



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

October 11, 2017

Mr. Brody V. Burks  
Assistant Criminal District Attorney  
McLennan County  
219 North 6th Street, Suite 200  
Waco, Texas 76701

OR2017-23171

Dear Mr. Burks:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. This request was originally received by the Open Records Division of this office and assigned ID #679495. Preparation of the ruling has been assigned to the Opinion Committee of this office.

You tell us that the McLennan County Criminal District Attorney's Office (the "district attorney's office") received a request for information on July 19, 2017, from Brent McCain. The request seeks "all communications responsive to the request addressed in" a previous letter ruling issued by this office, OR2017-13053, and further notes that "[t]his is a request for memos, e-mail or text messages related to the pre-trial intervention program." You tell us the request could be interpreted in different ways, and that accordingly the district attorney's office sent a request for clarification on July 24, 2017, to determine whether the requestor seeks the same information that was the subject of OR2017-13053 or, instead, wants internal memos, email, or text messages that the district attorney's office created in response to the request that was the subject of OR2017-13053.<sup>1</sup> See TEX. GOV'T CODE § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); see also *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is

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<sup>1</sup>You explain that OR2017-13053 was "extremely voluminous" and is "currently the subject of a dispute regarding production costs."

clarified or narrowed). You state that the requestor replied on August 2, 2017, “with a refusal to clarify his request.”

We note that a governmental body has a duty to make a good-faith effort to relate a request for information to information the governmental body holds. Tex. Att’y Gen. ORD-561 (1990) at 8. You tell us that, to the extent the request encompasses internal memos, email, or text messages that the district attorney’s office created in response to the underlying request of OR2017-13053, you have identified certain documents and attachments as potentially responsive to the request, which you have submitted under a tab marked “Exhibit C.” You assert that the information contained in Exhibit C is excepted from public disclosure under sections 552.108 and 552.111 of the Government Code and ask for a decision regarding their applicability to the information at issue. In this instance, you have submitted information you believe is responsive to the request and made arguments against disclosure of this information. Thus, we assume the district attorney’s office has made a good-faith effort to relate the request to information the district attorney’s office holds, and we will address the applicability of your arguments to the information.

Section 552.108 of the Government Code states, in pertinent part, the following:

- (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:

...

(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.

TEX. GOV'T CODE § 552.108(a)(4), (b)(3). A governmental body claiming an exception to disclosure under subsection 552.108(a)(4) or subsection 552.108(b)(3) must explain how and why this exception is applicable to the information at issue. *See id.* §§ 552.108, .301(e)(1)(A). You state that the information at issue reflects the mental impressions or legal reasoning of an attorney representing the State and assert that subsections 552.108(a)(4) and (b)(3) thus except the information from required disclosure. However, you do not explain how or why the information deals with the detection, investigation, or prosecution of crime, nor how or why it is used in matters relating to law enforcement or prosecution. Based on your representations and our review, we find that the district attorney's office has failed to demonstrate that the information at issue is excepted from disclosure under section 552.108. Therefore, the district attorney's office may not withhold the information contained in Exhibit C on the basis of section 552.108 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. Section 552.111 encompasses the deliberative process privilege. *See Tex. Att’y Gen. ORD-615 (1993) at 2.* 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.); *Tex. Att’y Gen. ORD-538 (1990) at 1–2.*

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 Tex. Att’y Gen. ORD-615 (1993) 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 do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See Tex. Att’y Gen. ORD-631 (1995) at 3.*

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. Att’y Gen.*, 37 S.W.3d 152, 157 (Tex. App.—Austin 2001, no pet.); see Tex. Att’y Gen. ORD-615 (1993) 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 Tex. Att’y Gen. ORD-313 (1982) at 3.

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 Tex. Att’y Gen. ORD-559 (1990) at 2 (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.

Section 552.111 also encompasses the attorney work product privilege found in Rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Tex. Att’y Gen. ORD-677 (2002) at 4–8. Rule 192.5 defines work product as

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
- (2) a communication made in anticipation of litigation or for trial between a party and the party’s representatives or among a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents.

TEX. R. CIV. P. 192.5(a). A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party’s representative. *Id.*; Tex. Att’y Gen. ORD-677 (2002) at 6–8. In order for this office to conclude the information was made or developed in anticipation of litigation, we must be satisfied that

- a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that

litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

*Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204 (quotation marks omitted); Tex. Att’y Gen. ORD-677 (2002) at 7.

You assert that the information contained in Exhibit C is excepted from public disclosure under section 552.111 because it requests interagency memoranda prepared for litigation as your office considered whether to file a lawsuit against the Attorney General with regard to the ruling issued in OR2017-13053. You do not specify whether your assertion is based on the deliberative process privilege or the attorney work product privilege of section 552.111.

Regarding the deliberative process privilege of section 552.111, we note that some of the information in Exhibit C includes a preliminary draft of a policy-related document which appears to have been released in final form, as evidenced by a signed copy you include under a tab marked “Exhibit B.” Based on your representation and our review, we find that the preliminary draft in Exhibit C, which we have marked, may be withheld from public disclosure under the deliberative process privilege of section 552.111. Of the remaining information in Exhibit C, we find that some information, which we have marked, consists of advice, opinions, and recommendations relating to the district attorney’s office policymaking matters. Therefore, the district attorney’s office may withhold the information we have marked under the deliberative process privilege of section 552.111.

Regarding the remaining information in Exhibit C, we consider whether the attorney work product privilege of section 552.111 is applicable. We note that some of the information in Exhibit C predates the issuance of OR2017-13053. Based on your representations and our review, we find the district attorney’s office has failed to establish that any of the remaining information consists of material prepared, mental impressions developed, or a communication made in anticipation of litigation or for trial by or for the district attorney’s office or representatives of the district attorney’s office. *See Nat'l Tank*, 851 S.W.2d at 206 (information created in ordinary course of business constitutes work product if agency demonstrates primary motivating purpose for preparation of information was in anticipation of litigation); *see also* Tex. Att’y Gen. ORD-677 (2002) at 7. Therefore, the district attorney’s office may not withhold the remaining information contained in Exhibit C under the attorney work product privilege of section 552.111 of the Government Code.

In summary, the district attorney’s office may withhold the information we have marked in Exhibit C under the deliberative process privilege of section 552.111 of the Government Code. The district attorney’s office must release the remaining information to the requestor.

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 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,



Becky P. Casares  
Assistant Attorney General  
Opinion Committee

BPC/eb

Ref: ID# 679495

Enc. Submitted documents

c: Requestor  
(w/o enclosures)