



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 1, 2013

Mr. Brian L. Rose  
Assistant General Counsel  
Office of the District Attorney  
Harris County  
1201 Franklin Street, Suite 600  
Houston, Texas 77002-1901

OR2013-03554

Dear Mr. Rose:

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# 480075.

The Harris County District Attorney's Office (the "district attorney's office") received a request for all e-mails sent by two specified employees of the district attorney's office from January 1, 2012, through January 15, 2013.<sup>1</sup> You state most of the requested information has been or will be released to the requestor. You claim some of the submitted information is not subject to the Act and the remaining submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.111, and 552.117 of the Government Code.<sup>2</sup> We have considered your arguments and reviewed the submitted information.

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<sup>1</sup>We note the district attorney's office sought and received clarification from the requestor regarding the request. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *see also City of Dallas v. Abbott*, 304 S.W.3d 380 (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).

<sup>2</sup>Although you raise section 552.1175 of the Government Code, we note section 552.117 is the proper exception to raise for information held in an employment context.

Initially, we address your assertion that some of the submitted information is not subject to the Act. The Act is applicable to "public information." See Gov't Code § 552.021. Section 552.002 of the Act provides that "public information" consists 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, virtually all information that is in a governmental body's physical possession constitutes public information that is subject to the Act. *Id.* § 552.002(a)(1); see also Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body, and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2); see Open Records Decision No. 462 at 4 (1987). Moreover, section 552.001 of the Act provides that 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).

You state Exhibit M consists of personal e-mails that do not relate to the transaction of official district attorney's office business. See 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). Upon review of the information at issue, we agree the e-mails we have marked 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 district attorney's office. See Gov't Code § 552.021. Thus, we conclude the marked e-mails are not subject to the Act, and need not be released in response to this request.<sup>3</sup> However, we find the remaining e-mails at issue were created in connection with the transaction of official business of the district attorney's office. Therefore, the remaining e-mails in Exhibit M constitute "public information" as defined by section 552.002(a) and are subject to the Act. Accordingly, we will address your submitted arguments for these e-mails.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This section encompasses information made confidential by other statutes. You contend one of the e-mails submitted in Exhibit L is confidential under rule 2.16 of the Texas Rules of Disciplinary Procedure, which provides certain records of a State Bar of Texas (the "state bar") grievance committee are confidential. TEX. R. DISCIPLINARY P. 2.16, reprinted in Gov't Code tit. 2, subtit. G, app. A-1. We note, however, rule 2.16 applies only to records of the state bar. TEX. R. DISCIPLINARY P. 2.16. The e-mail at issue consists a record of the district's attorney's office. Thus, we find rule 2.16 is not applicable to the e-mail at issue in the hands of the district attorney's office. We, therefore, determine the e-

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<sup>3</sup>As we are able to make this determination, we need not address your arguments against disclosure of this information.

mail at issue in Exhibit L is not confidential pursuant to rule 2.16 and may not be withheld under section 552.101 of the Government Code.

You raise section 552.101 in conjunction with confidentiality provisions found in chapter 55 of the Code of Criminal Procedure for the remaining e-mails submitted in Exhibit L. Articles 55.01 through 55.05 of the Code of Criminal Procedure provide for the expunction of criminal records in certain limited circumstances. Article 55.03 prescribes the effect of an expunction order and provides:

When the order of expunction is final:

- (1) the release, maintenance, dissemination, or use of the expunged records and files for any purpose is prohibited;
- (2) except as provided in Subdivision (3) of this article, the person arrested may deny the occurrence of the arrest and the existence of the expunction order; and
- (3) the person arrested or any other person, when questioned under oath in a criminal proceeding about an arrest for which the records have been expunged, may state only that the matter in question has been expunged.

Crim. Proc. Code art. 55.03. Article 55.04 imposes sanctions for violations of an expunction order and provides in part:

Sec. 1. A person who acquires knowledge of an arrest while an officer or employee of the state or of any agency or other entity of the state or any political subdivision of the state and who knows of an order expunging the records and files relating to that arrest commits an offense if he knowingly releases, disseminates, or otherwise uses the records or files.

*Id.* art. 55.04, § 1. This office has determined the expunction statute prevails over the Act. *See* Open Records Decision No. 457 at 2 (1987) (governmental body prohibited from releasing or disseminating arrest records subject to expunction order, as “those records are not subject to public disclosure under the [Act]”). You contend some of the e-mails in Exhibit L may contain information that is the subject of an expunction order. You seek to withhold that information under article 55.03 of the Code of Criminal Procedure. You state the e-mails at issue pertain to “pending expunction proceedings.” However, you do not inform us, and the submitted information does not otherwise reveal, whether or when the petition for expunction was granted. Nevertheless, to the extent an order for expunction of the information at issue has been granted, article 55.03 of the Code of Criminal Procedure prohibits the district attorney’s office from releasing any such information. *See* Crim. Proc. Code art. 55.03. To the extent the information at issue is not subject to an order for

expunction, it may not be withheld on the basis of article 55.03 of the Code of Criminal Procedure.

Section 552.108 of the Government Code provides in 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:

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

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication [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.

Gov't Code § 552.108(a)(1), (2), (4). Section 552.108(a)(1) is applicable to information pertaining to a pending criminal investigation or prosecution. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Section 552.108(a)(2) protects law enforcement records pertaining to a closed criminal investigation or prosecution that concluded in a final result other than a conviction or a deferred adjudication. Section 552.108(a)(4) protects information that was prepared by an attorney for the state for litigation or that reflects an attorney's legal reasoning. A governmental body that claims section 552.108 must reasonably explain its applicability. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must provide comments explaining why claimed exceptions to disclosure apply); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

You state the information submitted in Exhibit F relates to pending criminal cases. Based upon this representation, we conclude the district attorney's office may withhold the information in Exhibit F under section 552.108(a)(1) of the Government Code. You state the information submitted in Exhibit G pertains to cases that concluded in a result other than conviction or deferred adjudication. Based upon this representation, we conclude the district

attorney's office may withhold the information in Exhibit G under section 552.108(a)(2) of the Government Code. You state the e-mails submitted in Exhibit H reflect the mental impressions and legal reasoning of attorneys representing the State of Texas, and were prepared in the course of preparing for criminal litigation. Based upon this representation, we conclude the district attorney's office may withhold the information in Exhibit H under section 552.108(a)(4) of the Government Code.<sup>4</sup>

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. 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. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *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. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. 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). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. 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, *id.*, meaning it 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, orig. proceeding). 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. 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 explain the e-mails submitted in Exhibits I and K consist of confidential communications between attorneys and staff of the district attorney's office that were made in furtherance of the rendition professional legal services. You state these communications

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<sup>4</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

contain legal analysis and advice regarding questions raised by staff in the district attorney's office and litigation in which the district attorney's office is involved. You state these communications were intended to be confidential and that the confidentiality has been maintained. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue in Exhibits I and K. Accordingly, the district attorney's office may withhold the information in Exhibits I and K under section 552.107(1) of the Government Code.<sup>5</sup>

Section 552.103 of the Government Code provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

You seek to withhold certain e-mails in Exhibit D under section 552.103. You state the district attorney's office is currently a party to a pending lawsuit regarding the accessibility of services to deaf and blind individuals. The submitted information reflects the litigation at issue was pending at the time of the district attorney's office's receipt of the instant request for information. You further state the e-mails at issue are related to the pending litigation because they concern the district attorney's office's policies regarding providing services to

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<sup>5</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of some of this information.

disabled individuals. Based on your representations and our review of the submitted information, we conclude the information at issue is related to the pending litigation. Accordingly, the district attorney's office may withhold the e-mails at issue in Exhibit D, which we have marked, under section 552.103 of the Government Code.<sup>6</sup>

However, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. See Open Records Decision Nos. 349 (1982), 320 (1982). Further, the applicability of section 552.103(a) ends once the litigation has been concluded. See Attorney General Opinion MW-575 (1982); see also Open Records Decision No. 350 (1982).

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).

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

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<sup>6</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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 remaining information in Exhibit D consists of e-mails containing advice, opinion, and recommendations on policy making matters of the district attorney's office. You explain that some of these e-mails were exchanged between the district attorney's office and the Harris County Institute of Forensic Science (the "institute") regarding shifting some of the duties of the City of Houston Crime Laboratory to the institute. 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 in Exhibit D under section 552.111 of the Government Code.<sup>7</sup> 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 under section 552.111 of the Government Code.

Next, we address section 552.117 of the Government Code, which 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 that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the district attorney's office may only withhold information under section 552.117 on behalf of current or former officials or employees 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 employees timely elected to keep such information confidential under section 552.024, the district attorney's office must withhold the information we have marked under section 552.117 of the Government Code. If the employees did not make a timely election under section 552.024, the district attorney's office may not withhold the information we have marked under section 552.117 of the Government Code. Further, we

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<sup>7</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of some of this information.

find none of the remaining information at issue consists of the home address, home telephone number, emergency contact information, social security number, or family member information of an individual to whom section 552.117 applies. Accordingly, the district attorney's office may not withhold any of the remaining information under section 552.117 of the Government Code.

We note some of the remaining information is subject to common-law privacy, which is also encompassed by section 552.101 of the Government Code. The doctrine of common-law privacy 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 established. *Id.* at 681–82. The type of information considered highly intimate or 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. Upon review, we find the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the district attorney's office must withhold the marked information pursuant to section 552.101 of the Government Code in conjunction with common-law privacy.

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 owner of the e-mail address consents to its release or the e-mail address falls within the scope of section 552.137(c).<sup>8</sup> See Gov't Code § 552.137(a)-(c). Section 552.137 is not applicable to the work e-mail address of an employee of a governmental body because such an address is not that of the employee as a “member of the public” but is instead the address of the individual as a government employee. 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 affirmatively consent to their public disclosure.<sup>9</sup>

In summary, the e-mails we have marked are not subject to the Act, and need not be released in response to this request. To the extent an order for expunction of any of the information at issue in Exhibit L has been granted, article 55.03 of the Code of Criminal Procedure prohibits the district attorney's office from releasing any such information. The district

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<sup>8</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

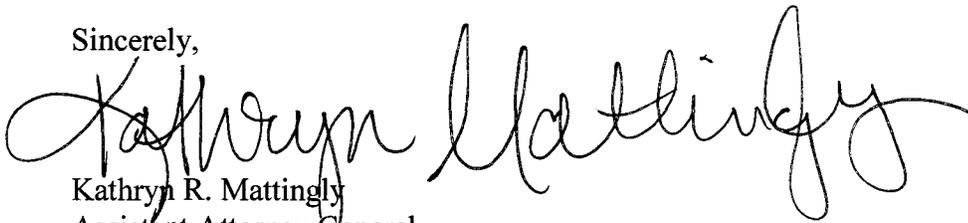
<sup>9</sup>We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general opinion.

attorney's office may withhold (1) the information in Exhibit F under section 552.108(a)(1) of the Government Code, (2) the information in Exhibit G under section 552.108(a)(2) of the Government Code, (3) the information in Exhibit H under section 552.108(a)(4) of the Government Code, (4) the information in Exhibits I and K under section 552.107(1) of the Government Code, (5) the e-mails at issue we have marked in Exhibit D under section 552.103 of the Government Code, and (6) the information we have marked in Exhibit D under section 552.111 of the Government Code. The district attorney's office must withhold (1) the information we have marked under section 552.117 of the Government Code to the extent the individuals to whom the information pertains elected to restrict access to the marked information in accordance with section 552.024 of the Government Code, (2) the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy, and (3) the e-mail addresses we have marked under section 552.137 of the Government Code unless the owners affirmatively consent to their public disclosure. The remaining 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.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, toll free at (888) 672-6787.

Sincerely,



Kathryn R. Mattingly  
Assistant Attorney General  
Open Records Division

KRM/bhf

Ref: ID# 480075

Enc. Submitted documents

c: Requestor  
(w/o enclosures)