



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 9, 2020

Mr. Mark Kratovil
Assistant Criminal District Attorney
Tarrant County District Attorney's Office
401 West Belknap, 9th Floor
Fort Worth, Texas 76196-0201

OR2020-10621

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# 821225.

The Tarrant County Administrator and Commissioners Court ("the county") received three requests from the same requestor for e-mails and other correspondence involving three named county employees and containing specified terms during a certain date range. You state the county will release some information. You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.111, 552.117, and 552.139 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See id.* § 552.107(1). 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). 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.*, 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 indicated is protected by section 552.107(1) of the Government Code. You state the information at issue consists of communications involving the county’s attorneys and county employees in their capacities as clients. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the county and that these communications have remained confidential. Based on these representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the county may generally withhold the information you indicated under section 552.107(1) of the Government Code. 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 marked, are maintained by the county separate and apart from the otherwise privileged e-mail strings in which they appear, then the county may not withhold these non-privileged e-mails under section 552.107(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).

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 exempts 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 that are 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 that 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.

You state a portion of the remaining information consists of a draft of a county policymaking document. You inform us the document at issue will be made available to the public in its final form. Upon review, we find the county may withhold the information we marked under section 552.111 of the Government Code.¹ However, we find the remaining information at issue consists of information that is administrative or purely factual in nature. Thus, we find you failed to demonstrate the remaining information at issue reveals advice, opinions, or recommendations that pertain to policymaking. Therefore, the county may not withhold any of the remaining information under section 552.111 of the Government Code.

Section 552.139 of the Government Code provides, in relevant part:

¹ As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

(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.

Gov't Code § 552.139(a). Section 2059.055(b)(1) of the Government Code provides "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 governmental entity[.]" *Id.* § 2059.055(b)(1). You state the information you indicated is related to computer security, infrastructure, or passwords. Based upon your arguments and our review of the information, we find the information at issue relates to computer network security. Accordingly, the county must withhold the information you indicated under section 552.139 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 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 Third Court of Appeals has concluded public citizens' dates of birth are protected by common-law privacy pursuant to section 552.101. *See 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 county must withhold all public citizens' dates of birth in the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

A portion of the remaining information may be subject to section 552.117 of the Government Code. Section 552.117(a)(1) of the Government Code applies to records a governmental body holds in an employment capacity and excepts from public disclosure the current and former home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). 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 is not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential.

Upon review, we conclude to the extent the individuals at issue are currently or were formerly employed by the county, and timely requested confidentiality under section 552.024 of the Government Code, the county must withhold the information we marked under section 552.117(a)(1) of the Government Code; however, the county may only withhold the marked cellular telephone numbers if a governmental body did not pay for the cellular telephone service. Conversely, to the extent the individuals were never employed by the county or if the individuals at issue did not timely request confidentiality under section 552.024, the county may not withhold this information under section 552.117(a)(1).

If the individuals at issue were never employed by the county, their information may be protected by section 552.1175 of the Government Code. Section 552.1175 protects the home address, home telephone number, emergency contact information, date of birth, social security number, and family member information of certain individuals, when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information confidential.² Gov't Code § 552.1175. Section 552.1175 also encompasses a personal cellular telephone number, unless the cellular telephone service is paid for by a governmental body. *See* ORD 506 at 5-6. Upon review, we find the information we marked consists of personal information of individuals who may be among the types of individuals listed in section 552.1175(a). Thus, if the information we marked relates to individuals to whom section 552.1175(a) applies, the county must withhold the information we marked under section 552.1175 of the Government Code if the individuals at issue elect to restrict access to this information in accordance with section 552.1175(b); however, the county may only withhold the marked cellular telephone numbers if a governmental body did not pay for the cellular telephone service. However, if the individuals at issue are not individuals to whom section 552.1175(a) applies or the individuals do not elect to restrict access to this information in accordance with section 552.1175(b), then the county may not withhold this information under section 552.1175 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). *See* Gov't Code § 552.137(a)-(c). The e-mail addresses at issue are not excluded by subsection (c). Therefore, the county must withhold the personal e-mail addresses we marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

In summary, the county may generally withhold the information you indicated under section 552.107(1) of the Government Code. However, if the non-privileged e-mails, which we marked, are maintained by the county separate and apart from the otherwise privileged e-mail strings in which they appear, then the county may not withhold the non-privileged e-mails under section 552.107(1) of the Government Code. The county may

² The 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).

withhold the information we marked under section 552.111 of the Government Code. The county must withhold the information you indicated under section 552.139 of the Government Code. The county must withhold all public citizens' dates of birth in the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the individuals at issue are currently or were formerly employed by the county, and timely requested confidentiality under section 552.024 of the Government Code, the county must withhold the information we marked under section 552.117(a)(1) of the Government Code; however, the county may only withhold the marked cellular telephone numbers if a governmental body did not pay for the cellular telephone service. If the information we marked relates to individuals to whom section 552.1175(a) applies, the county must withhold the information we marked under section 552.1175 of the Government Code if the individuals at issue elect to restrict access to this information in accordance with section 552.1175(b); however, the county may only withhold the marked cellular telephone numbers if a governmental body did not pay for the cellular telephone service. The county must withhold the personal e-mail addresses we marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. The county 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,

Deborah Southerland
Assistant Attorney General
Open Records Division

DS/gw

Ref: ID# 821225

Enc. Submitted documents

c: Requestor
(w/o enclosures)