



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

October 16, 2020

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

OR2020-26077

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# 849785 (ORR# 2020.08-0008).

The Harris County District Attorney's Office (the "district attorney's office") received a request for e-mails between a named individual and any of three named individuals during a specified time period. The district attorney's office claims some of the submitted information does not consist of public information subject to the Act. The district attorney's office claims the submitted information is excepted from disclosure under section 552.111 of the Government Code. We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, the district attorney's office argues the information submitted as Exhibit D is not subject to the Act. The Act applies to "public information," which is defined in section 552.002(a) of the Government Code as

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

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<sup>1</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 those records contain substantially different types of information than that submitted to this office.

- (1) by a governmental body; or
- (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.

Gov't Code § 552.002(a). Information is "in connection with the transaction of official business" if it is "created by, transmitted to, received by, or maintained by an officer or employee of the governmental body in the officer's or employee's official capacity, or a person or entity performing official business or a government function on behalf of a governmental body, and pertains to official business of the governmental body." *Id.* § 552.002(a-1). Thus, virtually all of the information in a governmental body's physical possession constitutes public information and is subject to the Act. *See* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988).

The district attorney's office informs us Exhibit D consists of consists of e-mails that are purely personal in nature that do not concern the business of the district attorney's office. The district attorney's office indicates this information was not written, produced, collected, or assembled and is not maintained pursuant to any law or ordinance or in connection with the transaction of the district attorney's office's business. The district attorney's office further indicates its policies allow for incidental use of e-mail by employees and officials. Based on these representations and our review of the information at issue, we agree Exhibit D does not constitute "information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by or for the district attorney's office. *See* Gov't Code § 552.002. Therefore, we conclude Exhibit D does not constitute public information for purposes of section 552.002 of the Government Code. *See* Open Records Decision No. 635 at 7 (1995) (section 552.002 not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). Accordingly, the district attorney's office is not required to release Exhibit D in response to the request for information.

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).

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).

The district attorney's office states the information submitted as Exhibit C consists of internal communications between employees of the district attorney's office that relate to policymaking issues. Thus, the district attorney's office states the information at issue consists of advice, opinions, and recommendations of the district attorney's office pertaining to its policymaking functions. Based on these representations and our review of the information at issue, we find the district attorney's office has demonstrated portions of the information at issue, which we marked, consist of advice, opinions, or recommendations on the policymaking matters of the district attorney's office. Thus, the district attorney's office may withhold the information we marked under section 552.111 of the Government Code. Upon review, however, we find the remaining information at issue is general administrative and purely factual information or does not pertain to policymaking, or the information was shared with an individual with whom the district attorney's office has not demonstrated it shares a privity of interest or common deliberative process. Thus, we find the district attorney's office has not shown the remaining information at issue consists of internal communications containing advice, opinions, or recommendations on the policymaking matters of the district attorney's office. Accordingly, the district attorney's office may not withhold any of the remaining information at issue under section 552.111 of the Government Code.

We note the remaining information contains e-mail addresses that may be subject to section 552.137 of the Government Code.<sup>2</sup> 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). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, an e-mail address that a governmental entity maintains for one of its officials or employees, or a personal e-mail address belonging to a district attorney’s office employee or official used to conduct official government business. *See Austin Bulldog v. Leffingwell*, 490 S.W.3d 240 (Tex. App.—Austin 2016, no pet.) (holding personal e-mail addresses of government officials used to conduct official government business are not e-mail addresses of “members of the public” for purposes of Gov’t Code § 552.137(a)). Because we are unable to discern whether the e-mail addresses within the remaining documents belong to district attorney’s office employees or officials or fall within the scope of section 552.137(c), we must rule conditionally. To the extent the e-mail addresses at issue belong to members of the public, the district attorney’s office must withhold such e-mail addresses under section 552.137, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release. *See id.* § 552.137(b). However, to the extent the e-mail addresses at issue are excluded by subsection 552.137(c) or belong to a district attorney’s office employee or official, the e-mail addresses may not be withheld under section 552.137 of the Government Code.

In summary, Exhibit D does not constitute public information for purposes of section 552.002 of the Government Code and the district attorney’s office is not required to release that information in response to the request for information. The district attorney’s office may withhold the information we marked within Exhibit C under section 552.111 of the Government Code. To the extent the e-mail addresses in the remaining information belong to members of the public, the district attorney’s office must withhold such e-mail addresses under section 552.137, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release. The district attorney’s office must release the remainder of Exhibit C.

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

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<sup>2</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).

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,

Claire V. Morris Sloan  
Assistant Attorney General  
Open Records Division

CVMS/jm

Ref: ID# 849785

c: Requestor