



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 22, 2018

Mr. Brent Chapell
Assistant District Attorney
Montgomery County District Attorney's Office
207 West Phillips, Second Floor
Conroe, Texas 77301-2824

OR2018-04165

Dear Mr. Chapell:

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# 696619.

The Montgomery County District Attorney's Office (the "district attorney's office") received a request for information pertaining to a specified case and specified proposed legislation. You claim the submitted information is excepted from disclosure under sections 552.103, 552.106, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note some of the submitted information, which we indicated, is not responsive to the instant request for information because it was created after the district attorney's office received the request for information. This ruling does not address the public availability of any information that is not responsive to the request and the district attorney's office is not required to release such information in response to this request.

Section 552.103 of the Government Code provides in relevant part as follows:

¹We 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.

(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.

...

(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), (c). A governmental body has the burden of providing relevant facts and documents to show section 552.103(a) is applicable in a particular situation. The test for meeting this burden is a showing 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 that 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.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). *See* ORD 551.

You state a post-conviction writ of habeas corpus proceeding styled *Ex parte Nicole Nadra Baukus*, Cause No. 12-06-07085-CR, was pending before the 435th Judicial District Court of Montgomery County, Texas, when the district attorney's office received the instant request for information. You represent the district attorney's office, as the prosecuting agency of the criminal case underlying the pending proceeding, is a party to any litigation arising from the district attorney's office's prosecution of the case. You state the information at issue is related to the pending proceeding. Based on your representations, the submitted documentation, and our review of the information, we find litigation to which the district attorney's office is a party was pending when the district attorney's office received the request for information. Further, we find the information at issue is related to the pending litigation for the purposes of section 552.103. Therefore, the district attorney's office may withhold the information we indicated under section 552.103(a) of the Government Code.²

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that

²As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to the pending litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

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.

Gov't Code § 552.108(a)(4), (b)(3). Sections 552.108(a)(4) and (b)(3) protect information that was prepared by an attorney for the state for litigation or that reflects an attorney's legal reasoning. A governmental body claiming an exception to disclosure under section 552.108

must explain how and why this exception is applicable to the information the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d at 710. You state the information at issue reflects the mental impressions or legal reasoning of attorneys representing the state. Upon review, we agree some of the information at issue reflects the mental processes or legal reasoning of an attorney representing the state. Therefore, we conclude the information we indicated is subject to sections 552.108(a)(4) and (b)(3) of the Government Code. Accordingly, the district attorney's office may withhold the information we indicated under sections 552.108(a)(4) and (b)(3) of the Government Code.³ However, upon review, we find you have not demonstrated the remaining information at issue deals with the detection, investigation, or prosecution of crime for the purposes of section 552.108(a)(4), or relates to law enforcement or prosecution for the purposes of section 552.108(b)(3). Thus, the district attorney's office may not withhold the remaining information at issue under section 552.108(a)(4) or section 552.108(b)(3) of the Government Code.

Section 552.106 of the Government Code excepts from disclosure “[a] draft or working paper involved in the preparation of proposed legislation” and “[a]n internal bill analysis or working paper prepared by the governor’s office for the purpose of evaluating proposed legislation.” Gov’t Code § 552.106(a)-(b). The purpose of section 552.106 is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body. *See Open Records Decision No. 615 at 2 (1993)*. Therefore, section 552.106 is applicable only to the policy judgments, recommendations, and proposals of persons who are involved in the preparation of proposed legislation and who have an official responsibility to provide such information to members of the legislative body. *See id.* at 1; *see also Open Records Decision No. 429 at 5 (1985)* (statutory predecessor to section 552.106 not applicable to information relating to governmental entity’s efforts to persuade other governmental entities to enact particular ordinances). Upon review, we find no portion of the remaining information at issue consists of policy judgments, recommendations, and proposals of persons involved in the preparation of proposed legislation and who have an official responsibility to provide such information to members of the legislative body. Accordingly, the district attorney’s office may not withhold any of the remaining information at issue under section 552.106 of the Government Code.

Section 552.117(a)(13) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee of a district attorney, criminal district attorney, or county or municipal attorney whose jurisdiction includes any criminal law or child protective services matters, regardless of whether the current or former employee

³As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

complies with section 552.024 or 552.1175.⁴ *See* Gov't Code § 552.117(a)(13). We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Accordingly, the district attorney's office must withhold the information we marked under section 552.117(a)(13) of the Government Code; however, the marked cellular telephone numbers may be withheld only if a governmental body does not pay for the cellular telephone service.

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). Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to an institutional e-mail address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address of a vendor who seeks to contract with a governmental body, an e-mail address maintained by a governmental entity for one of its officials or employees, or an e-mail address provided to a governmental body on a letterhead. *See id.* § 552.137(c). Accordingly, the district attorney's office must withhold the e-mail addresses of members of the public within the remaining responsive information under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their disclosure or they are excluded by subsection (c).

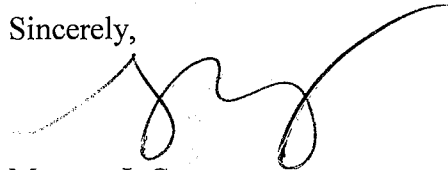
In summary, the district attorney's office may withhold the information we indicated under section 552.103(a) of the Government Code. The district attorney's office may withhold the information we indicated under sections 552.108(a)(4) and (b)(3) of the Government Code. The district attorney's office must withhold the information we marked under section 552.117(a)(13) of the Government Code; however, the marked cellular telephone numbers may be withheld only if a governmental body does not pay for the cellular telephone service. The district attorney's office must withhold the e-mail addresses of members of the public within the remaining responsive information under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their disclosure or they are excluded by subsection (c). The district attorney's office must release the remaining responsive 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.

⁴The 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 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,

A handwritten signature in black ink, appearing to read 'Meagan J. Conway', with a large, sweeping flourish extending to the right.

Meagan J. Conway
Assistant Attorney General
Open Records Division

MC/sb

Ref: ID# 696619

Enc. Submitted documents

c: Requestor
(w/o enclosures)