



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 27, 2012

Mr. Scott A. Durfee
Assistant General Counsel
Harris County District Attorney's Office
1201 Franklin, Suite 600
Houston, Texas 77002

OR2012-20777

Dear Mr. Durfee:

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# 474982.

The Harris County District Attorney's Office (the "district attorney's office") received a request for all communications referencing the requestor and/or a named individual's blog.¹ You claim the submitted information is excepted from disclosure under sections 552.108 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we note some of the submitted information, which we have marked, is not responsive to the instant request because it was created after the district attorney's office received the request for information. This ruling does not address the public availability of

¹You state the district attorney's office sought and received clarification of the information requested. See Gov't Code § 552.222 (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 that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²We 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.

any information that is not responsive to the request and the district attorney's office is not required to release non-responsive information in response to the request.

Section 552.108 of the Government Code provides in relevant part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

...

(4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) represents the mental impressions or legal reasoning of an attorney representing the state.

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

...

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a)(4), (b)(3). A governmental body must reasonably explain how and why section 552.108 is applicable to the information at issue. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

You state the e-mails contained in Exhibit B-1 reflect the mental impressions and legal reasoning of attorneys representing the State of Texas, and the documents were also prepared in the course of preparing for criminal litigation. Based on your representations and our review, we find the district attorney's office has demonstrated the applicability of

section 552.108(a)(4) to portions of the submitted information. Thus, the district attorney's office may withhold the information we have marked in Exhibit B-1 under section 552.108(a)(4) of the Government Code.³ However, we note the remaining responsive information in Exhibit B-1 consists of administrative e-mails, e-mails sent to or from the requestor and various third parties. You have not explained, and our review of information at issue does not reveal, how the remaining information in Exhibit B-1 was prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation or that it reflects the mental impressions or legal reasoning of an attorney representing the state. See Gov't Code § 552.108(a)(4), (b)(3). Accordingly, the district attorney's office may not withhold any of the remaining responsive information contained in Exhibit B-1 under subsections 552.108(a)(4) or 552.108(b)(3) of the Government Code.

Section 552.111 of the Government Code excepts from disclosure "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]" *Id.* § 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 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 information also may be withheld under section 552.111. See Open Records Decision No. 313 at 3 (1982).

³As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

Section 552.111 can also encompass communications between a governmental body and a third party, including a consultant or other party with a privity of interest. *See* Open Records Decision No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). When determining if an interagency memorandum is excepted from disclosure under section 552.111, we must consider whether the entities between which the memorandum is passed share a privity of interest or common deliberative process with regard to the policy matter at issue. *See id.* 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.

You state the information contained in Exhibits B-2 and B-3 consists of e-mails containing advice, opinion, and recommendations on policy making matters of the district attorney's office. Based on your representations and our review, we find the information we have marked consists of advice, opinions, and recommendations of the district attorney's office's policymaking. Therefore, the district attorney's office may withhold the information we have marked under section 552.111 of the Government Code. However, we find some of the remaining information at issue to be general administrative information or purely factual in nature. You have not explained how this information constitutes internal advice, recommendations, or opinions regarding policymaking issues. Additionally, some of this information has been communicated with individuals you have not demonstrated you share a privity of interest. Therefore, we find you have failed to establish the applicability of section 552.111 to the remaining information at issue. Accordingly, the district attorney's office may not withhold any of the remaining information under section 552.111 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."⁴ Gov't Code § 552.101. Section 552.101 encompasses the doctrine of common-law 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). To demonstrate the applicability of common-law privacy, both prongs of this test must be met. *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. *See id.* at 683. This office has found personal financial information not relating to

⁴The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

the financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990). In addition, this office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we find portions of the remaining information are highly intimate or embarrassing and of no legitimate public interest. Accordingly, the district attorney's office must withhold the information we have marked under section 552.101 in conjunction with common-law privacy.

Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Section 552.117(a)(1) also applies to the personal cellular telephone number of a current or former official or employee of a governmental body, provided the cellular telephone service is not paid by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Therefore, to the extent the individuals at issue timely requested confidentiality under section 552.024, the district attorney's office must withhold the information we have marked under section 552.117(a)(1) of the Government Code, including cellular telephone numbers if the cellular telephone services are not paid for by a governmental body.

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). Gov't Code § 552.137(a)-(c). Accordingly, the district attorney's office must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the addresses have affirmatively consented to their release. *See id.* § 552.137(b).

In summary, the district attorney's office may withhold the information we have marked in Exhibit B-1 under section 552.108(a)(4) of the Government Code and the information we have marked in Exhibits B-2 and B-3 under section 552.111 of the Government Code. To the extent the individuals at issue timely requested confidentiality under section 552.024, the district attorney's office must withhold the information we have marked under section 552.117(a)(1) of the Government Code, including cellular telephone numbers if the cellular telephone services are not paid for by a governmental body. The district attorney's

office must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the addresses have affirmatively consented to their release. The remaining responsive information must be released.⁵

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, toll free at (888) 672-6787.

Sincerely,



Kathleen J. Santos
Assistant Attorney General
Open Records Division

KJS/dls

Ref: ID# 474982

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁵We note the information being released contains the requestor's e-mail address, to which he has a right of access pursuant to section 552.137(b) of the Government Code. See Gov't Code § 552.137(b). Should the district attorney's office receive another request for this information from a different requestor, we note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. See ORD 684.