



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

November 2, 2020

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

OR2020-27430

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# 851289 (Ref. No. 2020.03-0061).

The Harris County District Attorney's Office (the "district attorney's office") received a request for e-mail communications sent or received by a named employee. You state the district attorney's office has released some information. We understand the district attorney's office will redact e-mail addresses of members of the public under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).<sup>1</sup> You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.108, 552.111, 552.117, and 552.139 of the Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the representative sample of information.<sup>3</sup>

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<sup>1</sup> Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

<sup>2</sup> Although the district attorney's office does not cite to section 552.107 of the Government Code in its brief, we understand the district attorney's office to raise this exception based on the substance of its argument.

<sup>3</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.

Initially, we note the submitted information includes a court-filed Order to Seal that is subject to section 552.022(a)(17) of the Government Code. Section 552.022(a)(17) provides for required public disclosure of “information that is also contained in a public court record[,]” unless the information is expressly made confidential under the Act or other law. Gov’t Code § 552.022(a)(17). We understand the district attorney’s office seeks to withhold a portion of this information under section 552.101 of the Government Code in conjunction with common-law privacy. We note information that is filed with a court is not protected by common-law privacy. *See Star-Telegram v. Walker*, 834 S.W.2d 54 (Tex. 1992) (common-law privacy not applicable to court-filed document). Therefore, the court-filed Order to Seal is subject to section 552.022(a)(17) and may not be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.107(2) of the Government Code allows a governmental body to withhold information if “a court by order has prohibited disclosure of the information.” Gov’t Code § 552.107(2). You state, and the submitted Order to Seal demonstrates, the information you indicated is sealed pursuant to the court order. Therefore, we agree a court, by order, has prohibited disclosure of the information at issue, which we marked. Accordingly, the district attorney’s office must withhold the information we marked under section 552.107(2) of the Government Code.<sup>4</sup>

Section 552.108 of the Government Code states, in pertinent part:

(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.

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

(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.

*Id.* § 552.108(a)(4), (b)(3). Sections 552.108(a)(4) and 552.108(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 706, 710 (Tex. 1977). You assert Appendix D consists of internal notations and records prepared by the district attorney's office and reflects the mental impressions or legal reasoning of attorneys representing the state. Based on these representations and our review, we agree sections 552.108(a)(4) and 552.108(b)(3) of the Government Code are applicable to the information at issue. Accordingly, the district attorney's office may withhold Appendix D under sections 552.108(a)(4) and 552.108(b)(3) of the Government Code.

Section 552.108(b)(1) of the Government Code excepts from disclosure the internal records and notations of law enforcement agencies and prosecutors when their release would interfere with law enforcement and crime prevention. Gov't Code § 552.108(b)(1); *see also* Open Records Decision No. 531 at 2 (1989) (quoting *Ex parte Pruitt*, 551 S.W.2d 706). A governmental body claiming section 552.108(b)(1) must explain how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706. Section 552.108(b)(1) is intended to protect "information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State." *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.). This office has concluded section 552.108(b)(1) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.,* Open Records Decision Nos. 531 (release of detailed use of force guidelines would unduly interfere with law enforcement), 252 (1980) (section 552.108 of the Government Code is designed to protect investigative techniques and procedures used in law enforcement), 143 (1976)

(disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). Section 552.108(b)(1) is not applicable, however, to generally known policies and procedures. *See, e.g.*, ORDs 531 at 2–3 (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

In Open Records Decision No. 506 (1988), this office determined the statutory predecessor to section 552.108(b) excepted from disclosure “cellular mobile phone numbers assigned to county officials and employees with specific law enforcement responsibilities.” ORD 506 at 2. We noted the purpose of the cellular telephones was to ensure immediate access to individuals with specific law enforcement responsibilities and public access to these numbers could interfere with that purpose. *Id.* You state the cellular telephone numbers assigned to assistant district attorneys and investigators of the district attorney’s office are used by these individuals to communicate for law enforcement purposes. You assert release of this information would interfere with law enforcement. Based on these representations and our review, we conclude the district attorney’s office may withhold the cellular telephone numbers of the assistant district attorneys and investigators you indicated under section 552.108(b)(1) of the Government Code.<sup>5</sup> However, we find you have failed to demonstrate the remaining cellular telephone numbers at issue are subject to section 552.108(b)(1) and they may not be withheld on that basis.

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; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). A governmental body’s policymaking functions do include administrative and personnel matters of broad scope that affect the

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<sup>5</sup> As our ruling is dispositive for this information, we need not address your remaining argument against its disclosure.

governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995). However, 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. ORD 615 at 5-6; *see also Dallas Morning News*, 22 S.W.3d at 364 (section 552.111 not applicable to personnel-related communications that did not involve policymaking).

Further, section 552.111 does not protect facts and written observations of facts and events severable from advice, opinions, and recommendations. *See Arlington Indep. Sch. Dist.*, 37 S.W.3d at 157; 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.

You state the information you indicated consists of advice, opinions, and recommendations on policymaking matters of the district attorney's office. You also state the information at issue includes drafts of policymaking documents that are intended for public release in their final forms. Based upon these representations and our review, we find some of the information at issue, which we marked, consists of advice, opinions, or recommendations on the policymaking matters of the district attorney's office. Accordingly, the district attorney's office may withhold the information we marked under section 552.111 of the Government Code. However, we find the remaining information at issue is either general administrative information that does not relate to policymaking or information that is purely factual in nature. Thus, we conclude you 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. Therefore, the district attorney's office may not withhold any of the remaining information under section 552.111 of the Government Code.

Section 552.117(a)(13) of the Government Code excepts from public disclosure the home address, home telephone number, emergency contact information, and social security number 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, as well as information that reveals whether the employee has family members, regardless of whether the employee complies with sections 552.024 and 552.1175 of the Government Code. *See* Gov't Code § 552.117(a)(13). We note section 552.117 also encompasses a personal cellular telephone number, unless the cellular service is paid for by a governmental body. *See* Open Records Decision No. 506 at 5-7 (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). The district attorney's office must withhold the information we marked and indicated under section 552.117(a)(13) of the Government Code; however, the cellular telephone numbers at issue may only be withheld to the extent the cellular telephone service is not paid for by a governmental body. Nevertheless, none of the remaining information at issue is subject to section 552.117(a)(13) of the Government Code and none of it may be withheld on that basis.

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.

Gov't Code § 552.139(a). Upon review, we find the information you marked relates to computer network security, and the design, operation, or defense of the computer network of the district attorney's office. Accordingly, the district attorney's office must withhold the information you marked under section 552.139 of the Government Code.

Section 552.102(a) of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."<sup>6</sup> *Id.* § 552.102(a). The Texas Supreme Court held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). Accordingly, the district attorney's office must withhold the information we marked under section 552.102(a) 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." Gov't Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685

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<sup>6</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).

(Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). Furthermore, this office has concluded the public has a legitimate interest in information that relates to public employees and their conduct in the workplace. *See, e.g.*, Open Records Decision Nos. 562 at 10 (1990), 470 at 4 (job performance does not generally constitute public employee's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of government employees), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest), 336 at 2 (1982) (names of employees taking sick leave and dates of sick leave taken not private), 329 (1982). We note that the fact that a public employee is sick is public information, but specific information about illnesses is excepted from disclosure. *See* ORD 470 at 4.

Upon review, we find the information we marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the district attorney's office must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. We note some of the remaining information at issue pertains to individuals who have been de-identified, and their privacy interests are, thus, protected. Upon review, we find the district attorney's office has failed to demonstrate the remaining information at issue is highly intimate or embarrassing and not of legitimate public interest. Therefore, the district attorney's office may not withhold any portion of the remaining information at issue under section 552.101 in conjunction with common-law privacy.

In summary, the district attorney's office must withhold the information we marked under section 552.107(2) of the Government Code. The district attorney's office may withhold Appendix D under sections 552.108(a)(4) and 552.108(b)(3) of the Government Code. The district attorney's office may withhold the cellular telephone numbers of the assistant district attorneys and investigators you indicated under section 552.108(b)(1) of the Government Code. The district attorney's office may withhold the information we marked under section 552.111 of the Government Code. The district attorney's office must withhold the information we marked and indicated under section 552.117(a)(13) of the Government Code; however, the cellular telephone numbers at issue may only be withheld to the extent the cellular telephone service is not paid for by a governmental body. The district attorney's office must withhold the information we marked under section 552.139 of the Government Code. The district attorney's office must withhold the information we marked under section 552.102(a) of the Government Code. The district attorney's office must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. 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,

Michelle Garza  
Assistant Attorney General  
Open Records Division

MRG/jxd

Ref: ID# 851289

Enc. Submitted documents

c: Requestor  
(w/o enclosures)