



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

January 20, 2017

Ms. Ashley D. Fourt  
Assistant Criminal District Attorney  
Tarrant County Criminal District Attorney's Office  
401 West Belknap  
Fort Worth, Texas 76196

OR2017-01357

Dear Ms. Fourt:

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# 642542.

The Tarrant County Criminal District Attorney's Office (the "district attorney's office") received a request for e-mail correspondence involving three named individuals regarding specified topics and e-mail correspondence regarding a specified letter involving specified employees of the district attorney's office. You claim the submitted information is excepted from disclosure under sections 552.107, 552.108, and 552.111 of the Government Code. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted information.

Initially, we note we have marked some information as not responsive to the instant request. This ruling does not address the public availability of the non-responsive information and the district attorney's office need not release it to the requestor.

Next, we note portions of the submitted information are subject to section 552.022 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[.]

*Id.* § 552.022(a)(17). The submitted information contains court-filed documents, which we have marked, subject to section 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.* You seek to withhold the information subject to section 552.022(a)(17) under sections 552.107 and 552.111 of the Government Code. However, these sections are discretionary exceptions and do not make information confidential under the Act. *See Open Records Decision Nos. 676 at 10-11 (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver).* Thus, the information subject to section 552.022 may not be withheld under section 552.107 or section 552.111 of the Government Code. However, we note the Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will, therefore, consider your assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence for the information subject to section 552.022(a)(17). We will also consider your arguments against disclosure of the information not subject to section 552.022.

Texas Rule of Evidence 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).

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. Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show 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 the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding).

The information subject to section 552.022(a)(17) of the Government Code consists of attachments to e-mail communications between attorneys and staff at the district attorney's office and employees of the county in their capacities as clients. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the county. You further state the communications were intended to be, and have remained, confidential. Upon 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 court-filed documents under rule 503 of the Texas Rules of Evidence.

Next, we will address your arguments to withhold the information not subject to section 552.022 of the Government Code. Section 552.107(1) protects information that comes within the attorney-client privilege. *See* Gov't Code § 552.107(1). The elements of the privilege under section 552.107 are the same as those 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. *See Huie*, 922 S.W.2d at 923.

You claim portions of the submitted information consist of communications between attorneys and staff at the district attorney's office and employees of the county in their capacities as clients. You 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 some of the information at issue. Thus, the district attorney's office may generally withhold the information we marked under section 552.107(1) of the Government Code.<sup>1</sup> However, we note some of the e-mail strings include non-privileged e-mails and attachments. Furthermore, if this information is removed from the e-mail strings at issue and stands alone, it is responsive to the request for information. Therefore, if these non-privileged e-mails and attachments, which we have marked, are maintained by the district attorney's office separate and apart from the otherwise privileged e-mail strings in which they appear, then the district attorney's office may not withhold them under section 552.107(1) of the Government Code. Additionally, we find a portion of the information you seek to withhold has been shared with individuals you have not demonstrated to be privileged parties. Therefore, we conclude you have failed to establish the remaining information you marked constitutes communications between or among district attorney's office employees for the purposes of section 552.107(1). Thus, the district attorney's office may not withhold any portion of the remaining information on that basis.

Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that did not result in conviction or deferred adjudication. *See* Gov't Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). You state the information you marked relates to a closed criminal case that did not result in conviction or deferred adjudication. Based on your representation and our review, we agree section 552.108(a)(2) is applicable to the information you marked. Therefore, the district attorney's office may withhold the information you marked under section 552.108(a)(2) 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

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<sup>1</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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 that are 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, 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). 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 state some of the remaining information contains communications between the district attorney's office and other government entities across the state of Texas with which the district attorney's office shares a privity of interest with respect to the information at issue. You explain these communications concern the application of a specified law in counties throughout the state. Thus, you assert the information at issue consists of advice, opinions,

and recommendations pertaining to the policymaking functions of the district attorney's office. Based on your representations and our review of the information at issue, we find the district attorney's office has demonstrated portions of the information at issue, which we have marked, consist of advice, opinions, or recommendations on the policymaking matters of the district attorney's office. Therefore, the district attorney's office may withhold the information we marked under section 552.111 of the Government Code. Upon review, however, we find the remaining information is general administrative and purely factual information or does not pertain to policymaking. Further, some of the remaining information was received from individuals with whom you have not demonstrated the district attorney's office shares a privity of interest or common deliberative process. Thus, we find you have failed to demonstrate the remaining information consists of internal communications containing advice, opinions, or recommendations on the policymaking matters of the district attorney's office. Accordingly, the district attorney's office may not withhold any portion of the remaining information under section 552.111 of the Government Code.

We note the remaining information contains an e-mail address that is subject to section 552.137 of the Government Code.<sup>2</sup> Section 552.137 of the Government Code exempts 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). The e-mail address at issue is not excluded by subsection (c). Therefore, the district attorney's office must withhold the personal e-mail address we marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure.

In summary, the district attorney's office may withhold the information we marked under section 552.107(1) of the Government Code; however, if the non-privileged e-mails and attachments, which we have marked, are maintained by the district attorney's office separate and apart from the otherwise privileged e-mail strings in which they appear, then the district attorney's office may not withhold them under section 552.107(1) of the Government Code. The district attorney's office may withhold the information you marked under section 552.108(a)(2) 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 personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure. The district attorney's office must release the remaining information.

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<sup>2</sup>The 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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](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,



Ian Lancaster  
Assistant Attorney General  
Open Records Division

IML/sb

Ref: ID# 642542

Enc. Submitted documents

c: Requestor  
(w/o enclosures)