



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

November 14, 2017

Mr. Mark C. Kratovil  
Assistant Criminal District Attorney  
Tarrant County  
401 West Belknap, 9<sup>th</sup> Floor  
Fort Worth, Texas 76196

OR2017-26051

Dear Mr. Kratovil:

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# 682357.

The Tarrant County Criminal District Attorney's Office (the "district attorney's office") received a request for eight categories of information regarding the TechShare Program.<sup>1</sup> You state you will release some information. You claim portions of the submitted information are excepted from disclosure under sections 552.104, 552.107, 552.111, and 552.116 of the Government Code. You also state release of this information may implicate the proprietary interests of Headspring, L.L.C. ("Headspring"); Global Tel\*Link ("Global"); Sogeti USA ("Sogeti"); and the Texas Conference of Urban Counties ("CUC"). Accordingly, you state, and provide documentation showing, you notified these third parties of the request for information and of their right to submit arguments to this office as to why the information at issue should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits

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<sup>1</sup>We note, and you provide documentation showing, you sent the requestor two estimates of charges pursuant to section 552.2615 of the Government Code. *See* Gov't Code § 552.2615. We also note the district attorney's office received clarification of the information requested. *See id.* § 552.222 (providing 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 when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from Headspring, Global, Sogeti, and CUC. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note Headspring argues against disclosure of information not submitted to this office for review. This ruling does not address information beyond what the district attorney's office has submitted to us for our review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit a copy of specific information requested). Accordingly, this ruling is limited to the information the district attorney's office submitted as responsive to the request for information.<sup>2</sup>

Section 552.104(a) of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." *Id.* § 552.104(a). The "test under section 552.104 is whether knowing another bidder's [or competitor's information] would be an advantage, not whether it would be a decisive advantage." *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). The district attorney's office informs us the information it has indicated pertains to a competitive bidding situation and a vendor has not been selected. Additionally, the district attorney's office asserts the release of the information would be detrimental to the county's bargaining power and would give an advantage to competitors or bidders. Upon review, we find the district attorney's office has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the district attorney's office may withhold the information you have indicated under section 552.104(a) of the Government Code.<sup>3</sup>

Additionally, a private third party may invoke section 552.104(a). *See id.* Headspring, Global, and Sogeti raise section 552.104 for some of the remaining information. Headspring, Global, and Sogeti state they have competitors. In addition, Headspring, Global, and Sogeti state release of their information would give competitors an advantage in submitting future competitive bids. After review of the information at issue and consideration of the arguments, we find Headspring, Global, and Sogeti have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the district attorney's office may also withhold Headspring's, Global's, and Sogeti's information under section 552.104(a) of the Government Code.<sup>4</sup>

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<sup>2</sup>As we are able to make this determination, we need not address the arguments against disclosure of this information.

<sup>3</sup>As our ruling is dispositive for this information, we need not address the remaining argument against disclosure of this information.

<sup>4</sup>As our ruling is dispositive for this information, we need not address the remaining arguments against disclosure of this information.

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. 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 state some of the remaining information consists of communications involving employees of the district attorney’s office and officials of the county. You state the communications were made in confidence for the purpose of facilitating the rendition of professional legal services to the county and these communications 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 remaining information. Accordingly, the district attorney’s office may generally withhold the information you have indicated under section 552.107(1) of the Government Code. However, we note some of the otherwise privileged e-mail strings include e-mails and attachments received from or sent to non-privileged parties. Furthermore, if the e-mails and attachments received from or sent to non-privileged parties are removed from the otherwise privileged e-mail strings in which

they appear and stand alone, they are responsive to the request for information. Therefore, if the district attorney's office maintains these non-privileged e-mails and attachments, which we have marked, separate and apart from the otherwise privileged e-mail strings in which they appear, then these non-privileged e-mails and attachments are not excepted under section 552.107(1), and the district attorney's office must release them.

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 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 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).

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

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 id.* We note a governmental body does not have a privity of interest or common deliberative process with a private party with which the governmental body is engaged in contract negotiations. *See id.* (section 552.111 not applicable to communication with entity with which governmental body has no privity of interest or common deliberative process).

You claim some of the remaining information is excepted from disclosure under the deliberative process privilege encompassed by section 552.111 of the Government Code. You also state some of the information at issue consists of draft documents which will be released in their final form. You argue the information at issue pertains to internal deliberations between officials of the district attorney's office, county officials, and representatives of CUC, with whom you have demonstrated the district attorney's office shares a privity of interest. Based upon your representations and our review, we find the district attorney's office has demonstrated some of the information at issue consists of advice, opinions, or recommendations on the policymaking matters of the district attorney's office. Accordingly, the district attorney's office may withhold the information we have marked under section 552.111 of the Government Code. However, we find the remaining information at issue consists of information that is administrative or purely factual in nature. Accordingly, the district attorney's office may not withhold any of the remaining information at issue 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.

(b) In this section:

(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.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You state a portion of the remaining information consists of audit working papers pertaining to an audit conducted by the county auditor's office. You state the audit at issue was conducted by the auditor's office pursuant to its authority under sections 112.006 and 115.001 of the Local Government Code. *See* Local Gov't Code §§ 112.006, 115.001 (relating to the duties of the county auditor). However, it is apparent the information you seek to withhold was created after the audit and was not prepared or maintained in conducting the audit or preparing the audit report. Thus, we find the information at issue is not audit working papers and may not be withheld under section 552.116 of the Government Code.

Section 552.137 of the Government Code excepts 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).<sup>5</sup> See Gov't Code § 552.137(a)-(c). Therefore, if the e-mails we have marked exist separate and apart from the privileged e-mail strings in which they appear, and, therefore, may not be withheld under section 552.107(1), then 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 affirmatively consent to its public disclosure.

Lastly, we note CUC claims some of its information is protected by the attorney-client privilege, the elements of which we previously discussed, enacted by Texas Rule of Evidence 503. See TEX. R. EVID. 503. CUC states the information it has indicated consists of communications between privileged parties which consists of CUC's general counsel and a group of member representatives appointed by CUC's board of directors, which includes a member of the county. CUC also states the communications were made in confidence for the purpose of facilitating the rendition of professional legal services to CUC and these communications have remained confidential. Based on CUC's representations and our review, we find CUC has demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the district attorney's may withhold the information we have marked under rule 503 of the Texas Rules of Evidence.

In summary, the district attorney's office may withhold the information you have indicated under section 552.104(a) of the Government Code. The district attorney's office may also withhold Headspring's, Global's and Sogeti's information under section 552.104(a) of the Government Code. The district attorney's office may generally withhold the information you have indicated under section 552.107(1) of the Government Code; however, if the non-privileged e-mails, which we 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 these non-privileged e-mails under section 552.107(1) of the Government Code. The district attorney's office may withhold the information we have marked under section 552.111 of the Government Code. If the e-mails we have marked exist separate and apart from the privileged e-mail strings in which they appear, 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 affirmatively consents to its public disclosure. The district attorney's office may withhold the information we have marked under rule 503 of the Texas Rules of Evidence. 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.

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<sup>5</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 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,



Jahna Ward  
Assistant Attorney General  
Open Records Division

JW/tdw

Ref: ID# 682357

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

4 Third Parties  
(w/o enclosures)