



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 15, 2013

Mr. Scott A. Durfee  
Assistant General Counsel  
Harris County District Attorney's Office  
1201 Franklin, Suite 600  
Houston, Texas 77002-1901

OR2013-17869

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# 502269.

The Harris County District Attorney's Office (the "district attorney's office") received a request for "all [p]rosecutors," "all DA [e]mployees," and/or "[a]ll [i]nvestigators" e-mails, excluding certain topics, produced during a specified time period. You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.111, 552.117, and 552.1175 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

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. The district attorney's office need not release non responsive information in response to this request, and this ruling will not address that information.

Section 552.108 of the Government Code provides in relevant part:

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<sup>1</sup>Although you raise sections 552.103 and 552.107 of the Government Code, you make no arguments to support these claims. Therefore, we assume you have withdrawn your claims these sections apply to the submitted information. See Gov't Code §§ 552.301, .302.

(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:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime; [or]

...

(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) reflects 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:

(1) release of the internal record or notation would interfere with law enforcement or prosecution; [or]

...

(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)(1), (a)(4), (b)(1), (b)(3). A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information that the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

Subsection 552.108(b)(1) is intended to protect "information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this

State.” *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.). This office has concluded subsection 552.108(b) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (1989) (release of detailed use of force guidelines would unduly interfere with law enforcement), 252 (1980) (section 552.108 of the Government Code is designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). Subsection 552.108(b)(1) is not applicable, however, to generally known policies and procedures. *See, e.g.*, ORDs 531 at 2-3 (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known). To prevail on its claim that subsection 552.108(b)(1) excepts information from disclosure, a law-enforcement agency must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. The determination of whether the release of particular records would interfere with law enforcement is made on a case-by-case basis. Open Records Decision No. 409 at 2 (1984).

You inform us the radio identification numbers and non-public backline numbers contained in Exhibit B-3 are used by investigators of the district attorney’s office in the field to carry out their law enforcement duties. You contend release of the radio identification numbers would allow individuals to pose as staff members by identifying themselves solely by the assigned coded number of investigators. You also indicate the release of the backline numbers would interfere with law enforcement by preventing the investigators from taking care of immediate calls in the field. Based on your representations and our review of the information at issue, we conclude the district attorney’s office may withhold the submitted radio identification numbers and non-public backline numbers under subsection 552.108(b)(1) of the Government Code.

You state the information in Exhibits B-1 and B-2 consists of e-mails between members of the district attorney’s office containing legal analysis and discussing strategy used and to be used in the prosecution and investigation of criminal cases. Based on your representations and our review, we find the information we have marked was prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation or reflects the mental processes or legal reasoning of an attorney. Accordingly, the district attorney’s office may withhold this information under subsection 552.108(b)(3) of the Government Code.<sup>2</sup> However, you have not explained, and the information at issue does not reveal, how the remaining information in Exhibit B-2 pertains to an ongoing criminal investigation or prosecution, nor have you explained how its release would interfere in some way with the detection, investigation, or prosecution of crime. Thus, you have not met your burden under subsection 552.108(a)(1) or subsection 552.108(b)(1). Further, you have not

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<sup>2</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

explained how this information 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 the remaining information in Exhibit B-2 under section 552.108.

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, 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).

You state the remaining information in Exhibit B-2 consists of e-mails containing advice, opinion, and recommendations on policy making matters of the district attorney's office. Upon review, however, we find 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. 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 at issue in Exhibit B-2 under section 552.111 of the Government Code.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home address, home telephone number, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 and 552.1175 of the Government Code. *See* Gov't Code § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. We note section 552.117 is also applicable to personal cellular telephone numbers and pager numbers, provided the cellular telephone and pager service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Accordingly, if the individuals whose information is at issue in Exhibit B-3 are currently licensed peace officers as defined by article 2.12, the district attorney's office must withhold the information we have marked under section 552.117(a)(2) of the Government Code. Further, if a governmental body did not pay for the officers' cellular telephone service, the district attorney's office must withhold these individuals' cellular telephone numbers under section 552.117(a)(2) of the Government Code.<sup>3</sup>

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, 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. Gov't Code § 552.117(a)(1). As previously noted, section 552.117 is also applicable to personal cellular telephone numbers and pager numbers, provided the cellular telephone and pager service is not paid for by a governmental body. *See* Open Records Decision No. 670 at 6 (2001) (extending section 552.117 exception to personal cellular telephone number and personal pager number of employee who elects to withhold home telephone number in accordance with section 552.024). 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. Therefore, to the extent the individuals timely requested confidentiality under section 552.024, the district attorney's office must withhold the information we have marked in Exhibit B-3 under section 552.117(a)(1); however, their marked cellular telephone numbers may be withheld only if a governmental body did not pay for the service. Conversely, if any of the individuals at issue did not timely request confidentiality under section 552.024, or a governmental body pays for the marked cellular telephone, the district attorney's office may not withhold the marked information under section 552.117(a)(1).

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

Section 552.1175 of the Government Code protects the home address, home telephone number, emergency contact information, date of birth, social security number, and family member information of certain individuals, when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information confidential. *See* Act of May 26, 2013, 83rd Leg., R.S., H.B. 1632, § 3 (to be codified as an amendment to Gov't Code § 552.1175). As noted above, a cellular telephone number is excepted under section 552.1175, provided the cellular telephone service is not paid for with public funds. *See* ORD 506 at 5-6. You state Exhibit B-3 contains the cellular telephone numbers of Houston Police Department Robbery Division officers. If officers at issue elect to restrict access to the cellular telephone numbers in accordance with section 552.1175(b), then the district attorney's office must withhold the marked cellular telephone numbers under section 552.1175 if the cellular telephone service is not paid for by a government body. However, if the cellular telephone service is paid for with public funds or they do not properly elect to restrict access to their personal telephone numbers, the district attorney's office may not withhold the cellular telephone numbers we have marked under section 552.1175 of the Government Code.

Section 552.101 of the Government Code excepts "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. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). We note the names, home addresses, and telephone numbers of living members of the public are generally not highly intimate or embarrassing. *See* Open Records Decision Nos. 551 at 3 (1990) (disclosure of person's name, address, or telephone number not invasion of privacy), 455 at 7 (home addresses and telephone numbers not protected under privacy). Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the district attorney's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find none of the remaining information is highly intimate or embarrassing and not of legitimate public concern. Therefore, the district attorney's office may not withhold any of the remaining information under section 552.101 in conjunction with common-law privacy.

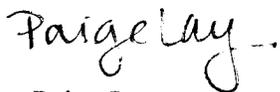
In summary, the district attorney's office may withhold the submitted radio identification numbers and non-public backline numbers under subsection 552.108(b)(1) of the Government Code. The district attorney's office may withhold the information we have marked under subsection 552.108(b)(3) of the Government Code. If the individuals whose information we have marked under section 552.117(a)(2) of the Government Code are

currently licensed peace officers as defined by article 2.12 of the Code of Criminal Procedure, the district attorney's office must withhold the information we have marked under section 552.117(a)(2); however, their marked cellular telephone numbers may be withheld only if a governmental body did not pay for the service. 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 in Exhibit B-3 under section 552.117(a)(1); however, their marked cellular telephone numbers may be withheld only if a governmental body did not pay for the service. If officers at issue elect to restrict access to the cellular telephone numbers in accordance with section 552.1175(b), then the district attorney's office must withhold the marked cellular telephone numbers under section 552.1175 if the cellular telephone service is not paid for by a government body. The district attorney's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The remaining responsive information must be released.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Paige Lay  
Assistant Attorney General  
Open Records Division

PL/bhf

Ref: ID# 502269

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)