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Harris County District Attorney's Office
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HARRIS COUNTY DISTRICT ATTORNEY
KIM K. OGG

July 25, 2019

Wayne Dolcefino
Dolcefino Consulting
3701 Kirby, Suite 560
Houston, Texas 77098

Re: Submission of detailed written comments to Attorney General

Dear Mr. Dolcefino,

I am writing to confirm that I am submitting detailed written comments to the Attorney General regarding your recent request for emails involving Amir Mireskandari. Please see enclosed with this correspondence a copy of the District Attorney's written comments. You will be notified when the Attorney General issues an opinion. The responsive emails that are not subject to the District Attorney's objections are being processed and will be forwarded to you. Please feel free to call if you have questions.

Sincerely,

A handwritten signature in blue ink that reads "Brian L. Rose". The signature is fluid and cursive.

Brian L. Rose
Assistant District Attorney
Harris County District Attorney's Office
General Litigation Division
(713) 274-5816

blr/s

Tom Berg
First Assistant

Vivian King
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Criminal Justice Center
1310 Prairie, Suite 500
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HARRIS COUNTY DISTRICT ATTORNEY
KIM K. OGG

July 25, 2019

Hon. Ken Paxton
Attorney General
Office of the Attorney General
Open Records Division
P.O. Box 12548
Austin, Texas 78711-2548
Sent by certified mail, RRR, #7015 0640 0006 6570 0294

Re: Public Information Act Request – Requestor Wayne Dolcefino

Dear Sir:

On May 22, 2019, this office received the enclosed request for disclosure of information, which I have construed as a request for information under the Public Information Act. *See Appendix A (request)*. The author of the enclosed request, Mr. Wayne Dolcefino, seeks the following information which is the subject of this request for determination:

3. Any e-mail communication sent between Amir Mireskandari and Kim Ogg or any employee of the Harris County District Attorney's Office since January 1, 2018.¹

On June 6, 2019, this Office sought clarification of the request by written letter to the requestor, Mr. Dolcefino. *See Appendix B (District Attorney's request for clarification letter)*. Following discussions with the Mr. Dolcefino by telephone, Mr. Dolcefino narrowed his request for emails between Amir Mireskandri and "all employees" to emails between Amir Mireskandri and District Attorney Kim Ogg (rather than all employees). This narrowing was accomplished via written clarifications submitted by email on June 20, 2019, and June 21, 2019. *See Appendix C (Dolcefino emails dated June 20, 2019 and June 21, 2019 clarifying/narrowing the request)*.

Portions of the emails between Amir Mireskandari and District Attorney Kim Ogg were produced to Mr. Dolcefino on Wednesday, July 3, 2019, while others were submitted on July 11, 2019, to the Attorney General as representative samples with detailed written comments regarding various available exceptions. *See Appendix D (District Attorney's 15-day letter to the Attorney General)*.

¹ The contracts requested in item No. 1 were released to the requestor on Friday June 21, 2019. Mr. Dolcefino has responded separately in writing to a request for clarification of his request for "work product produced by Amir Mireskandari" requested as item No. 2 in his original request and this will be the subject of another request for an opinion. *See Appendix A (request) and Appendix B (request for clarification letter)*.

Hon. Ken Paxton
July 25, 2019
Page 2.

On Wednesday, July 3, 2019, Mr. Dolcefino requested in writing via email the broader set of emails between Amir Mireskandari and all employees (rather than the more narrow set of emails between Amir Mireskandari and District Attorney Kim Ogg). See Appendix E (Dolcefino email of July 3, 2019, requesting all emails).

A. Request for Determination

On July 18 2019, this Office timely requested that the Attorney General determine whether the information sought by the author of the enclosed correspondence is exempt from disclosure under all available exceptions provided by Chapter 552 of the Texas Government Code, including but not limited to Sections 552.101, 552.102, 552.103, 552.107, 552.108, 552.1085, 552.109, 552.110, 552.111, 552.117, 552.1175, 552.119, 552.129, 552.130, 552.1325, 552.137, 552.147 and 552.152. See Appendix E-1 (request for determination of July 18, 2019).

The District Attorney now submits detailed comments and representative samples of the withheld responsive information for your review within the statutory deadline for responding under the Act.²

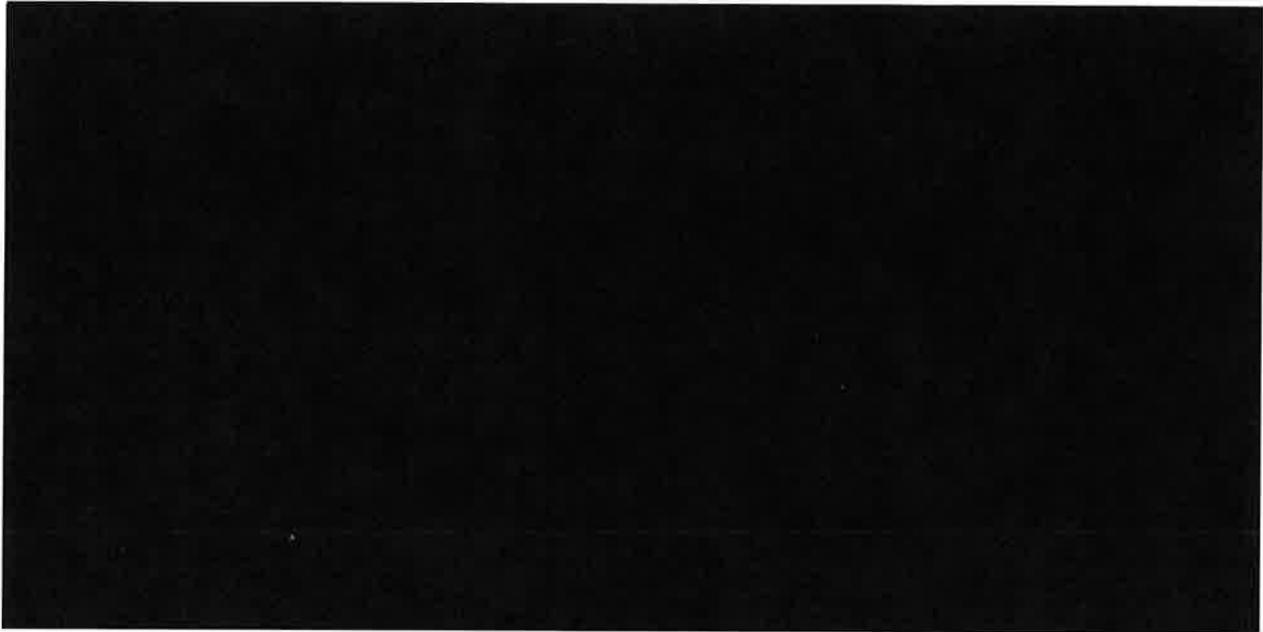
B. Section 552.108(a)(4) & (b)(3) — Prosecutorial work product

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 it is information that reflects the mental impressions or legal reasoning of an attorney representing the state. See Gov't Code Section 552.108(a)(4)(B). Similarly, 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 production if it is information that is prepared by an attorney representing the state and reflects the mental impressions or legal reasoning of an attorney representing the state. See Gov't Code Section 552.108(b)(3)(B).

Attached as Appendix G are representative samples of emails and attachments between prosecutors, investigators, and Amir Mireskandari that contain the mental impressions, trial strategy and other similar information about investigations and pending cases that reflect the mental impressions and legal reasoning of the District Attorney and Assistant District Attorneys for the Harris County District Attorney's Office with regard to cases they are or were prosecuting or investigating. These emails are also internal records or notations of a law enforcement agency or prosecutor that are maintained for internal use in matters relating to law enforcement or prosecution, are prepared by attorneys representing the state, and reflect the mental impressions or legal reasoning of an attorney representing the state. See Gov't Code Section 552.108(a)(4)(B); 552.108(b)(3)(B).

² This request is timely. Note that July 4, 2019 was a Harris County holiday. See Appendix F (Harris County, Texas holiday schedule).

NOTE: Pursuant to 552.301(d)(2) and (e-1) the following discussion has been redacted from the copy of this letter to the requestor because it discloses the substance of the information.



C. Section 552.108(a)(1) & (b)(1) — Interference with law enforcement or prosecution

Information relating to a pending criminal investigation or prosecution is an example of information that is excepted under Gov't Code Section 552.108 (a)(1) and (b)(1), because release of such information would presumptively interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177, 184-185 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), writ ref'd n.r.e., 536 S.W.2d 559 (Tex. 1976) (per curiam).

Section 552.108(a)(1) and (b)(1) specifically provide as follows:

- (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;
 -
- (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 the requirements of 552.021 if:

- (1) release of the internal record or notation would interfere with law enforcement or prosecution;

The representative sample attached as Appendix H involves information relating to a pending criminal investigations and prosecutions, the release of which would interfere with law enforcement or prosecution. The email attached in Appendix H dated March 20, 2018, 2:33 PM, relates to a pending criminal charge. See Appendix H (pending charge email). The email relates to defendant Dalena Nguyen, who is charged with capital murder in cause number 1604145, currently pending in the 351st District Court of Harris County, Texas. See Appendix H-1 (indictment of Dalena Nguyen). The case is next set on the court's docket on August 13, 2019. This representative sample of a pending case and all other responsive materials relating to pending prosecutions should be excepted from required disclosure. Furthermore, Appendix G contains numerous examples of pending criminal investigations with uncharged criminal targets and the District Attorney submits those as further representative samples. See Appendix G (Financial Crimes Monthly report).

D. Section 552.111 — Agency Memorandum

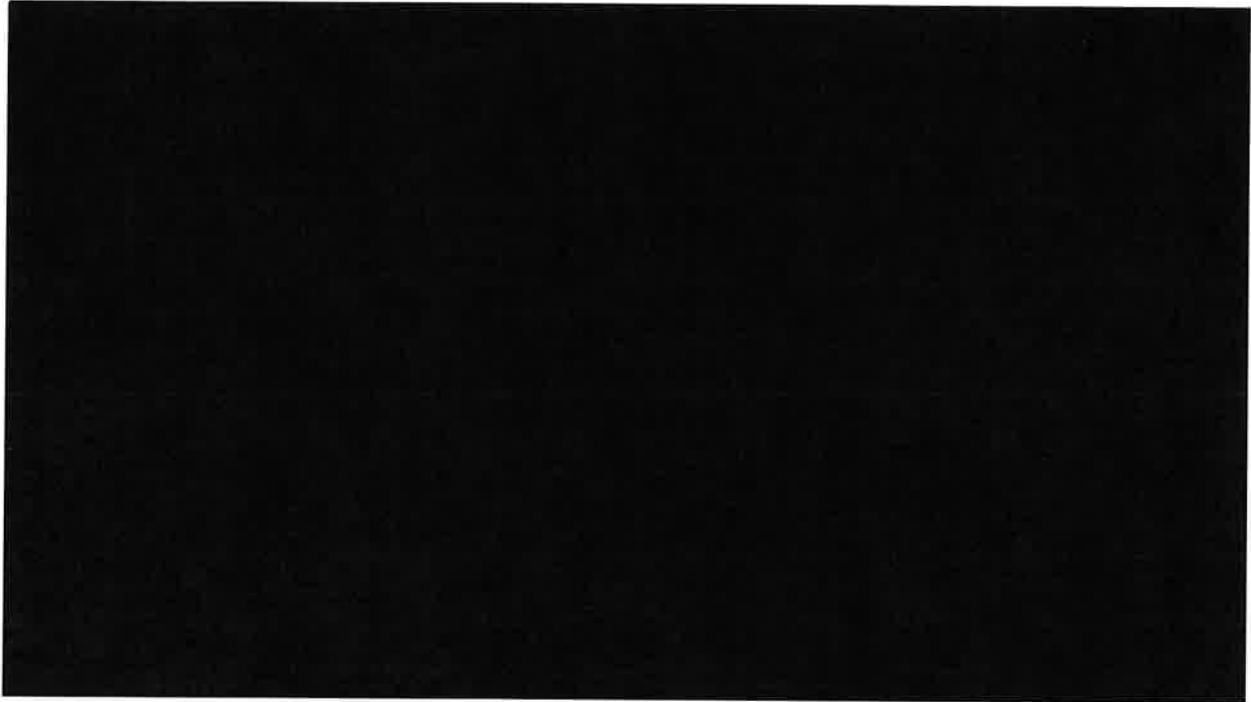
Section 552.111 of the Government Code excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” The purpose of Section 552.111 is to protect advice, opinion and recommendation in the decisional process and 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, no writ); Open Records Decision No. 538, at 1-2 (1990). 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). The Attorney General has also concluded that Section 552.111 excepts from disclosure the entire contents of a preliminary draft of a policymaking document that will be released to the public in its final form. Open Records Decision 559 (1990).

Attached as Appendix I are representative samples of emails that are protected by the deliberative process privilege, which protects from disclosure intra-agency communications consisting of advice, opinion or recommendations on policymaking matters of the governmental body at issue. See generally *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 361 & 364 (Tex. 2000).

Appendix I contains a representative sample of emails communications among various officials with the Harris County District Attorney's Office including District Attorney Kim Ogg and contractor/consultant Amir Mireskandri, as well as other high-level employees including former First Assistant Tom Ber, Chief of Staff Vivian King, former Administrative Bureau Chief Barbara Hartle, Director of Communications Dane Schiller, Major Fraud Division Chief John Brewer and other District Attorney's Office employees. The communications are advice, opinions and recommendations of the District Attorney's staff to the District Attorney on a variety of policy issues of importance to the District Attorney's Office. The samples include documents that were preliminary drafts of policymaking documents that would potentially later be released to the public in its final form. See Appendix I-1.

Hon. Ken Paxton
July 25, 2019
Page 5.

NOTE: Pursuant to 552.301(d)(2) and (e-1) the following discussion has been redacted from the copy of this letter to the requestor because it discloses the substance of the information.



The above-described documents constitute communications involving the deliberative process between the District Attorney and her staff, and internal advice, opinions and recommendations by the District Attorney's staff to the District Attorney on policy matters. As such, this information should be excepted from disclosure pursuant to Section 552.111.

E. Section 552.137 Confidentiality of Certain E-mail Addresses; Section 552.117 Confidentiality of Certain Addresses, Telephone Numbers, Social Security Numbers and Personal family information.

Section 552.137 provides that "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with the governmental body is confidential and not subject to disclosure under this chapter."

Section 552.117 protects from public disclosure the home address, home telephone number, emergency contact information, social security number and information that reveals whether the person has family members of current or former government employees who elect not to disclose this information.

Attached hereto as Appendix J are representative samples of emails that contain email addresses of members of the public and information of current or former employees of the Harris County District Attorney's Office which they have elected not to disclose. This type of information is excepted from disclosure under Section 552.137 and 552.117.

F. Section 552.101, Tex. R. Evid. 503, and 552.107 – Attorney-Client Privileged Information

Information within the attorney-client privilege is excepted from disclosure under Section 552.107 of the Government Code. Such information is also protected under Section 552.101, and Tex. R. Evid. 503, as a “foundational tenant in the law . . .” *Paxton v. City of Dallas*, 2017 WL 469597, *1 (Tex. February 3, 2017) (explaining the Legislature’s choice to exempt such information shows a recognition that “ensuring the free flow of information between attorney and client ultimately serves the broader societal interest of effective administration of justice.”)

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 5, 6-8, 10 (2002). The governmental body must demonstrate that:

- (1) the information constitutes or documents a communication; *Id.* at 7;
- (2) the communication was made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body; Tex. R. Evid. 503(b)(1);
- (3) the communication must be made between or among clients, client representatives, lawyers and lawyer representatives, *Id.*;
- (4) the communication was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” Tex. R. Evid. 503(a)(5); and
- (5) a governmental body must explain that the confidentiality of a communication has been maintained. Tex. Att’y Gen. OR2013-15370, *2 (2013).

A representative sample of information responsive to the request is attached hereto as Appendix K. This communications is excepted from disclosure under the attorney-client privilege because it is a communication between an assistant district attorney and an employee of the District Attorney. The communication was made for the purpose of facilitating the rendition of professional legal services by Assistant District Attorney Bernadatte Haby to the Harris County District Attorney in connection with determining whether the Harris County District Attorney has jurisdiction to pursue bad check criminal charges under a certain defined set of circumstances. This communication was the rendition of professional legal services as it provided an expert legal opinion on a specialty topic and was given to guide the District Attorney’s staff in their handling of such matters. These communications were not intended to be disclosed to third parties, nor were they, in fact, disclosed

to any third parties. All of the elements of the attorney-client privilege are met with respect to this information as described above, and they are thus excepted from disclosure.

G. Section 552.101 – Common-law privacy protects certain private information about public employees, including medical information.

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. This section encompasses the doctrine of common-law privacy which protects from disclosure highly intimate or embarrassing facts in which the public does not have a legitimate interest. It also encompasses information that other statutes make confidential, including federal law.

Common Law Privacy. Under the doctrine of common-law privacy, an individual has the right to be free from the publicizing of the individual’s private affairs when there is no legitimate public concern served by disclosure. *Industrial Found. of the South v. Texas Ind. Acc. Bd.*, 540 S.W.2d 668, 682 (Tex. 1976). Thus, information is protected under the common-law right to privacy if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of a legitimate concern to the public. *Id.* at 683.

In *Industrial Foundation*, the court found that information about sexual assaults, mental or physical abuse in the workplace and the like were highly personal matters that should be protected. *Id.* The Attorney General and subsequent courts have recognized the private nature of dating and personal relationships, personal financial information, and mental or physical conditions or disabilities. *See, e.g., Morales v. Ellen*, 840 S.W.2d 519, 525 (Tex. App. – El Paso 1992, writ denied); Tex. Atty. Gen. Op. OR2013-00967 (Jan. 16, 2013) (citing Open Records Decisions Nos. 470, 455, and 343).

Under the Americans With Disabilities Act (“ADA”), 42 U.S.C. 12101 *et seq.*, employers are required to maintain the medical conditions and histories of applicants and employees confidentially. The ADA requires that such information must be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. The Attorney General has found that “some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy.” Tex. Atty. Gen. Op. OR2013-00967 (Jan. 16, 2013) (citing Open Records Decision Nos. 470, 455, and 343 *See, e.g.,* Tex. Atty. Gen. Op. OR 2008-14247 (Oct. 17, 2008) (recognizing that the ADA requires certain information be maintained confidentially and exempting such information from public disclosure).

Attached hereto as Appendix L are representative samples of emails that disclose such information (i.e. an employee’s illness) that should be excepted from public disclosure under 552.101.

H. Assertion of multiple exceptions/privileges, where applicable.

The above arguments support the application of multiple exceptions as to the representative samples attached. For example, emails concerning pending investigations or cases are excepted under 552.108 as attorney work product and interference with law enforcement or prosecution.

Hon. Ken Paxton
July 25, 2019
Page 8.

The District Attorney asserts all of the multiple exceptions/ privileges, to the extent that they apply, to all the representative samples attached as Appendices.

The District Attorney further re-offers as detailed written comments and representative samples the entirety of her July 11, 2019, written comments regarding responsive emails to Dolcefino's request in his item No. 3. See Appendix D (District Attorney's 15-day letter to the Attorney General). Those comments and the representative samples previously submitted with them are equally applicable thoughts and analysis regarding the emails that are the subject of this letter and the District Attorney offers them in full for their insights and arguments regarding the exceptions raised there.

CONCLUSION

For these reasons, the District Attorney asks that you find that the materials described herein are excepted from disclosure under the Public Information Act.

Sincerely,



Brian L. Rose
Assistant General Counsel
Office of the District Attorney
(713) 274-5816

cc: Requestor - w/o attachments

Sent by certified mail, RRR, # 7015 0640 0006 6570 0287

Mr. Wayne Dolcefino
Dolcefino Consulting
3701 Kirby, Suite 560
Houston, Texas 77098