KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 2, 2015

Ms. Lacey B. Lucas
Assistant District Attorney
Dallas County District Attorney's Office
411 Elm Street, Fifth Floor
Dallas, Texas 75202-3317

OR2015-13432

Dear Ms. Lucas:

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# 567740.

The Dallas County Criminal District Attorney's Office (the "district attorney's office") received a request for all emails to or from a named individual dating back to a specific date. The district attorney's office states it will release some information. The district attorney's office claims the submitted information is excepted from disclosure under sections 552.103, 552.107, 552.108, 552.111, and 552.116 of the Government Code. We have considered the exceptions the district attorney's office claims and reviewed the submitted representative sample of information.[1]

Initially, we note the requestor seeks emails to or from only the named individual. We note the submitted information contains an email which was not sent to or from the named individual. Accordingly, this email, which we have marked, is not responsive to the instant request. This ruling does not address the public availability of non-responsive information,

[1]We 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 those records contain substantially different types of information than that submitted to this office.

and the district attorney's office is not required to release such information in response to this request.

Next, we note some of the responsive information was the subject of a previous request for information in response to which this office issued Open Records Letter No. 2015-13386 (2015). As we have no indication the law, facts, and circumstances on which the prior ruling was based has changed, the district attorney's office must continue to rely on Open Records Letter No. 2015-13386 as a previous determination and withhold or release the identical information, which we have marked, in accordance with that ruling.[2] *See* Open Records Decision No. 673 (2001) (so long as law, facts, and 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 a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). For the information that is not subject to Open Records Letter No. 2015-13386, we will consider the district attorney's office's arguments against disclosure.

Next, we note the remaining responsive 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:
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> . . .
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> (17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(17). The district attorney's office 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 the district attorney's office seeks to withhold the court-filed documents under section 552.107(1) of the Government Code, this is a discretionary exception to disclosure and does not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 6 (2002) (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). Therefore, the district attorney's office may not withhold the court-filed documents under section 552.107(1) of the Government Code. The Texas Supreme Court has held, however, that the Texas Rules of Evidence are "other law" that makes information expressly confidential for purposes of section 552.022. *See In re City of Georgetown*, 53

[2]As our ruling is dispositive, we need not address the district attorney's office's remaining arguments against disclosure of this information.

S.W.3d 328, 336 (Tex. 2001). Accordingly, we will consider the district attorney's office's assertion of the attorney-client privilege under Texas Rule of Evidence 503 for the court-filed documents. We will also consider the district attorney's office's arguments against disclosure of the remaining responsive information not subject to section 552.022.

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

> 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:
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> > (A) between the client or the client's representative and the client's lawyer or the lawyer's representative;
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> > (B) between the client's lawyer and the lawyer's representative;
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> > (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).

The district attorney's office states the information at issue consists of communications between district attorney's office attorneys and Dallas County (the "county") employees. The district attorney's office states the communications were made for the purpose of facilitating the rendition of professional legal services to the county and the district attorney's office. We understand these communications were intended to be confidential and have remained confidential. Based on these representations and our review, we find the district attorney's office has demonstrated the applicability of the attorney-client privilege to the court-filed documents. Accordingly, the district attorney's office may withhold the court-filed documents under rule 503 of the Texas Rules of Evidence.

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.

The district attorney's office raises section 552.107(1) of the Government Code for the remaining information in Exhibit C and Exhibit C-1. The district attorney's office states the information at issue consists of communications between district attorney's office attorneys and county employees. The district attorney's office states the communications were made for the purpose of facilitating the rendition of professional legal services to the county and the district attorney's office. We understand these communications were intended to be confidential and have remained confidential. Based on these representations and our review, we find the district attorney's office has demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the district attorney's office may withhold the remaining information in Exhibit C and Exhibit C-1 under section 552.107(1) of the Government Code.[3]

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

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[3]As our ruling is dispositive, we need not address the district attorney's remaining argument against disclosure of this information.

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). The district attorney's office states Exhibit D consists of communications pertaining to pending criminal investigations or prosecutions. Based upon this representation, we conclude release of Exhibit D 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). Thus, the district attorney's office may withhold Exhibit D under section 552.108(a)(1) of the Government Code.[4]

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, 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 severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *see* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion,

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[4]As our ruling is dispositve, we need not address the district attorney's office's remaining argument against disclosure of this information.

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 which the governmental body establishes it has a privity of interest or common deliberative process. *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). 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.

The district attorney's office states the remaining information in Exhibit E consists of advice and recommendations regarding the district attorney's office's official policies on key subjects. Upon review, we find the district attorney's office has failed to demonstrate how it shares a privity of interest or common deliberative process with an individual in one of the remaining communications. Further, 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. Accordingly, none of the remaining information at issue may not be withheld under section 552.111 of the Government Code.

Section 552.116 of the Government Code provides:

> (a) An audit, working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, a hospital district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from [required public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public disclosure] by this section.
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> (b) In this section:
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> > (1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, the bylaws adopted by or other action of the governing board of a hospital district, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution

> or other action of a joint board described by Subsection (a) and includes an investigation.
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> (2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:
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> (A) intra-agency and interagency communications; and
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> (B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116(a), (b)(1)–(2). The district attorney's office states the information in Exhibit F consists of audit working papers prepared or maintained as part of an audit being conducted by the Dallas County Commissioner's Court (the "commissioner's court"). The district attorney's office states the commissioner's court is authorized to conduct an annual audit of the district attorney's office's seizure, forfeiture, receipt, and specific expenditure of all proceeds and property. Crim. Proc. Code art. 59.06(g)(1). We note, however, section 552.116 is intended to protect the auditor's interests. The information at issue is maintained by the district attorney's office, who we understand is the auditee in Exhibit F. As the auditee, the district attorney's office cannot assert section 552.116 in order to protect its own interest in withholding the information. Thus, section 552.116 is not applicable, and the district attorney's office may not withhold any of the information in Exhibit F under section 552.116 of the Government Code.

Section 552.103 of the Government Code provides, in part, the following:

> (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.
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> (b) For purposes of this section, the state or a political subdivision is considered to be a party to litigation of a criminal nature until the applicable statute of limitations has expired or until the defendant has exhausted all appellate and postconviction remedies in state and federal court.
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> (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), (b), (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 that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date the governmental body received 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, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a). *See* Open Records Decision No. 551 at 4 (1990).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.[5] Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). We also note that the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

The district attorney's office claims the remaining information in Exhibit B is excepted from disclosure under section 552.103 of the Government Code. The district attorney's office states the information at issue relates to pending cases in which the statute of limitation has not expired and the defendant has not exhausted all appellate and postconviction remedies. However, the district attorney's office provides no further explanation as to how the information at issue relates to pending or reasonably anticipated litigation involving the district attorney's office. Thus, we find the district attorney's office has failed to demonstrate the information at issue relates to pending or reasonably anticipated litigation to which the

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[5]In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

district attorney's office is or may be a party. Therefore, the district attorney's office may not withhold any of the information at issue under section 552.103 of the Government Code.

Section 552.136 provides, "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential."[6] Gov't Code § 552.136(b). Section 552.136(a) defines "access device" as "a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to . . . obtain money, goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument." *Id.* § 552.136(a). Therefore, the district attorney's office must withhold the account numbers in Exhibit F under section 552.136 of the Government Code.

Section 552.137 of the Government Code excepts from disclosure "an email 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 email address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). The email addresses at issue are not within the scope of section 552.137(c). Accordingly, the district attorney's office must withhold the email addresses we have marked under section 552.137 of the Government Code, unless their owners affirmatively consent to their release.

In summary, the district attorney's office must continue to rely on Open Records Letter No. 2015-13386 as a previous determination and withhold or release the identical information, which we have marked, in accordance with that ruling. The district attorney's office may withhold the court-filed documents under rule 503 of the Texas Rules of Evidence. The district attorney's office may withhold the remaining information in Exhibit C and Exhibit C-1 under section 552.107(1) of the Government Code. The district attorney's office may withhold Exhibit D under section 552.108(a)(1) of the Government Code. The district attorney's office must withhold the account numbers in Exhibit F under section 552.136 of the Government Code. The district attorney's office must withhold the email addresses we have marked under section 552.137 of the Government Code, unless their owners affirmatively consent to their release. The district attorney's office must release the remaining responsive information.

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[6]The 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).

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,

Rahat Huq
Assistant Attorney General
Open Records Division

RSH/dls

Ref: ID# 567740

Enc. Submitted documents

c: Requestor
(w/o enclosures)