



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

January 2, 2018

Ms. Lindsey Aston  
General Counsel  
Office of the Secretary of State  
P.O. Box 12697  
Austin, Texas 78711

OR2018-00109

Dear Ms. Aston:

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# 689216.

The Office of the Secretary of State (the "secretary's office") received a request for e-mails related to twelve specified terms sent or received during a specified time period.<sup>1</sup> You claim the requested information is excepted from disclosure under sections 552.101, 552.106,

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<sup>1</sup>We note the secretary's office asked for and received clarification regarding this request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *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 clarified or narrowed). The secretary's office states it sent the requestor a cost estimate of charges pursuant to section 552.2615 of the Government Code, and the requestor accepted the cost estimate. *See* Gov't Code § 552.2615. The estimate of charges required the requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. *See id.* § 552.263(a). You also inform us the secretary's office received the required deposit on October 9, 2017. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date governmental body receives bond or deposit).

552.107, 552.136, 552.137, and 552.139 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

Initially, you argue some of the submitted information is not public information subject to disclosure under the Act. The Act is applicable only to “public information.” Gov’t Code §§ 552.002, .021. Section 552.002(a) defines “public information” as:

information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body;

(2) for a governmental body and the governmental body:

(A) owns the information;

(B) has a right of access to the information; or

(C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or

(3) by an individual officer or employee of a governmental body in the officer’s or employee’s official capacity and the information pertains to official business of the governmental body.

*Id.* § 552.002(a). In Open Records Decision No. 581 (1990), this office determined certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. Upon review, we find the information at issue has significance other than its use as a tool for the maintenance, manipulation, or protection of public property, and thus constitutes public information under section 552.002 of the Government Code. Therefore, we conclude the information at issue is subject to the Act and the secretary’s office must release it unless the secretary’s office demonstrates the information falls within an exception to public disclosure under the Act. *See id.*

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<sup>2</sup>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 that those records contain substantially different types of information than that submitted to this office.

§§ 552.006, .021, .301, .302. Accordingly, we will consider your arguments against the disclosure of the submitted information.

The secretary's office asserts the dates of birth are excepted from public disclosure under section 552.101 of the Government Code in conjunction with common-law privacy. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Under the common-law right of privacy, an individual has a right to be free from the publicizing of private affairs in which the public has no legitimate concern. *Id.* at 682. The court of appeals has concluded public citizens' dates of birth are protected by common-law privacy pursuant to section 552.101. *Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at \*3 (Tex. App.—Austin May 22, 2015, pet. denied) (mem. op.). Thus, the secretary's office must withhold all public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy.

Next, we address your argument under section 552.107 of the Government Code as it is potentially the most encompassing. Section 552.107(1) of the Government Code protects information subject to 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 the information you have marked constitutes communications between attorneys for the secretary's office and employees of the secretary's office that were made for the purpose of facilitating the rendition of professional legal services to the secretary's office. You also state the 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 most of the information at issue. Thus, the secretary's office may generally withhold the e-mails you have marked under section 552.107(1) of the Government Code.<sup>3</sup> We note, however, some of these e-mail strings include e-mails received from or sent to non-privileged parties. Furthermore, if the e-mails received from or sent to non-privileged parties are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, if these non-privileged e-mails, which we have marked, are maintained by the secretary's office separate and apart from the otherwise privileged e-mail strings in which they appear, then the secretary's office may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code.

You also claim the marked non-privileged e-mails, as well as some of the remaining information, are subject to section 552.106 of the Government Code. Section 552.106(a) excepts from required public disclosure “[a] draft or working paper involved in the preparation of proposed legislation[.]” Gov’t Code § 552.106(a). Section 552.106(a) ordinarily applies only to persons with a responsibility to prepare information and proposals for a legislative body. *See Open Records Decision No. 460 at 1 (1987)*. The purpose of this exception is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body. Therefore, section 552.106 encompasses only policy judgments, recommendations, and proposals involved in the preparation of proposed legislation and does not except purely factual information from public disclosure. *Id.* at 2. However, a comparison or analysis of factual information prepared to support proposed legislation is within the ambit of section 552.106. *Id.* A proposed budget constitutes a recommendation by its very nature and may be withheld under section 552.106. *Id.*

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

The secretary's office states the information it marked consists of drafts of legislation and other information that reflects policy judgments, recommendations, and proposals by the secretary's office's staff, a vendor for the secretary's office, employees of the Office of the Lieutenant Governor and Office of the Attorney General, and employees of senators and a representative. Upon review, we find the secretary's office has established most of the information it has marked constitutes advice, opinion, analysis, and recommendations regarding ordinances or resolutions related to the secretary's office. However, we find the secretary's office has not demonstrated the marked non-privileged e-mails, to the extent they are maintained separate and apart from the otherwise privileged e-mail strings, consist of policy judgments, recommendations, or proposals pertaining to the preparation of proposed legislation. Therefore, the secretary's office may not withhold the marked non-privileged e-mails under section 552.106. Accordingly, except for the marked non-privileged e-mails, the secretary's office may withhold the information you have marked under section 552.106 of the Government Code.<sup>4</sup>

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).

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<sup>4</sup>As our ruling on this information is dispositive, we need not address your remaining argument against its disclosure.

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, 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.

We understand you to assert the non-privileged e-mails at issue are protected under the deliberative process privilege of section 552.111 of the Government Code. However, the marked non-privileged e-mails were shared with parties with whom the secretary's office has not established it shares a privity of interest or a common deliberative process. Therefore, the secretary's office may not withhold the marked non-privileged e-mails under the deliberative process privilege of section 552.111 of the Government Code.

Section 552.136 of the Government Code states “[n]otwithstanding any other provision of this chapter, 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.” Gov’t Code § 552.136; *see also id.* § 552.136(a) (defining “access device”). Upon review, we agree the secretary's office must withhold the conference call access code you have marked under section 552.136 of the Government Code.

Section 552.137 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). *See id.* § 552.137(a)-(c). The e-mail addresses at issue are not a type specifically excluded by section 552.137(c). Accordingly, the secretary's office must withhold the e-mail addresses you have marked and the e-mail address we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their disclosure.

Section 552.139 of the Government Code provides, in part:

(a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; [and]

(2) any other assessment of the extent to which data processing operations, a computer, a computer program, network, system, or system interface, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use[.]

*Id.* § 552.139(a), (b)(1)-(2). Section 2059.055 of the Government Code provides, in pertinent part:

(b) Network security information is confidential under this section if the information is:

(1) related to passwords, personal identification numbers, access codes, encryption, or other components of the security system of a state agency[.]

*Id.* § 2059.055(b)(1). You assert the information you marked pertains to technical details of the statewide voter registration system (the "system") and relates to the design and operation of the system. Based on your representations and our review, we conclude the secretary's office must withhold the information we marked under section 552.139 of the Government Code. However, we find you have failed to demonstrate any of the remaining information at issue relates to computer network security, to restricted information under section 2059.055, or to the design, operation, or defense of a computer network as contemplated in section 552.139(a). Further, we find you have failed to demonstrate any of the remaining information at issue consists of a computer network vulnerability report or assessment as contemplated by section 552.139(b).

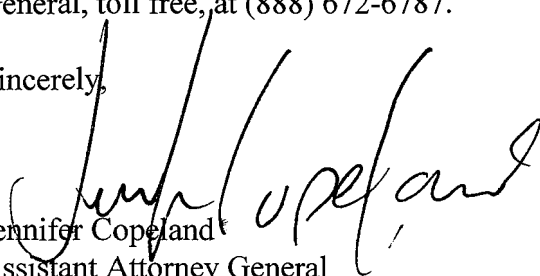
In summary, the secretary's office must withhold all public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy. The secretary's office may generally withhold the e-mails you have marked under section 552.107(1) of the Government Code; however, if the secretary's office maintains the marked

non-privileged e-mails separate and apart from the otherwise privileged e-mail strings, they may not be withheld under section 552.107(1) of the Government Code. Except for the marked non-privileged e-mails, the secretary's office may withhold the information you have marked under section 552.106 of the Government Code. The secretary's office must withhold the conference call access code you have marked under section 552.136 of the Government Code. The secretary's office must withhold the e-mail addresses you have marked and the e-mail address we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses at issue affirmatively consent to their disclosure. The secretary's office must withhold the information we have marked under section 552.139 of the Government Code. The remaining information must be released.

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,



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Assistant Attorney General  
Open Records Division

JC/gw

Ref: ID# 689216

Enc. Submitted documents

c: Requestor  
(w/o enclosures)