



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 3, 2015

Mr. Mark Kennedy
General Counsel
County of Hays
111 East San Antonio Street, Suite 202
San Marcos, Texas 78666

OR2015-18536

Dear Mr. Kennedy:

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# 578216.

Hays County (the "county") received a request for e-mails sent to or by a named county employee during a specified time period. You state the county will release some of the requested information. You claim the remaining requested information is excepted from disclosure under sections 552.103, 552.107, 552.108, 552.111, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note portions of the requested information may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2015-14044 (2015). In this ruling, we concluded the following: (1) the county may withhold the court-filed document at issue under rule 503 of the Texas Rules of Evidence; (2) the county may withhold certain information under section 552.107(1) of the Government Code; however, if the non-privileged e-mails are maintained by the county separate and apart

¹We 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.

from the otherwise privileged e-mail strings in which they appear, then the county may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code; (3) the county may withhold certain information, including the e-mails that exist separate and apart from the original e-mail strings, under section 552.108(a)(1) of the Government Code; (4) the county may withhold certain information under section 552.111 of the Government Code; (5) to the extent the individual whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the county must withhold the certain information under section 552.117(a)(1) of the Government Code; (6) to the extent the e-mail address at issue consists of a personal e-mail address, the county must withhold the e-mail address at issue under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure or subsection (c) applies; and (7) the remaining information must be released. We have no indication the law, facts, and circumstances on which Open Records Letter No. 2015-14044 was based have changed. Accordingly, to the extent the requested information is identical to the information previously requested and ruled upon by this office, the county must continue to rely on Open Records Letter No. 2015-14044 as a previous determination and withhold or release the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the requested information is not encompassed by the previous ruling, we will address the submitted arguments.

Next, we note the submitted information contains court-filed documents subject to section 552.022(a)(17) of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(17). The county must release the information subject to section 552.022(a)(17) unless it is made confidential under the Act or other law. *See id.* Although you seek to withhold the court-filed documents under sections 552.103, 552.108, and 552.107(1) of the Government Code, these sections are discretionary exceptions to disclosure and do not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); *see also* Open Records Decision

Nos. 676 at 6 (Gov't Code § 552.107(1) is not other law for purposes of Gov't Code § 552.022), 665 at 2 n.5 (2000) (discretionary exceptions generally), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). Therefore, the county may not withhold the court-filed documents under section 552.103, section 552.108, or 552.107(1) of the Government Code. The Texas Supreme Court has held, however, that the Texas Rules of Evidence are "other law" that make information expressly confidential for purposes of section 552.022. See *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will address your claim under Texas Rule of Evidence 503 for the court-filed documents. We will also consider your arguments against disclosure of the remaining information not subject to section 552.022.

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

(A) between the client or the client's representative and the client's lawyer or the lawyer's representative;

(B) between the client's lawyer and the lawyer's representative;

(C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;

(D) between the client's representatives or between the client and the client's representative; or

(E) among lawyers and their representatives representing the same client.

Tex. R. Evid. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made to further the rendition of professional legal services to the client or reasonably necessary to transmit the communication. *Id.* 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must 1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; 2) identify the parties involved in the communication; and 3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that

it was made in furtherance of the rendition of professional legal services to the client. *See* ORD 676. Upon a demonstration of all three factors, the entire communication is confidential under rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

We note the submitted court-filed documents are attachments to a communication you state is a confidential communication between county attorneys. You state the communication was made in confidence for the purpose of facilitating the rendition of professional legal services and this communication has remained confidential. Upon review, we find the county has demonstrated the applicability of the attorney-client privilege to the information at issue. Therefore, the county may withhold the court-filed documents under rule 503.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. The elements of the privilege under section 552.107(1) are the same as those discussed for rule 503. 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* ORD 676 at 6-7. 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*, 922 S.W.2d 920, 923.

You state the remaining information you have marked consists of communications involving county attorneys and county agents. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the county and these communications have remained confidential. Upon review, we find you have demonstrated the applicability of the attorney-client privilege to the remaining information you have marked. Therefore, the county may generally withhold the remaining information you have marked under section 552.107(1) of the Government Code.² However, we note some of the information you have marked consists of an e-mail string that includes an e-mail involving non-privileged parties. Furthermore, if this e-mail is removed from the e-mail string and stands alone, it is responsive to the request for information. Therefore, if the county maintains this non-privileged information, which we have marked, separate and apart from the otherwise privileged e-mail string in which it appears, then the county may not withhold it under section 552.107(1). We will consider your remaining arguments against disclosure of this information, to the extent the county maintains it separate and apart from the otherwise privileged e-mail string in which it appears.

²As our ruling on this information is dispositive, we need not address your remaining arguments against its disclosure.

We will now address your argument under section 552.108 of the Government Code for the remaining information you have marked, including the non-privileged information we have marked, to the extent it exists separate and apart from the privileged e-mail string. Section 552.108(a)(1) of the Government Code excepts 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 inform us the information at issue relates to pending or contemplated criminal cases. Based on this representation and our review of the information at issue, 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 present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, the county may withhold the remaining information you have marked, including the non-privileged information we have marked, to the extent it exists separate and apart from the privileged e-mail string, under section 552.108(a)(1) of the Government Code.³

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. Section 552.111 of the Government Code also 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, 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. ORD 615 at 5; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). 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). However, a governmental body’s policymaking functions do not encompass routine

³As our ruling for this information is dispositive, we need not address your remaining arguments against its disclosure.

internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. ORD 615 at 5-6; *see also Dallas Morning News*, 22 S.W.3d at 364 (section 552.111 not applicable to personnel-related communications that did not involve policymaking).

Further, section 552.111 does not generally except from disclosure facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 157; 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). When determining if an interagency memorandum is excepted from disclosure under section 552.111, we must 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).

You assert Exhibit D consists of advice, opinions, and recommendations relating to policy matters of the county. Upon review, we find Exhibit D constitutes policymaking advice, opinion, and recommendations. Accordingly, the county may withhold Exhibit D under section 552.111 of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, emergency contact information, 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. *See* Gov't Code § 552.117(a); Open Records Decision No. 622 (1994). 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). Thus, 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 of the governmental body's receipt of the request for the information. We have marked the personal information of a county employee. If the employee whose personal information we have marked timely elected to keep his information confidential pursuant to section 552.024, the county must withhold the information we have marked under section 552.117(a)(1). The county may not withhold this information under section 552.117(a)(1) if the employee did not timely elect to keep his information confidential pursuant to section 552.024.

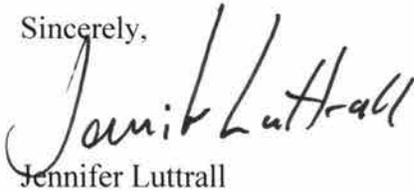
In summary, to the extent the requested information is identical to the information previously requested and ruled upon by this office, the county must continue to rely on Open Records Letter No. 2015-14044 as a previous determination and withhold or release the identical information in accordance with that ruling. The county may withhold the court-filed documents under rule 503 of the Texas Rules of Evidence. The county may withhold the remaining information you have marked under section 552.107(1) of the Government Code;

however, if the county maintains the non-privileged information we have marked separate and apart from the otherwise privileged e-mail string in which it appears, then the county may not withhold it under section 552.107(1) of the Government Code. If the county maintains the non-privileged information we have marked separate and apart from the otherwise privileged e-mail string in which it appears, then the county may withhold it and the remaining information the county has marked under section 552.108(a)(1) of the Government Code. The county may withhold Exhibit D under section 552.111 of the Government Code. If the employee whose personal information we have marked timely elected to keep his information confidential pursuant to section 552.024 of the Government Code, the county must withhold the information we have marked under section 552.117(a)(1) of the Government Code. 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.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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/akg

Ref: ID# 578216

Enc. Submitted documents

c: Requestor
(w/o enclosures)