



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 19, 2005

Mr. Shawn Dick
Assistant District Attorney
Williamson County
405 M.L.K., No. 1
Georgetown, Texas 78626

OR2005-07523

Dear Mr. Dick:

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# 229651.

The Williamson County District Attorney's Office (the "district attorney") received a request for information pertaining to particular proposed legislation, as well as the district attorney's appointment calendars, mobile phone records, and telephone messages for a certain time period. You inform us that you have released some information to the requestor. You also inform us that there are no responsive mobile phone records.¹ You claim that a portion of the submitted information is not public information subject to release under the Act, and alternatively, that this information, as well as the remaining submitted information, is excepted from disclosure under sections 552.106, 552.109, 552.111 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

¹The Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received or to prepare new information in response to a request. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

²You also raise section 552.117 of the Government Code; however, you make no arguments, nor do you mark the submitted documents, with regard to this exception.

First, we address your argument that the submitted e-mail communications are not public information subject to the Act. You state that

the type of information requested was generated by [the district attorney] using his personal laptop, paid for without government funds. The e-mail correspondence sought by requestor pertains to a private, personal e-mail address through commercial servers paid for with [the district attorney's] personal funds. The computer and personal e-mail accounts were purchased so that [the district attorney] could conduct personal business independent of his work as an elected District Attorney. That personal communication should not be converted to public records simply because of his title as District Attorney. The legislative communications are separate from his function as a District Attorney. [The district attorney] has a right as a citizen to speak freely and participate in the legislative process. The open records request infringes upon [the district attorney's] right as a citizen to speak freely and participate in the legislative process [and his] rights as a citizen to freedom of speech and association. These records should not be considered open records under [the Act] because they are not the product of a 'governmental body'. See Tex. Gov't Code [§] 552.003.

Initially, we note that a county district attorney's office is a governmental body within the meaning of the Act. See Gov't Code § 552.003(a)(1); *Holmes v. Morales*, 924 S.W.2d 920, 923 (Tex. 1996). Next, section 552.002 of the Act defines "public information" as consisting of

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, under this provision, information is generally "public information" within the scope of the Act when it relates to the official business of a governmental body or is maintained by a public official or employee in the performance of official duties, even though it may be in the possession of one person. In addition, section 552.001 of the Government Code states it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees. See Gov't Code § 552.001(a). We further note that the characterization of information as "public information" under the Act is not dependent on whether the requested records are in the possession of an individual or whether a governmental body has a particular policy or

procedure that establishes a governmental body's access to the information. *See* Open Records Decision No. 635 at 3-4 (1995) (finding that information does not fall outside definition of "public information" in Act merely because individual member of governmental body possesses information rather than governmental body as whole); *see also* Open Records Decision No. 425 (1985) (concluding, among other things, that information sent to individual school trustees' homes was public information because it related to official business of governmental body) (overruled on other grounds by Open Records Decision No. 439 (1986)). Thus, the mere fact that the district attorney generated the information at issue using his personal laptop computer does not take the information outside the scope of the Act. *See id.*

We have reviewed the information at issue and find that, because the correspondence pertains to proposed legislation addressing the operation of community supervision in criminal cases, because the district attorney's opinion was sought due to his position as a public official, and because the correspondence was exchanged during the business hours of the district attorney's office, this correspondence relates to the transaction of the official business of the district attorney. Thus, we conclude that the e-mails at issue constitute public information subject to the Act.³

We next address the submitted appointment calendar. You state that the district attorney's calendar is kept on his own private laptop computer, which is not paid for in any part by the county. You state that the district attorney keeps his laptop with him at all times, that the calendar is updated and maintained by him personally, and that of his over 20 employees, only his personal secretary has access to read his calendar. You further state that, although the calendar is intended as a work calendar, it also contains personal information that you believe should be withheld from the requestor. On the basis of your representations, we understand you to assert that portions of the district attorney's calendar are not public information subject to the Act, and that alternatively, certain calendar entries are excepted from disclosure under sections 552.106, 552.109, and 552.111 of the Government Code.

Based on your representations and our review of the calendar entries in question, we conclude that some of these calendar entries, a representative sample of which we have marked, do not fall within the definition of public information under section 552.002. Therefore, the Act does not require the district attorney to release these calendar entries to the requestor. We find that the remaining entries relate to the transaction of the official business of the district attorney, and thus are public information. We have marked a representative sample of entries that are public information. We will therefore address your arguments under sections 552.109 and 552.111 of the Government Code for this information as well as the remaining submitted information.

³ Given our conclusion that the information at issue is public information subject to disclosure under the Act, we further conclude that no constitutional rights of the district attorney are infringed in responding to this request.

Section 552.109 protects private correspondence and communications of elected office-holders when release of the information "would constitute an invasion of privacy." See Gov't Code § 552.109. In determining whether information is excepted from disclosure by section 552.109, this office relies on the same common-law privacy test applicable under section 552.101 of the Government Code.⁴ See Open Records Decision Nos. 506 (1988), 241 (1980), 212 (1978); see also Open Records Decision No. 40 (1974) (providing that section 552.109 may protect content of information, but not fact of communication). This office has also concluded that section 552.109 protects the privacy interest of the elected officials and not the interests of their correspondents. See Open Records Decision Nos. 473 at 3 (1987), 332 at 2 (1982).

Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type 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. 540 S.W.2d at 683. In addition, this office has found that the following types of information are excepted from required public disclosure under common-law privacy: personal financial information not relating to a financial transaction between an individual and a governmental body, see Open Records Decision Nos. 600 (1992), 545 (1990), 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).

Upon review of the information at issue, we conclude that none of the public information implicates the privacy rights of the district attorney, and thus, it may not be withheld under section 552.109. However, we have marked a small amount of information pertaining to another individual that is protected under section 552.101 in conjunction with common law privacy. You must withhold this marked information.

Section 552.111 of the Government Code 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." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice,

⁴ Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses the doctrine of common-law privacy.

recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. 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.*, 37 S.W.3d at 160; ORD 615 at 4-5. Section 552.111 can encompass communications between a governmental body and a third party consultant. See Open Records Decision Nos. 631 at 2 (1995) (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). Section 552.111 is not applicable, however, to communications with a party with which the governmental body has no privity of interest or common deliberative process. See Open Records Decision No. 561 at 9 (1990).

You state that "several members of the Legislature and Governor's office look to [the district attorney] as an authority on criminal matters and seek out his advice on pieces of legislation." You also inform us that "several of these documents were also prepared at the request of the Governor's office." Based upon your representations and our review of the submitted documents, we conclude that a portion of the information, which we have marked, is excepted from disclosure under 552.111. However, some of the remaining information is purely factual or contains no advice, opinion, or recommendations concerning the policymaking processes of the district attorney, and thus, it may not be withheld under section 552.111. In addition, some of the information has been shared with a third party, and you do not demonstrate that the third party shares a privity of interest or common deliberative process with the district attorney. Thus, this information also may not be withheld under section 552.111.⁵

We note that the submitted information also contains e-mail addresses. 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 Gov't Code § 552.137(a)-(c). The e-mail addresses at issue are not one

⁵We note that the governmental interests and the kinds of documents excepted by section 552.106 resemble those protected by section 552.111. See Open Records Decision No. 429 (1985). Thus, our conclusion with regard to section 552.111 is dispositive, and we need not address the applicability of section 552.106 to the remaining submitted information.

of the types specifically excluded by section 552.137(c). Therefore, unless the individuals at issue consented to the release of their e-mail addresses, the district attorney must withhold them in accordance with section 552.137 of the Government Code.

In summary, certain personal information contained in the district attorney's calendar, which we have marked, is not public information under the Act and may be withheld from the requestor. The information we have marked under sections 552.101, 552.111, and 552.137 may also be withheld. The remaining submitted information must be released to the requestor.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Jaime L. Flores
Assistant Attorney General
Open Records Division

JLF/seg

Ref: ID# 229651

Enc. Submitted documents

c: Ms. Ann del Llano
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(w/o enclosures)