



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 10, 2015

Ms. Caroline L. Cross
Assistant District Attorney
Civil Division
County of Dallas
411 Elm Street, 5th Floor
Dallas, Texas 75202-3317

OR2015-23661

Dear Ms. Cross:

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# 586769.

The Dallas County Criminal District Attorney's Office and the Dallas County Information Technology Department (collectively, the "district attorney's office") received three requests for all e-mails sent from or received by a named individual over specified time periods. You claim some of the submitted information is excepted from disclosure under sections 552.107, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

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 "to facilitate the rendition of professional legal services" to the client governmental body. TEX. R.

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.

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)(A), (B), (C), (D), (E). 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.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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. *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 claim a portion of the submitted information is protected from disclosure under section 552.107(1) of the Government Code. You state the information at issue consists of communications between attorneys, employees, and officials of the district attorney’s office. You state these communications were made for the purpose of facilitating the rendition of professional legal services and you indicate the communications at issue 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 withhold the information you have indicated under section 552.107(1) of the Government Code.

Section 552.108 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]

...

(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.

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

...

(3) the internal record or notation:

(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), (a)(4), (b)(3). A governmental body claiming section 552.108 must reasonably explain how and why this exception is applicable to the information at issue. *See id.* §§ 552.108, .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706, 710 (Tex. 1977). The district attorney's office states the remaining information relates to pending criminal investigations or prosecutions. Based on this representation, we conclude the release of the information we have marked 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, 186-87 (Tex. Civ. App.—Houston [14th Dist.] 1975) (delineating law enforcement interests present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Therefore, section 552.108(a)(1) of the Government Code is applicable to the information we have marked and the district attorney's office may withhold such information on that basis.² However, we note the remaining information at issue reflects that the suspect in a case entered a plea of guilty and has been sentenced to prison or reflects that it does not relate to pending investigations or prosecutions. As such, we find you have failed to demonstrate release of the remaining information at issue would interfere with the detection, investigation, or prosecution of crime. Therefore, we conclude the district attorney's office

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

may not withhold any of the remaining information at issue under section 552.108(a)(1) of the Government Code.

Sections 552.108(a)(4) and 552.108(b)(3) are applicable to information that was prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation or that reflects the mental impressions or legal reasoning of an attorney representing the state. Gov't Code § 552.108(a)(4), (b)(3). However, you do not specify which portions of the remaining information at issue, if any, were actually “prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation.” *See id.* § 552.108(a)(4)(A), (b)(3)(A). Likewise, you have not demonstrated any of the remaining information “represents the mental impressions or legal reasoning of an attorney representing the state.” *Id.* § 552.108(a)(4)(B), (b)(3)(B). Thus, we find you have not shown any of the information at issue actually consists of prosecutorial work product. *See id.* § 552.301(e)(1)(A), (e)(2) (governmental body must label copy of requested information to indicate which exceptions apply to which parts of the copy). Therefore, as you have not established that the information at issue falls within the scope of section 552.108(a)(4) or 552.108(b)(3), we conclude the district attorney’s office may not withhold any of the remaining information under section 552.108(a)(4) or 552.108(b)(3) 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[.]” 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*, 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, 364 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body’s policymaking functions 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 severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152, 157 (Tex. App.—Austin 2001, no pet.); *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, section 552.111 protects the factual information. *See* Open Records Decision No. 313 at 3 (1982).

This office has also concluded section 552.111 exempts from disclosure a preliminary draft of a document intended for public release in its final form because the draft necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document. *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 of a preliminary draft of a policymaking document, including comments, underlining, deletions, and proofreading marks, that will be released to the public in its final form. *See id.* at 2.

You state the remaining information consists of advice, opinions, and recommendations relating to the policymaking of the district attorney's office. You also state the information at issue contains draft documents. You do not state whether the draft documents will be released to the public in their final forms. Thus, to the extent the district attorney's office will release the draft documents to the public in their final forms, the district attorney's office may withhold the draft documents we have marked in their entireties under section 552.111. To the extent the district attorney's office will not release the draft documents to the public in their final forms, the district attorney's office may not withhold these document in their entireties under section 552.111. In that event, we find portions of the draft documents constitutes advice, opinions, or recommendations. Thus, to the extent the draft documents will not be released in their final forms, the district attorney's office may withhold the information we marked under section 552.111 of the Government Code within the draft documents. Further, we find portions of the remaining information consist of advice, opinions, and recommendations pertaining to a policymaking matter. Accordingly, the district attorney's office may withhold the information we have marked under section 552.111. However, we find the remaining information at issue consists of either general administrative information that does not relate to policymaking or information that is purely factual in nature. Thus, the remaining information may not be withheld under section 552.111 of the Government Code.

Section 552.137 of the Government Code provides, "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c).³ Gov't Code § 552.137(a)-(c). The district attorney's office must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner of the e-mail address affirmatively consents to its release.

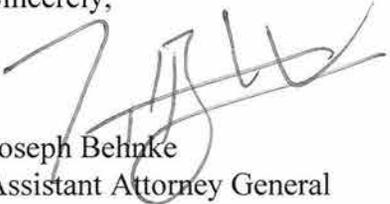
³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

In summary, the district attorney's office may withhold the information you have indicated under section 552.107(1) of the Government Code. The district attorney's office may withhold the information we have marked under section 552.108(a)(1) of the Government Code. To the extent the district attorney's office will release the draft documents to the public in their final forms, the district attorney's office may withhold the draft documents we have marked in their entirety under section 552.111 of the Government Code. To the extent the draft documents will not be released in their final forms, the district attorney's office may withhold the information we marked under section 552.111 of the Government Code within the draft documents. In any event, 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 e-mail address we have marked under section 552.137 of the Government Code, unless the owner of the e-mail address affirmatively consents to its release. 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,



Joseph Behnke
Assistant Attorney General
Open Records Division

JB/som

Ref: ID# 586769

Enc. Submitted documents

c: 3 Requestors
(w/o enclosures)