



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 19, 2014

Ms. Elizabeth Hanshaw Winn
Assistant County Attorney
Travis County District Attorney's Office
P.O. Box 1748
Austin, Texas 78767-1748

OR2014-21071

Dear Ms. Winn:

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# 543621.

The Travis County District Attorney's Office (the "district attorney's office") received a request for communications pertaining to two specified incidents or the resignation of a named official. You claim portions of the submitted information are exempted from disclosure under sections 552.107, 552.108, and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹Although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Additionally, although you also raise Texas Rule of Evidence 503, we note the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107 of the Government Code. *See* Open Records Decision Nos. 677 (2002), 676 at 1-2. Although you also raise the attorney work product doctrine under section 552.111 of the Government Code, you provide no arguments explaining how this doctrine is applicable to the information at issue. Therefore, we assume you no longer assert this doctrine. *See* Gov't Code §§ 552.301, .302.

²We assume 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.

Section 552.108(a)(1) of the Government Code exempts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state the information you seek to withhold under section 552.108(a)(1) pertains to an open investigation by the Public Integrity Unity of the district attorney’s office relating to a criminal offense. Based on your representation, we conclude the release of the information at issue 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) (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). Therefore, you may withhold the information you marked under section 552.108(a)(1).

Section 552.107(1) of the Government Code protects information that comes 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. *See Open Records Decision No. 676 at 6-7 (2002)*. First, a governmental body must demonstrate 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. *See 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. *See 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 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *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, *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 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 claim the information you marked is protected by section 552.107(1) of the Government Code. You state the information at issue consists of communications between attorneys and employees of the district attorney's office. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the district attorney's office. You further state these 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 at issue. Thus, the district attorney's office may generally withhold the information you marked under section 552.107(1) of the Government Code.³ We note, however, the e-mail strings include an e-mail received from an individual you have not demonstrated is a privileged party. Furthermore, if the e-mail received from the non-privileged party is removed from the e-mail strings and stands alone, it is responsive to the request for information. Therefore, if this non-privileged e-mail, which we have marked, is maintained by the district attorney's office separate and apart from the otherwise privileged e-mail strings in which it appears, then the district attorney's office may not withhold this non-privileged e-mail under section 552.107(1) of the Government Code. In that event, we will address your argument under section 552.111 of the Government Code for the non-privileged e-mail and the remaining information.

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, writ ref’d n.r.e.); *Open Records Decision No. 538 at 1-2 (1990)*.

In *Open Records Decision No. 615 (1993)*, 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 that 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

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

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)*. 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. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5. 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)*.

We note section 552.111 can encompass communications between a governmental body and a third party. *See Open Records Decision Nos. 631 at 2 (Gov't Code § 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) (Gov't Code § 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (Gov't Code § 552.111 applies to memoranda prepared by governmental body's consultants)*. In order 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 at 9*.

You state the remaining information consists of communications between attorneys and employees of the district attorney's office. You state some of this information consists of advice, opinion, and recommendation in regards to the content of the communications or conducting searches for prior open records requests. Upon review, we find the district attorney's office may withhold the information we marked under section 552.111 of the Government Code. However, we find the remaining information at issue consists of routine administrative information or purely factual information. Further, some of the information consists of communications with individuals you have failed to demonstrate share a privity of interest or common deliberative process with the district attorney's office. You have failed to establish that any of the remaining information constitutes advice, opinions, recommendations, or other material reflecting the policymaking processes of the district attorney's office. Accordingly, you may not withhold any portion of the remaining information under section 552.111 of the Government Code.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the current and former home addresses and telephone numbers, emergency contact information, social security number, and family member information of a peace officer, regardless of whether the peace officer made an election under section 552.024 or section 552.1175 of the Government Code to keep such information confidential.⁴ Gov't Code § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Accordingly, the district attorney's office must withhold the information we marked under section 552.117(a)(2); however, the district attorney's office may only withhold the marked cellular telephone number if the service is 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). *See* Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to an institutional e-mail address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address of a vendor who seeks to contract with a governmental body, an e-mail address maintained by a governmental entity for one of its officials or employees, or an e-mail address provided to a governmental body on a letterhead. *See id.* § 552.137(c). Upon review, we find the district attorney's office must withhold the submitted e-mail addresses under section 552.137 of the Government Code, unless their owners affirmatively consent to their public disclosure or subsection (c) applies.

In summary, the district attorney's office may withhold the information you marked under section 552.108(a)(1). The district attorney's office may generally withhold the information you marked under section 552.107(1) of the Government Code. However, if the non-privileged e-mail, which we have marked, is maintained by the district attorney's office separate and apart from the otherwise privileged e-mail strings in which it appears, then the district attorney's office may not withhold this non-privileged e-mail under section 552.107(1) of the Government Code. The district attorney's office may withhold the information we marked under section 552.111 of the Government Code. The district attorney's office must withhold the information we marked under section 552.117(a)(2); however, the district attorney's office may only withhold the marked cellular telephone number if the service is not paid for by a governmental body. The district attorney's office must withhold the submitted e-mail addresses under section 552.137 of the Government

⁴The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Code, unless their owners affirmatively consent to their public disclosure or subsection (c) applies. The district attorney's office must release the remaining information.

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.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 that reads "Paige Thompson". The signature is written in a cursive, flowing style.

Paige Thompson
Assistant Attorney General
Open Records Division

PT/dls

Ref: ID# 543621

Enc. Submitted documents

c: Requestor
(w/o enclosures)