



KEN PAXTON  
ATTORNEY GENERAL OF TEXAS

November 20, 2019

Ms. Elizabeth Stevens  
Assistant General Counsel  
Harris County District Attorney's Office  
500 Jefferson, Suite 600  
Houston, Texas 77002

OR2019-32884

Dear Ms. Stevens:

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# 796667 (Reference #2019.08-0004).

The Harris County District Attorney's Office (the "district attorney's office") received a request for four categories of information pertaining to a named individual and specified information pertaining to specified cases. You state you have released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.108 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

We note some of the submitted information was the subject of a previous request for a ruling, as a result of which this office issued Open Records Letter No. 2019-28324 (2019). In that ruling, we ruled, in part, that the information submitted as Appendix E in the instant request was excepted from disclosure under section 552.108(a)(2) of the Government Code. However, we note the circumstances have changed for Appendix E as the district attorney's office is now raising section 552.108(a)(1) of the Government Code for this information. Thus, the district attorney's office may not rely on Open Records Letter No. 2019-28324 as a previous determination for Appendix E. However, we have no indication there has been a change in the law, facts, or circumstances for the remainder of the information at issue in Open Records Letter No. 2019-28324. Accordingly, we conclude the district attorney's office may continue to rely on Open Records Letter No. 2019-28324 as a

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<sup>1</sup> We assume that 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.

previous determination with respect to the information we have marked and withhold or release that information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). We will also address your submitted arguments against disclosure of the remaining information.

Section 552.108 of the Government Code provides, in 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 the requirements of Section 552.021 if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication; [or]

...

(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.

...

(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)(1)-(2), (4), (b)(3). Section 552.108(a)(1) protects information that pertains to a specific pending criminal investigation or prosecution. Section 552.108(a)(2) protects information that relates to a concluded criminal investigation or prosecution that did not result in conviction or deferred adjudication. Section 552.108(a)(4)

protects information that was prepared by an attorney for the state for litigation or that reflects an attorney's legal reasoning. A governmental body that claims an exception to disclosure under section 552.108 must explain how and why the exception it claims is applicable to the information the governmental body seeks to withhold. *See id.* §552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108 may be invoked by any proper custodian of information relating to a pending investigation or prosecution of criminal conduct. *See Open Records Decision No. 474 at 4-5 (1987)*. Where a governmental body has custody of information relating to a pending case of a law enforcement agency, the custodian of the records may withhold the information if it provides this office with a demonstration that the information relates to the pending case and a representation from the law enforcement agency that it wishes to have the information withheld.

The district attorney's office states Appendix F and the remaining information in Appendix G were prepared by the district attorney and assistant district attorneys in anticipation of or in the course of preparing for potential litigation and reflects the prosecutors' mental impressions and legal reasoning. Upon review, we agree the information at issue reflects the mental processes or legal reasoning of an attorney representing the state. Therefore, we conclude Appendix F and the remaining information in Appendix G is subject to section 552.108(a)(4). Thus, the district attorney's office may withhold Appendix F and the remaining information in Appendix G under section 552.108(a)(4) of the Government Code.<sup>2</sup>

The district attorney's office states Appendices C and D pertain to concluded investigations that did not result in convictions or deferred adjudications. Based on this representation and our review, we find the district attorney's office may withhold Appendices C and D under section 552.108(a)(2) of the Government Code.<sup>3</sup>

The district attorney's office states Appendix E pertains to a pending case with the Federal Bureau of Investigation ("FBI"). However, the district attorney's office has not provided a representation from the FBI objecting to the release of the information at issue. Therefore, the district attorney's office may not withhold Appendix E under section 552.108(a)(1) 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[.]" 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)*.

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<sup>2</sup> As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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

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 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).

This office has also concluded a preliminary draft of a document 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* ORD 561.

The district attorney's office state the remaining information in Appendix H consists of advice, opinions, and recommendations of district attorney's office employees and a consultant with whom the district attorney's office shares privity regarding policymaking matters. Upon review, we find except for the information we have marked for release, the district attorney's office may withhold the remaining information in Appendix H under section 552.111 of the Government Code. However, the remaining information at issue is


either factual in nature or consists of internal administrative matters that do not rise to the level of policymaking. Therefore, we find the district attorney's office has failed to demonstrate the remaining information at issue constitutes internal communications containing advice, recommendations, or opinions reflecting the policymaking processes of the district attorney's office. Accordingly, the district attorney's office may not withhold the information we have marked for release under section 552.111 of the Government Code.

In summary, except for Appendix E, the district attorney's office may continue to rely on Open Records Letter No. 2019-28324 as a previous determination and withhold or release the information at issue in accordance with that ruling. The district attorney's office may withhold Appendix F and the remaining information in Appendix G under section 552.108(a)(4) of the Government Code. The district attorney's office may withhold Appendices C and D under section 552.108(a)(2) of the Government Code. Except for the information we have marked for release, the district attorney's office may withhold the remaining information in Appendix H under section 552.111 of the Government Code. 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.

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,



Meredith L. Coffman  
Assistant Attorney General  
Open Records Division

MLC/rm

Ref: ID# 796667

Enc. Submitted documents

c: Requestor  
(w/o enclosures)