



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 27, 2016

Mr. Mark Kennedy
General Counsel
County of Hays
712 South Stagecoach Trail, Suite 1231
San Marcos, Texas 78666

OR2016-02010

Dear Mr. Kennedy:

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# 595667.

The Hays County Office of General Counsel (the "county") received a request for all e-mail correspondence pertaining to the requestor that was sent or received by five named individuals. You claim the submitted information is excepted from disclosure under sections 552.107, 552.108, and 552.111 of the Government Code, and privileged under Texas Rule of Evidence 503.¹ We have considered the raised arguments and reviewed the submitted information.

Initially, we note you did not submit any information responsive to the request for e-mail communications involving one of the named individuals. Therefore, to the extent information responsive to this aspect of the request exists, we assume the county has released

¹Although you also raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Thus, we do not address your argument under section 552.101 of the Government Code.

it to the requestor. If the county has not released such information, it must do so. Gov't Code §§ 552.301(a), .302; Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible under circumstances).

We further note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108; [and]

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(1), (17). The information at issue includes reports you state are completed, and thus are subject to section 552.022(a)(1) and must be released unless they are excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. *See id.* § 552.022(a)(1). The information at issue also contains court-filed documents that are subject to section 552.022(a)(17). The county must release this information pursuant to section 552.022(a)(17), unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(17). You seek to withhold the court-filed documents under sections 552.107, 552.108, and 552.111 of the Government Code. However, these sections are discretionary exceptions and do not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). Therefore, the court-filed documents may not be withheld under these exceptions. However, the attorney-client privilege is also found in Texas Rule of Evidence 503, which the Texas Supreme Court has held is "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will, therefore, consider your assertion of the attorney-client privilege under rule 503 for the information subject to subsections 552.022(a)(1) and 552.022(a)(17). We will also consider your assertion of section 552.108(a)(2) to the information subject to section 552.022(a)(1) of the Government Code.

Texas Rule of Evidence 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

(A) between the client or the client's representative and the client's lawyer or the lawyer's representative;

(B) between the client's lawyer and the lawyer's representative;

(C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;

(D) between the client's representatives or between the client and the client's representative; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if it is 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).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. *See* Open Records Decision No. 676 at 6-7 (2002). Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding).

You state, and the submitted documentation reflects, the information at issue constitutes communications between county attorneys, their representatives, and county employees. You indicate the communications were made for the purpose of facilitating the rendition of professional legal services to the State of Texas. You also indicate the communications were

intended to be confidential and have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information we have marked. Accordingly, the county may withhold the information we have marked under rule 503 of the Texas Rules of Evidence. However, the remaining information at issue does not document a communication. Thus, we find you have not demonstrated the remaining information constitutes privileged attorney-client communications for the purposes of Texas Rule of Evidence 503. Thus, the county may not withhold the remaining information at issue on that basis.

Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that did not result in conviction or deferred adjudication. *See* Gov't Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). You state the remaining information pertains to “at least ten” cases that have been dismissed. However, the submitted documentation reflects two of the cases resulted in conviction. Additionally, you do not inform us which communications relate to which closed criminal cases that did not result in a conviction or deferred adjudication. Consequently, we find you have failed to sufficiently demonstrate the applicability of section 552.108(a)(2) to the remaining information. Therefore, the county may not withhold the remaining information under section 552.108(a)(2) of the Government Code.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. Gov't Code § 552.107(1). The elements of the privilege under section 552.107(1) are the same as those discussed above in rule 503. 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. ORD No. 676 at 6-7. 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 remaining information at issue constitutes communications between county attorneys, their representatives, and county employees. You indicate the communications were made for the purpose of facilitating the rendition of professional legal services to the State of Texas. You also indicate the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find some of the remaining information consists of privileged attorney-client communications. Accordingly, the county may generally withhold the information we have marked under section 552.107(1) of the Government Code. However, we find you have failed to demonstrate the remaining information consists of communications between privileged

parties or communications made for the purpose of facilitating the rendition of professional legal services to the county. Therefore, the county may not withhold any of the remaining information under section 552.107(1). Additionally, we note some of the otherwise privileged e-mail strings include e-mails received from or sent to non-privileged parties. Furthermore, if the e-mails received from or sent to the non-privileged parties are removed from the otherwise privileged e-mail strings in which they appear and stand alone, they are responsive to the request for information. Therefore, if these non-privileged e-mails, which we have marked, are maintained by the county separate and apart from the otherwise privileged e-mail strings in which they appear, then the county may not withhold these non-privileged e-mails under section 552.107(1). To the extent the non-privileged e-mails exist separate and apart, we will consider whether the e-mails are otherwise excepted from disclosure under the Act. We will also consider whether the remaining information not subject to section 552.107 is excepted from disclosure under the Act.

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, orig. proceeding); 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, orig. proceeding). 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. ORD 615 at 5; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). However, section 552.111 does not generally except from disclosure facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 157; 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).

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). 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 id.* at 9.

You assert the remaining information consists of discussions of issues related to policymaking matters of the county. However, the information at issue either consists of factual information, or consists of a communication with parties you have not identified as sharing a privity of interest or common deliberative process with the county. Therefore, we conclude you have failed to demonstrate the remaining information constitutes internal communications containing advice, recommendations, or opinions reflecting the policymaking matters of the county. Consequently, the county may not withhold any of the remaining information under section 552.111 of the Government Code.

Section 552.137 of the Government Code provides, “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act],” unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c).² Gov’t Code § 552.137(a)–(c). The county must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their release.

In summary, the county may withhold the information we have marked under rule 503 of the Texas Rules of Evidence. The county may generally withhold the information we have marked under section 552.107(1) of the Government Code; however if the county maintains the non-privileged e-mails we have marked separate and apart from the otherwise privileged e-mail strings in which they appear, they must be released. The county must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their release. The county must release the remaining information.³

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.

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480(1987), 470 (1987).

³We note the information being released contains the requestor’s e-mail address, social security number, and other personal information. The requestor has a right of access to his e-mail address under section 552.137(b) of the Government Code, and his social security number and other personal information under section 552.023 of the Government Code. *See* Gov’t Code §§ 552.023(a), .137(b); Open Records Decision No. 481 at 7 (1987) (privacy theories not implicated when individual requests information concerning himself).

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 black ink, appearing to read "J. Behnke", is written over the typed name.

Joseph Behnke
Assistant Attorney General
Open Records Division

JB/som

Ref: ID# 595667

Enc. Submitted documents

c: Requestor
(w/o enclosures)