 552.101 in conjunction with section 154.073 of the Civil Practice and Remedies Code, which provides in part:

> (a) Except as provided by Subsections (c), (d), (e), and (f) a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.[4]
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> (b) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.
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> (d) A final written agreement to which a governmental body, as defined by Section 552.003, Government Code, is a signatory that is reached as a result of a dispute resolution procedure conducted under this chapter is subject to or excepted from required disclosure in accordance with Chapter 552, Government Code.

Civ. Prac. & Rem. Code § 154.073(a)-(b), (d). In Open Records Decision No. 658 (1998), this office found that communications made during the formal settlement process were intended to be confidential. *See* Open Records Decision No. 658 at 4: *see also* Gov't Code § 2009.054(c). The county contends that the information in Exhibit M discusses a mediation and thus, is confidential under section 153.073. Having considered the submitted arguments and reviewed the information at issue, we find that the county has not demonstrated that the information contained in Exhibit M consists of either a communication relating to the subject matter of a dispute made by a participant in an alternative dispute resolution procedure or a record made at such a procedure. *See* Civ. Prac. & Rem. Code § 154.073(a)-(b). Therefore,

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[4]We note that subsections 154.073(c), (e), and (f) are not applicable in this instance.

the county may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with section 154.073 of the Civil Practice and Remedies Code.

Section 552.101 also encompasses section 261.201 of the Family Code, which provides as follows:

> (a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:
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> > (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
> >
> > (2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). The district attorney states that Sample D-8 relates to a case of indecency with a child. Because this information was used or developed in an investigation of child abuse, it is within the scope of section 261.201 of the Family Code. *See id.* § 261.001(1), (4) (defining "abuse" and "neglect" for purposes of Fam. Code ch. 261); *see also id.* § 101.003(a) (defining "child" for purposes of this section as person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes). The district attorney has not indicated that it has adopted a rule that governs the release of this type of information. Therefore, we assume that no such regulation exists. Given that assumption, Sample D-8 is confidential pursuant to section 261.201 of the Family Code and must be withheld under section 552.101 of the Government Code.[5]

The county also raises section 552.101 in conjunction with the informer's privilege, which has long been recognized by Texas courts. *E.g., Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). 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 that 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

[5]As our ruling is dispositive, we need not address the district attorney's other argument with regard to this information.

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). 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). 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); *see Roviaro v. United States*, 353 U.S. 53, 60 (1957).

The county argues that certain identifying information contained in Exhibit B is subject to the informer's privilege. However, the county has not identified an alleged violation of a criminal or civil statute, nor explained whether any alleged violation carries civil or criminal penalties. Furthermore, we note that witnesses 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 the informer's privilege. Accordingly, we find that the informer's privilege is not applicable to any of the information at issue. Thus, we conclude that the county may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with the informer's privilege.

Section 552.101 also encompasses the common-law right of privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. In addition, this office has found that the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). A compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. U. S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (finding significant privacy interest in complication of individual's criminal history by recognizing distinction between public records found in courthouse files and local police stations and compiled summary of information). Furthermore, we find that a compilation of a private citizen's criminal history is generally not of legitimate concern to the public.

This office has found, however, that the names, addresses, and telephone numbers of members of the public are not excepted from required public disclosure under common-law privacy, unless there is a showing of special circumstances. *See* Open Records Decision

Nos. 455 (1987) (absent special circumstances, the home address and telephone numbers of private citizens are generally not protected under the Act's privacy exceptions), 169 (1977). This office has also found that information concerning domestic violence generally does not come within the scope of common-law privacy. *See* Open Records Decision No. 611 (1992) ("An assault by one family member on another is a crime, not a family matter normally considered private"). Upon review, we determine that the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Furthermore, the county has failed to demonstrate the existence of special circumstances. Therefore, the marked information must be withheld under section 552.101 in conjunction with common-law privacy. The remaining information, however, is not protected by common-law privacy and may not be withheld under section 552.101 on that basis.[6]

Next, the county and the district attorney raise section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); 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 that 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. *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

[6]While the county also raises section 552.101 of the Government Code in conjunction with common-law privacy for the submitted e-mail addresses, we note that section 552.137 of the Government Code is the proper exception for this information. Therefore, we will address the e-mail addresses under this exception.

information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

This office has also concluded that 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.

Upon review, we determine that section 552.111 is applicable to the draft indictments and affidavits we have marked in Exhibit A. Therefore, the county may withhold the marked information under section 552.111.[7] However, we find the county and district attorney have failed to establish that the remaining information at issue is excepted on the basis of the deliberative process privilege under section 552.111. Therefore, none of the remaining information at issue may be withheld under section 552.111 of the Government Code.

The county and the district attorney raise section 552.103 of the Government Code. Section 552.103 provides in relevant part as follows:

> (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.
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> (c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103 exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or

[7]As our ruling is dispositive, we need not address the remaining arguments with regard to this information.

reasonably anticipated on the date that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103.

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that, if an individual publicly threatens to bring suit against a governmental body but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

In this instance, the county and the district attorney have failed to demonstrate that litigation was reasonably anticipated on the date the county received the instant request for information. Accordingly, the county may not withhold any portion of the submitted information under section 552.103 of the Government Code.

The county and the district attorney also raise section 552.108 of the Government Code. Section 552.108(a) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime." Gov't Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). The district attorney states that Samples D-1 through D-7 and D-9 "reflect communication between law enforcement, witnesses and victims of crime under investigation and prosecution." Based on this representation and our review, we find that section 552.108(a)(1) is applicable to Samples D-1 through D-7, as well as D-9, and they may be withheld on this basis.

Finally, we address the county's argument under section 552.137 of the Government Code, which 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). Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. We have marked a representative sample of e-mail addresses that are not a type specifically excluded by section 552.137(c). The county does inform us that the relevant members of the public have consented to the release of these e-mail addresses. Therefore, the county must withhold the types of e-mail addresses we have marked under section 552.137 of the Government Code.

In summary, the marked draft by-laws are not subject to the Act and the county is not required to disclose them to the requestor. The county must withhold Sample D-8 under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. The county must also withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The draft indictments and affidavits we have marked in Exhibit A may be withheld under section 552.111 of the Government Code. The county may withhold Samples D-1 through D-7 and D-9 under section 552.108(a)(1) of the Government Code. The county must withhold the types of e-mail addresses we have marked under section 552.137 of the Government Code, unless the county receives consent for their release. The remaining information must be released to the 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.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,

Jordan Hale

Jordan Hale
Assistant Attorney General
Open Records Division

JH/jb

Ref: ID# 331062

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

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