



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

May 3, 2022

Mr. Adam Bitter  
General Counsel  
Office of the Texas Secretary of State  
P.O. Box 12887  
Austin, Texas 78711-2887

OR2022-12527

Dear Mr. Bitter:

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# 944987 (SOS PIR No. 22-0218).

The Office of the Texas Secretary of State (the "secretary's office") received a request for information pertaining to the November 2020 general election during a specified time period. The secretary's office states it will release some of the requested information to the requestor. Additionally, the secretary's office states it will withhold or release some of the requested information pursuant to our decisions in Open Records Letter Nos. 2021-35866 (2021), 2021-36465 (2021), 2022-00364 (2022), 2022-00733 (2022), 2022-01837 (2022), and 2022-10725 (2022). *See* Open Records Letter 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 information is or is not excepted from disclosure). The secretary's office further states it will withhold certain e-mail addresses under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).<sup>1</sup> The secretary's office claims some of the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.139 of the Government Code. Additionally, the secretary's office states, and provides documentation showing, it has notified the Office of the Attorney General (the "OAG") of its right to submit comments to this office as to why some of the submitted information should not be released. *See* Gov't Code § 552.304

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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 categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. *See* ORD 684.

(interested party may submit comments stating why information should or should not be released). We have received comments from the OAG. We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>2</sup>

Initially, we note some of the submitted information, which we have marked, is not responsive to the instant request for information because it consists of information that was created outside of the time period specified by the requestor. This ruling does not address the public availability of any information that is not responsive to the request and the secretary's office is not required to release such information in response to this request.<sup>3</sup>

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 section 31.006 of the Election Code. Section 31.006 of the Election Code provides the following:

(a) If, after receiving or discovering information indicating that criminal conduct in connection with an election has occurred, the [secretary's office] determines that there is reasonable cause to suspect that criminal conduct occurred, the secretary shall promptly refer the information to the [Office of the Attorney General ("OAG")]. The secretary shall deliver to the [OAG] all pertinent documents and information in the secretary's possession.

(b) The documents and information submitted under Subsection (a) are not considered public information until:

(1) the [secretary's office] makes a determination that the information received does not warrant an investigation; or

(2) if referred to the [OAG], the [OAG] has completed the investigation or has made a determination that the information referred does not warrant an investigation.

Elec. Code § 31.006. The secretary's office states the information it marked pertains to election complaints. The secretary's office also states it was still evaluating the complaints at the time of the request and had not made any determination regarding whether the complaints did or did not warrant an investigation. Based on the secretary's office's

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<sup>2</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.

<sup>3</sup> As we are able to make this determination, we need not address the arguments against disclosure of this information.

representations and our review, we agree the information at issue is not considered public information under section 31.006(b). Accordingly, the secretary's office must withhold the information it marked under section 552.101 of the Government Code in conjunction with section 31.006(b) of the Election Code.<sup>4</sup>

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. 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. *See* ORD 676 at 6-7. First, a governmental body must demonstrate 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 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. *See 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 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).

The secretary's office states the remaining information it marked consists of communications between attorneys and employees of the secretary's office that were made for the purpose of providing legal services to the secretary's office. The secretary's office

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

also states the communications were intended to be, and have remained, confidential. Based on these representations and our review, we find the information at issue consists of privileged attorney-client communications. Therefore, the secretary's office may withhold the remaining information it marked under section 552.107(1) of the Government Code.<sup>5</sup>

Section 552.108(a)(1) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108 may be invoked by the 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 that would otherwise qualify for exception under section 552.108 as information relating to the pending case of a law enforcement agency, the custodian of the records may withhold the information if it provides this office with a demonstration the information relates to the pending case and a representation from the law enforcement agency that it wishes to have the information withheld.

The OAG has advised this office the information at issue relates to an open criminal investigation conducted by the OAG’s Election Fraud Division. Further, the OAG states release of the information at issue would interfere with the pending investigation. Based upon these representations, we conclude the release of the information at issue would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, section 552.108(a)(1) is applicable to the information at issue. Accordingly, the secretary of state’s office may withhold the information we have marked under section 552.108(a)(1) of the Government Code on behalf of the OAG.

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

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<sup>5</sup> As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

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.

The secretary's office states the remaining information it marked consists of advice, opinions, and recommendations of employees of the secretary's office regarding policymaking matters. The secretary's office also states the information at issue includes draft documents which we understand were made available to the public in their final forms. Upon review, we find the secretary's office may withhold the remaining information it marked under section 552.111 of the Government Code.

Section 552.139 of the Government Code provides, in relevant 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.

(b) The following information is confidential:

(1) a computer network vulnerability report;

(2) any other assessment of the extent to which data processing operations, a computer, a computer program, network, system, or system interface, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use; [and]

...

(4) information directly arising from a governmental body's routine efforts to prevent, detect, investigate, or mitigate a computer security incident, including information contained in or derived from an information security log.

Gov't Code § 552.139(a), (b)(1)-(2), (4). Section 2059.055 of the Government Code provides, in pertinent part:

(b) 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;

(2) collected, assembled, or maintained by or for a governmental entity to prevent, detect, or investigate criminal activity; or

(3) related to an assessment, made by or for a governmental entity or maintained by a governmental entity, of the vulnerability of a network to criminal activity.

*Id.* § 2059.055(b). The secretary's office states the information at issue resides on a secured, restricted site. Upon review, we find the information at issue relates to computer network security or the design, operation, or defense of a computer network. Accordingly, the secretary's office must withhold the information it marked under section 552.139 of the Government Code.

In summary, the secretary's office must withhold the information it marked under section 552.101 of the Government Code in conjunction with section 31.006(b) of the Election Code. The secretary's office may withhold the remaining information it marked under section 552.107(1) of the Government Code. The secretary of state's office may withhold the information we have marked under section 552.108(a)(1) of the Government Code on behalf of the OAG. The secretary's office may withhold the remaining

information it marked under section 552.111 of the Government Code. The secretary's office must withhold the information it marked under section 552.139 of the Government Code. The secretary'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.

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,

Alexandra C. Burks  
Assistant Attorney General  
Open Records Division

ACB/jxd

Ref: ID# 944987

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Third Party  
(w/o enclosures)