



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 23, 2013

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

OR2013-06646

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# 485540.

The Harris County District Attorney's Office (the "district attorney's office") received a request for communications from and between any person employed by the district attorney's office from January 1, 2009 to January 31, 2013 pertaining to the requestor's cases and/or clients, including but not limited to, comments regarding the requestor's trial tactics, the requestor's advertisement methods, and how the requestor's cases should be handled.¹ You claim that the submitted information is excepted from disclosure under sections 552.108

¹You state the district attorney's office sought and received clarification of the information requested. See Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); see also *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (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).

and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we note some of the submitted information, which we have marked, is not responsive to the instant request because it was created outside the dates specified in the request for information. This ruling does not address the public availability of any information that is not responsive to the request and the district attorney's office is not required to release non-responsive information in response to the request.

Next, we note the information at issue contains a document subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[.]" unless it is excepted by section 552.108 of the Government Code or "made confidential under [the Act] or other law[.]" Gov't Code § 552.022(a)(1). The submitted information contains a completed trial report which is subject to section 552.022(a)(1) and must be released unless it is either excepted under section 552.108 of the Government Code or is confidential under the Act or other law. Although you assert this information is excepted from disclosure under the deliberative process privilege encompassed by section 552.111 of the Government Code, this section is discretionary and does not make information confidential under the Act. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally); 470 at 7 (1987) (governmental body may waive statutory predecessor to section 552.111 deliberative process). Therefore, the district attorney's office may not withhold the information subject to section 552.022 under section 552.111. However, because information subject to section 552.022(a)(1) may be excepted under section 552.108 of the Government Code, we will address your argument under this exception.

Section 552.108 of the Government Code provides in relevant 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:

...

(4) it is information that:

²We 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.

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) represents the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a)(4). A governmental body must reasonably explain how and why section 552.108 is applicable to the information at issue. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state the information at issue reflects the mental impressions and legal reasoning of attorneys representing the State of Texas, and the documents were also prepared in the course of preparing for criminal litigation. Based on your representations and our review, we find the district attorney's office has demonstrated the applicability of section 552.108(a)(4) to portions of the submitted information. Thus, the district attorney's office may withhold the information we have marked under section 552.108(a)(4) of the Government Code.³ However, you have not explained, and our review of the information at issue does not reveal, how the remaining 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). Accordingly, the district attorney's office may not withhold any of the remaining information under section 552.108(a)(4) of the Government Code.

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[.]” *Id.* § 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

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

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 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 assert section 552.111 for some of the remaining information. Upon 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 under section 552.111 of the Government Code. However, we find the remaining information at issue consists of either general administrative information that does not relate to policymaking or is purely factual in nature. Furthermore, some of this information has been communicated with individuals you have not demonstrated you share a privity of interest. Therefore, we find you have failed to demonstrate how the remaining information is protected by the deliberative process privilege, and it may not be withheld under section 552.111 of the Government Code.

Section 552.117(a)(1) 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 this

information be kept confidential under section 552.024 of the Government Code.⁴ Gov't Code § 552.117(a)(1). Section 552.117(a)(1) also applies to the personal cellular telephone number of a current or former official or employee of a governmental body, provided the cellular telephone service is not paid by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, to the extent the individual at issue timely requested confidentiality under section 552.024, the district attorney's office must withhold the cellular telephone number we have marked under section 552.117(a)(1) if the cellular telephone services are not paid for by a governmental body.

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 member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). We note the requestor has a right of access to his own e-mail address. *See id.* §§ 552.023 (a person or person's authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and is protected from public disclosure by laws intended to protect person's privacy interests), .137(b). Upon review, we find the e-mail addresses we have marked are not of the types specifically excluded by section 552.137(c) of the Government Code. Accordingly, 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 of the addresses have affirmatively consented to their release.

In summary, the district attorney's office may withhold the information we have marked under section 552.108(a)(4) of the Government Code. The district attorney's office may withhold the information we have marked under section 552.111 of the Government Code. The district attorney's office must withhold the cellular telephone number we have marked under section 552.117(a)(1) of the Government Code if the cellular service is paid for with personal funds and the individual timely elected confidentiality under section 552.024 of the Government Code. 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 have consented to their release. The remaining information must be released.

⁴The 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).

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, 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,



Thana Hussaini
Assistant Attorney General
Open Records Division

TH/som

Ref: ID# 485540

Enc. Submitted documents

c: Requestor
(w/o enclosures)