



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 29, 2009

Mr. David M. Swope  
Assistant County Attorney  
Harris County  
1019 Congress, 15<sup>th</sup> Floor  
Houston, Texas 77002-1700

OR2009-05693

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# 341308 (C. A. File No. 09GEN0315).

The Harris County Sheriff's Office (the "sheriff") received a request for e-mails sent or received by the sheriff and named employees over a specific period of time. You claim that portions of the requested information are not subject to the Act and other portions are excepted from disclosure under sections 552.107, 552.108, and 552.111 of the Government Code. We have considered your claims and reviewed the submitted information.<sup>1</sup>

Initially, we address your contention that some of the e-mails submitted as Exhibit B are not public information 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). Information that is collected, assembled, or maintained by a third party may

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<sup>1</sup>We assume that 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.

be subject to disclosure under the Act if it is maintained for a governmental body, the governmental body owns or has a right of access to the information, and the information pertains to the transaction of official business. *See* Open Records Decision No. 462 (1987).

After reviewing Exhibit B, we agree that the e-mails we have marked are purely personal, and thus 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 sheriff. *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 these e-mails are not subject to the Act, and need not be released in response to this request. However, we find that the remaining e-mails in Exhibit B were created in connection with the transaction of official sheriff business. Therefore, these e-mails constitute "public information" as defined by section 552.002(a) and are subject to the Act. As you have raised no exceptions to disclosure for the remaining e-mails in Exhibit B, they must be released.

We next address your argument under section 552.107 of the Government Code, which excepts from disclosure information that comes within the attorney-client privilege. *See* Gov't Code § 552.107(1). A governmental body asserting the attorney-client privilege bears the burden of providing the necessary facts to demonstrate the elements of the privilege. *See* Open Records Decision No. 676 at 6-7 (2002). First, the governmental body must demonstrate that the information at issue constitutes or documents a communication. *See 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. *See* TEX. R. EVID. 503(b)(1); *In re Texas 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. *See* 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, meaning such communication 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. *See 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. Finally, we note that section 552.107(1) generally excepts an entire communication that is 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 instance, you state that the information you have marked as Exhibit B-1 consists of communications among sheriff employees and attorneys representing the sheriff. You also state that these communications were made in furtherance of the rendition of legal services to the sheriff, and you inform this office that these communications have remained confidential. Based on your representations and our review, we agree that the information in Exhibit B-1 constitutes privileged attorney-client communications. Accordingly, the sheriff may withhold Exhibit B-1 under section 552.107(1) of the Government Code.

You assert the information submitted as Exhibit B-2 is excepted from disclosure under section 552.108(a) of the Government Code. Section 552.108(a)(1) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime.” Gov’t Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See* Gov’t Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state, and provide an affidavit supporting, that the information in Exhibit B-2 relates to pending criminal investigations. Based upon this representation and the submitted affidavit, we conclude that the release of Exhibit B-2 would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). Accordingly, we conclude that the sheriff may withhold Exhibit B-2 under section 552.108(a)(1) of the Government Code.

You claim the information submitted as Exhibit B-3 is excepted from disclosure under the deliberative process privilege encompassed by section 552.111 of the Government Code. *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. Section 552.111, however, 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 a preliminary draft of a document 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.

We note that section 552.111 can encompass communications between a governmental body and a third party. *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). When determining if an interagency memorandum is excepted under section 552.111, we must also consider whether the agencies between which the memorandum is passed share a privity of interest or common deliberative process with regard to the policy matter at issue. *See* Open Records Decision No. 561 at 9 (1990). For section 552.111 to apply in such instances, 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 (1990).

You assert the drafts and e-mails submitted as Exhibit B-3 are internal communications containing advice, recommendations, and opinions reflecting the policymaking processes of the sheriff. You state the drafts do not represent the final policy to be implemented by the sheriff. We understand the submitted drafts will be released in their final forms. Based on your representations and our review of the information at issue, we find that you have established that the deliberative process privilege is applicable to most of the information submitted as Exhibit B-3. Therefore, the sheriff may withhold the information we have marked in Exhibit B-3 under section 552.111 of the Government Code. However, the remaining information appears to consist either of general administrative information that does not relate to policymaking or information that is purely factual in nature. You have failed to demonstrate, and the information does not reflect on its face, that this information consists of advice, recommendations, or opinions that pertain to policymaking. Further, we find that a portion of the remaining information was communicated with a party with whom

you have not demonstrated the sheriff shares a privity of interest or common deliberative process. Accordingly, we find that the remaining information is not excepted from disclosure under section 552.111, and it may not be withheld on that basis.

We note that a portion of the remaining information in Exhibit B-3 is subject to common-law privacy. Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section 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. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). 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. *Id.* at 683. Additionally, a compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. Cf. *U. S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Moreover, we find that a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. Upon review, we find the information we have marked in Exhibit B-3 is highly intimate or embarrassing and not of legitimate public concern. Therefore, the sheriff must withhold the information we have marked in Exhibit B-3 pursuant to section 552.101 of the Government Code in conjunction with common-law privacy.

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 sheriff may withhold: (1) Exhibit B-1 under section 552.107(1) of the Government Code; Exhibit B-2 under section 552.108(a)(1) of the Government Code; and (3) the information we have marked in Exhibit B-3 under section 552.111 of the Government Code. The sheriff must withhold the information we have marked in Exhibit B-3 under section 552.101 of the Government Code in conjunction with common-law privacy. The remaining information must be released.<sup>2</sup>

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.

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<sup>2</sup>We note that the submitted 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.

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](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 at (512) 475-2497.

Sincerely,



Jennifer Luttrall  
Assistant Attorney General  
Open Records Division

JL/eeg

Ref: ID# 341308

Enc. Submitted documents

c: Requestor  
(w/o enclosures)