



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

January 15, 2009

Mr. David M. Swope
Assistant County Attorney
Harris County Attorney's Office
1019 Congress, 15th Floor
Houston, Texas 77002

OR2009-00654

Dear Mr. Swope:

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# 331131 (Harris County Attorney file no. 08GEN18238).

Harris County Judge Ed Emmett (the "judge") received a request for e-mails received or sent by the judge, the judge's executive assistant, and the Harris County Communications Director during specified time periods. The requestor also asks for the judge's calendar for a specified time period. You state that a portion of the requested information will be provided to the requestor. You claim that a portion of the submitted information is not subject to the Act. You also claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.107, 552.111, 552.130, and 552.137 of the Government Code. We have considered the arguments and reviewed the submitted information.

Initially, we address your contention that the e-mails in Exhibit B are not subject to the Act. The Act is only applicable to "public information." *See* Gov't Code § 552.021. Section 552.002(a) 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(a). Thus, virtually all information that is in a governmental body's physical possession constitutes public information that is subject to the Act. *Id.* § 552.002(a)(1); *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). Upon review of the e-mails in Exhibit B, we agree that most of the e-mails in Exhibit B do not constitute "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by or for the judge's office. *See* Gov't Code § 552.021; *see also* 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). Thus, we conclude that most of the e-mails in

Exhibit B, which we have marked, are not subject to the Act, and need not be released in response to this request.

However, based on our review, we find the remaining e-mails in Exhibit B appear to have been created in connection with the transaction of official business by the judge's office. You do not provide us with any arguments explaining why the remaining e-mails in Exhibit B do not pertain to the business of the judge's office. Accordingly, we find that the remaining e-mails in Exhibit B constitute "public information" as defined by section 552.002(a) and are subject to the Act. The remaining e-mails in Exhibit B must be released unless they come within an exception to public disclosure. Gov't Code § 552.021.

Next, we address your argument against the disclosure of Exhibit B-1. Section 552.101 of the Government Code exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This section encompasses information that other statutes make confidential. You raise section 552.101 in conjunction with sections 418.181 and 418.182 of the Government Code. Sections 418.176 through 418.182 were added to chapter 418 of the Government Code as part of the Texas Homeland Security Act (the "HSA"). Section 418.181 provides as follows:

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.

Section 418.182 provides as follows:

(a) Except as provided by subsections (b) and (c), information, including access codes and passwords, in the possession of a governmental entity that relates to the specifications, operating procedures, or location of a security system used to protect public or private property from an act of terrorism or related criminal activity is confidential.

Id. §§ 418.181, .182(a); *see generally id.* § 421.001 (defining critical infrastructure to include "all public or private assets, systems, and functions vital to the security, governance, public health and safety, and functions vital to the state or the nation"). The fact that information may relate to a governmental body's security measures does not make the information *per se* confidential under the Texas Homeland Security Act. *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 the claimed provision. As with any exception to disclosure, a claim under section 418.181 must be accompanied by an adequate explanation of 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).

In this instance, you explain that Exhibit B-1 consists of the minutes of certain meetings of the Houston-Harris County Regional Homeland Security Advisory Council (the "council").

You state that the minutes provide a “snapshot into the very thought process of the [council].” You also contend that the release of Exhibit B-1 would “be counterproductive to intelligence gathering and homeland security formulation.” However, you have not provided any specific arguments demonstrating, nor can we discern, how the council minutes in Exhibit B-1 identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. Thus, section 418.181 is not applicable to Exhibit B-1. Additionally, we note that section 418.182 pertains to security systems used to protect public or private property from terrorism. You have made no arguments explaining how the submitted minutes at Exhibit B-1 relate to the specifications, operating procedures, or location of a security system used to protect public or private property from terrorism. Accordingly, you have failed to demonstrate the applicability of section 418.182 to Exhibit B-1. Therefore, the judge may not withhold Exhibit B-1 under section 552.101 of the Government Code on these grounds.

We note, however, that Exhibit B-3 contains some information that is protected by section 418.176(a)(3) of the HSA, which provides as follows:

(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:

(3) consists of a list or compilation of pager or telephone numbers, including mobile and cellular telephone numbers, of the provider.

Id. § 418.176(a)(3). Based on our review of Exhibit B-3, we find that the information we have marked consists of telephone numbers that were collected, assembled, or maintained by or for a governmental entity for the purpose of responding to an act of terrorism or related criminal activity. *See id.* § 418.176(a)(3). We therefore conclude that the judge must withhold the marked telephone numbers in Exhibit B-3 under section 552.101 in conjunction with section 418.176 of the Government Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that (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). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. 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. This office has also found that some kinds of medical information or information indicating disabilities or specific illnesses is protected by

common-law privacy. *See* Open Records Decision No. 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). We have marked information in Exhibit B-3 that is highly intimate and not of legitimate public interest. This information is confidential under common-law privacy and must be withheld under section 552.101 of the Government Code.

Next, you seek to withhold Exhibit B-4 under section 552.107 of the Government Code. Section 552.107(1) protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating 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). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). 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 to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of 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, no writ). 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).

In this case, you state that Exhibit B-4 consists of confidential communications made for the purpose of facilitating the rendition of professional legal services. You also state that the communications were between Harris County attorneys and employees and administrators in the judge’s office. Finally, you state that the communications have remained confidential. Thus, the judge may withhold Exhibit B-4 under section 552.107(1) of the Government Code.

Next, the judge asserts that the e-mails and draft documents in Exhibit B-5 are excepted from disclosure under section 552.111 of the Government Code. Section 552.111 excepts from

disclosure "an 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, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615 (1993), 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). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5.

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.

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 assert that Exhibit B-5 consists of emails and draft versions of policy making documents relating to shared projects between governmental entities. However, you have not identified the other parties to information in Exhibit B-5 nor have you demonstrated how the information in Exhibit B-5 constitutes communications made between parties in privity of interest for section 552.111 purposes. *See* Gov't Code § 552.301(e)(1) (requiring the governmental body to explain the applicability of the raised exception). You have also failed to demonstrate that the information in Exhibit B-5 constitutes communications that consist of advice, recommendations, and opinions that reflect the policymaking processes of the judge's office. Thus, Exhibit B-5 may not be withheld under section 552.111 of the Government Code.

We note that some of the remaining information in Exhibits B and B-3 may be excepted from disclosure under section 552.117(a)(1) of the Government Code.¹ Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. *Id.* § 552.117(a)(1). We note that section 552.117 also encompasses a personal cellular telephone number, provided that the service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-7 (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 only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request under section 552.024 that the information be kept confidential. We have marked personal information of the judge and other employees of the judge's office. You have not informed us that the judge or the other employees whose information is at issue requested confidentiality pursuant to section 552.024. Accordingly, if these individuals timely elected confidentiality, the judge must withhold the information that we marked in Exhibits B and B-3 under section 552.117(a)(1). However, if any of the cellular telephone numbers we have marked under section 552.117(a)(1) are from a cellular telephone service paid for by the judge's office, then those telephone numbers must be released. If the

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

employees did not timely elect, none of their information may be withheld under section 552.117(a)(1).

We note that Exhibit B-3 contains some information that may be subject to section 552.1175 of the Government Code. Section 552.1175 provides in part:

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure;

...

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(a), (b). The judge must only withhold the personal information of the peace officers we have marked in Exhibit B-3 if those licensed peace officers elect to restrict access to their information in accordance with section 552.1175(b). If no election is made, the judge may not withhold those officers' information under section 552.1175.

Section 552.130 of the Government Code provides that information relating to a motor vehicle driver's license or motor vehicle title or registration issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(1), (2). Accordingly, the judge must withhold the Texas motor vehicle information you have highlighted in Exhibit B-2, as well as the additional information we have marked in Exhibit B-3, under section 552.130 of the Government Code. As you raise no further exceptions to the disclosure of the remaining information in Exhibit B-2, it must be released to the requestor.

Finally, you seek to withhold the information you have highlighted in Exhibit B-3 under section 552.137 of the Government Code. Section 552.137 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 id.* § 552.137(a)-(c). Section 552.137(c) excludes the e-mail addresses of a person who has a contractual relationship with a governmental body or its agent. *Id.* § 552.137(c)(1).

Section 552.137 is also not applicable to an e-mail address that a governmental entity maintains for one of its officials or employees. We note that some of the e-mail addresses you have highlighted in Exhibit B-3 are either the e-mail addresses of contractors for Harris County or are the e-mail addresses of an employee of a governmental entity, which are types of e-mail addresses that may not be withheld under section 552.137. We have marked these e-mail addresses for release. In addition, you have highlighted other information in Exhibit B-3, including, among other things, home addresses and telephone numbers, which is not protected by section 552.137. This information, which we have marked, may not be withheld under section 552.137. However, the remaining e-mail addresses you have highlighted in Exhibit B-3, as well as the additional e-mail addresses we have marked in Exhibits B, B-1, B-3, and B-5 must be withheld under section 552.137, unless the owners of these e-mail addresses consent to their release.

In summary, the e-mails we have marked in Exhibit B are not subject to the Act, and need not be released in response to this request. The judge must withhold the marked telephone numbers in Exhibit B-3 under section 552.101 in conjunction with section 418.176 of the Government Code. The judge may withhold Exhibit B-4 under section 552.107(1) of the Government Code. If the judge and the employees at issue timely elected confidentiality, the judge must withhold the information that we marked in Exhibits B and B-3 under section 552.117(a)(1) of the Government Code. However, if any of the cellular telephone numbers we have marked under section 552.117(a)(1) of the Government Code are from a cellular telephone service paid for by the judge's office, then those telephone numbers must be released. If the licensed peace officers at issue elect to restrict access to their information, the judge must withhold the personal information of the peace officers we have marked in Exhibit B-3 under section 552.1175 of the Government Code. The judge must withhold the Texas motor vehicle information you have highlighted in Exhibit B-2, well as the additional information we have marked in Exhibit B-3, under section 552.130 of the Government Code. Except as we have marked for release, the judge must withhold the e-mail addresses you have highlighted in Exhibit B-3, as well as the additional e-mail addresses we have marked in Exhibits B, B-1, B-3, and B-5, under section 552.137 of the Government Code, unless the owners of these e-mail addresses consent to their release. The remaining information must be released to the requestor.²

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,

²We note the remaining information contains a social security number. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. Gov't Code § 552.147.

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,

A handwritten signature in cursive script that reads "Laura E. Ream".

Laura E. Ream
Assistant Attorney General
Open Records Division

LER/jb

Ref: ID# 331131

Enc. Submitted documents

cc: Requestor
(w/o enclosures)