

Administrative, Litigation, and Third Party Records

I. Administrative & Litigation Records

INTRODUCTION

The following materials in part I contain a discussion of the statutes in the Public Information Act (the “Act”) and other law that are relevant to administrative and litigation records and to requests for rulings involving such records. The materials include a discussion of sections 552.022, 552.103, 552.107, 552.111, 552.301 and 552.302 of the Government Code, as well as rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure.

PROCEDURAL AND RELEASE PROVISIONS OF THE ACT

SECTION 552.301

Section 552.301 prescribes the procedures and deadlines for asking the Office of the Attorney General (the “OAG”) for a ruling on whether information is excepted from disclosure.

WHAT MUST A GOVERNMENTAL BODY DO WHEN A REQUEST IS RECEIVED?

- Determine if the governmental body is claiming any exceptions to disclosure. A governmental body can choose not to assert a discretionary exception and to release information that is not deemed confidential by law.
- Section 552.301(b):
 - Within 10 business days of receipt of the request for information, a governmental body must:
 - send the OAG a written request for a ruling, stating every exception the governmental body believes may be applicable; and
 - send the requestor (a) a written statement the governmental body wishes to withhold information and has asked the OAG for a ruling and (b) a copy of the communication with the OAG.
- Section 552.301(e):
 - Within 15 business days of receipt of the request for information, a governmental body must:

- send the OAG (a) written comments in support of each exception or privilege claimed; (b) a copy of the written request for information; (c) a signed statement as to the date the written request was received or evidence sufficient to establish the date; and (d) a copy of the requested information, or representative samples if the information is voluminous, labeled to indicate which exceptions apply to which part of the information; and
- send the requestor a copy of the written comments (which the governmental body may redact to avoid disclosure of the substance of the information at issue).

SECTION 552.302

Section 552.302 prescribes the consequences for the failure to comply with section 552.301.

- If a governmental body fails to comply with section 552.301, the requested information is presumed to be subject to required public disclosure, and the information must be released, unless there is a compelling reason to withhold the information.
- Sections 552.103, 552.107(1), and 552.111, Texas Rule of Evidence 503, and Texas Rule of Civil Procedure 192.5 are generally not compelling reasons for non-disclosure under section 552.302.

SECTION 552.022

Provides for required public disclosure of 18 categories of information, with limited exceptions.

- Examples: a completed report, audit, evaluation or investigation made by or for a governmental body; information in an account, voucher or contract relating to the receipt or expenditure of public funds by a governmental body; information in an attorney's fee bill.
- Information encompassed by section 552.022 may not be withheld from disclosure unless the information is expressly made confidential under the Act or other law.
- Sections 552.103, 552.107(1), and 552.111 are discretionary exceptions to disclosure under the Act; as such, these sections do not make information confidential under the Act, and are not "other law" that makes information confidential for purposes of section 552.022.
- However, the attorney-client privilege under Texas Rule of Evidence 503 and core attorney work product privilege under Texas Rule of Civil Procedure 192.5 are "other law" for purposes of section 552.022.

RELEVANT EXCEPTIONS TO DISCLOSURE

SECTION 552.103

WHAT INFORMATION IS PROTECTED?

Information related to civil or criminal litigation involving a governmental body, or its employees in their employment capacities, that was pending or reasonably anticipated on the date the governmental body received the request for information.

WHAT MUST A GOVERNMENTAL BODY DEMONSTRATE?

- 1) The governmental body is a party to pending or reasonably anticipated litigation,
 - 2) on the date the governmental body received the request,
- AND
- 3) how the information at issue is related to the pending or reasonably anticipated litigation.

WHAT CONSTITUTES LITIGATION?

- Civil or criminal action in a judicial forum.
- Contested case under the Texas Administrative Procedure Act, Government Code chapter 2001.
- Internal grievances that are conducted in a quasi-judicial forum. Establishing factors may include:
 - Use of administrative procedures;
 - Multi-level hearing process before administrators;
 - Grievant representation by counsel;
 - Grievant presentation of evidence and witnesses who testify on grievant' s behalf; and
 - Completion of internal grievance procedures requirement before grievant can appeal to a court of competent jurisdiction.
- For **pending litigation**, the governmental body must provide sufficient evidence to demonstrate litigation was pending on the date the request was received. For example:

- A copy of a pleading showing a lawsuit involving the governmental body was filed on or before the date the request for information was received by the governmental body.
- An explanation of the details of the pending litigation, including when the litigation was filed, the cause of action, and who is involved.
- For reasonably **anticipated litigation**, the governmental body must provide “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” For example:
 - Receipt of a letter containing a specific threat to sue the governmental body from an attorney representing a potential opposing party.
 - A potential opposing party filed a complaint with the Equal Employment Opportunity Commission (“EEOC”).
 - A potential opposing party threatened to sue on several occasions and hired an attorney.
 - Receipt of a notice of claim letter from a potential opposing party that is in compliance with the notice requirements of the Texas Tort Claims Act, chapter 101 of the Civil Practice and Remedies Code, or an applicable municipal ordinance.
 - A potential opposing party hired an attorney who made a demand for disputed payments and threatened to sue if payments were not made promptly.
 - The governmental body is a prospective plaintiff and the evidence reflects anticipated litigation of a specific matter is “realistically contemplated.”
- Examples of **not meeting the reasonably anticipated standard**:
 - A potential opposing party publicly threatens to sue, but does not actually take objective or concrete steps toward filing a lawsuit.
 - A potential opposing party has hired an attorney who makes a request for information.
- The governmental body must explain how the submitted information is **related to** the pending or reasonably anticipated litigation.

IMPORTANT POINTS TO REMEMBER WHEN RAISING SECTION 552.103

- The protections of the litigation exception under section 552.103 are waived by failure to comply with the procedural requirements of section 552.301.
- Section 552.103 does not make information confidential under the Act and is not “other law” for purposes of section 552.022.
- Once information has been obtained by all parties to the litigation, through discovery or otherwise, the information cannot be withheld under section 552.103.
- The applicability of section 552.103 ends once the litigation has concluded or is no longer anticipated.

SECTION 552.107(1) AND TEXAS RULE OF EVIDENCE 503

WHAT INFORMATION IS PROTECTED?

Communications between and among clients, clients’ representatives, clients’ lawyers, and clients’ lawyers’ representatives, made for the purpose of providing legal services to the client that were intended to be confidential and have remained confidential.

WHAT MUST A GOVERNMENTAL BODY DEMONSTRATE?

The governmental body must demonstrate four elements:

- The information constitutes or documents a communication.
- The communication was made for the purpose of facilitating the rendition of professional legal services to the client governmental body.
 - An important question here is: In what capacity is the lawyer communicating? Is she communicating as a manager, as an employee, or as a lawyer?
 - Just because a lawyer is included in the communication does not necessarily mean it is privileged.
- The communication is between the client, the client’s lawyer, or their representatives.

- Identify all parties to the communications and explain their relationship to the governmental body. Don't forget to identify any third-party consultants who are representatives of the governmental body.
- Do not merely state, "All parties are city employees." It is the governmental body's burden to demonstrate each party is a privileged party with respect to the communication at issue.
- The communication was intended to be, and has remained, confidential.
 - Parties making and receiving the communication must have intended for the communication to be confidential.
 - The communication may not have been shared with any non-privileged party since it was made.
 - If an e-mail in an e-mail chain is separately responsive to the request and exists separate and apart from the submitted e-mail chain, that e-mail is not protected by the attorney-client privilege if it is communicated to a non-privileged party.

WHEN TO ASSERT SECTION 552.107(1) vs. WHEN TO ASSERT RULE 503

- Raise section 552.107(1) if the information at issue is not subject to section 552.022.
- Raise rule 503 if the information is subject to section 552.022 because the Texas Supreme Court held the Texas Rules of Evidence are "other law" for section 552.022 purposes.
 - For example, an attorney fee bill is subject to section 552.022(a)(16). Communications between privileged parties within the fee bill may be withheld under rule 503.
 - Section 552.107(1) does not make information confidential under the Act, and is not considered "other law" for purposes of section 552.022. Thus, section 552.107(a) **will not apply** to section 552.022 information.
- Rule 503 is not a confidentiality provision and should not be claimed in conjunction with section 552.101 of the Government Code.

ATTORNEY FEE BILLS

- Attorney fee bills are expressly public under section 552.022(a)(16) and no part of an attorney fee bill may be withheld under section 552.107(1).

- However, if a governmental body can establish that certain entries in an attorney fee bill consist of, document, or reveal privileged attorney-client communications, such information may be excepted from disclosure under rule 503.
- For each particular entry a governmental body seeks to withhold in a fee bill, it must show how the entry (1) reveals a communication (2) between privileged parties that (3) was made for the rendition of legal services and (4) was intended to be, and has remained, confidential.
- Even though an attorney may have provided an entire fee bill to a client governmental body, a governmental body may not withhold the entirety of a fee bill as a privileged communication.
 - Section 552.022(a)(16) provides that information “that is *in* a bill for attorney’s fees” is not excepted from required disclosure unless it is confidential under other law or privileged under the attorney-client privilege. Thus, this provision, by its express language, does not permit the entirety of an attorney fee bill to be withheld.

IMPORTANT POINTS TO REMEMBER

- “Creating,” “drafting,” or “preparing” an e-mail, memorandum or document does not indicate that the e-mail, memorandum or document was sent or communicated. The governmental body needs to explain whether the e-mail, memorandum, or document was actually communicated.
- The attorney-client privilege of section 552.107(1) and rule 503 are waived by failure to comply with the procedural requirements of section 552.301.
- If information is subject to section 552.022, the attorney-client privilege under section 552.107(1) does not apply because section 552.107(1) does not make information confidential under the Act and does not consist of “other law” for purposes of section 552.022.
 - However, if a governmental body can demonstrate that the information subject to section 552.022 consists of or reveals privileged attorney-client communications, then the governmental body may be able to withhold the information under the attorney-client privilege of rule 503.

SECTION 552.111

WHAT INFORMATION IS PROTECTED?

An interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency.

The OAG has interpreted section 552.111 to incorporate two distinct types of privileges:

- the deliberative process privilege (information related to policy matters), *and*
- the attorney work product privilege (information related to litigation).

SECTION 552.111-DELIBERATIVE PROCESS PRIVILEGE

The purpose of the deliberative process privilege is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process.

- In Open Records Decision No. 615 (1993), the OAG determined the deliberative process privilege under section 552.111 protects only those internal communications that consist of advice, opinions, and recommendations that reflect a governmental body's policymaking process.
- In *City of Garland v. Dallas Morning News*, 22 S.W. 3d 351 (Tex. 2000), the supreme court upheld the OAG's interpretation of the deliberative process privilege and concluded section 552.111 does not protect personnel-related communications that do not involve policymaking.

WHAT TYPES OF INFORMATION ARE PROTECTED?

- Interagency and intra-agency communications that consist of advice, opinions, and recommendations that reflect the policymaking processes of a governmental body.
- **Intra-agency communications** include (1) internal communications relating to a governmental body's policymaking processes and (2) communications with a governmental body's consultant who is acting on behalf of the governmental body.
- **Interagency communications** include communications with other governmental entities with which a governmental body shares a privity of interest or common deliberative process with respect to the communications.

- The information must pertain to the governmental body’s policy mission. Policymaking does not include information pertaining to a purely administrative or personnel matter, unless the administrative or personnel matter is of a broad scope sufficient to affect the governmental body’s policy mission.
- Preliminary drafts of a policymaking document prepared by a governmental body or its consultant that has been released, or is intended for release, in its final form.
 - The draft must pertain to policymaking. The entire draft, including factual information and edits, is protected.
 - If a policymaking draft will not be released in its final form, then portions of the draft may still be subject to the deliberative process privilege.
- Factual information that is severable from advice, opinions, and recommendations is not protected.

WHAT MUST A GOVERNMENTAL BODY DEMONSTRATE?

- Explain how the information at issue relates to the governmental body’s policy mission.
- If the information pertains to administrative or personnel matters, explain how and why the administrative or personnel matter is of a broad scope so as to affect the governmental body’s policy mission.
- If the information involves officials or employees of the governmental body, explain who they are and why they are qualified to make policy.
- If an outside consultant is involved, identify the consultant, explain the consultant’s relationship to the governmental body, and explain the task the consultant is performing for the governmental body.
- If another governmental entity is involved in a communication or in the preparation of a draft document, explain why the other governmental body has a privity of interest or shares a common deliberative process with your governmental body.
- If the information at issue is a draft of a document, explain how it qualifies as a policymaking document and state whether the draft has been or is intended to be released in its final form.

IMPORTANT POINTS TO REMEMBER

- If the deadlines under section 552.301 are not met, the deliberative process privilege under section 552.111 is waived.
- If information is subject to section 552.022, the deliberative process privilege under section 552.111 does not apply and the information may not be withheld on that basis.

THE ATTORNEY WORK PRODUCT PRIVILEGE OF SECTION 552.111

In Open Records Decision No. 647 (1996), the OAG concluded section 552.111 also encompasses the attorney work product privilege. We issued a more expansive explanation of the work product privilege in Open Records Decision No. 677 (2002).

WHAT INFORMATION IS PROTECTED?

- Material prepared for and mental impressions developed, as well as communications made, in anticipation of litigation or for trial by or for a party or its representatives.
- Encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure.

WHAT MUST A GOVERNMENTAL BODY DEMONSTRATE?

- Explain how the information at issue consists of material or mental impressions developed by or for your governmental body in anticipation of litigation or for trial, *or*
- Explain how the information at issue is a communication made between your governmental body and its representatives in anticipation of litigation or for trial; *and*
- Identify the parties or potential parties to litigation, the person or entity that prepared the information, and any individual with whom the information was shared.

IMPORTANT POINTS TO REMEMBER

- The attorney work product privilege under section 552.111 is waived by failure to comply with section 552.301.

- If information is subject to section 552.022, the attorney work product privilege under section 552.111 does not apply because section 552.111 does not make information confidential under the Act and does not consist of “other law” for purposes of section 552.022.
 - However, if a governmental body can demonstrate that the information subject to section 552.022 contains core attorney work product, then the governmental body may be able to withhold the information under the attorney work product privilege of rule 192.5 of the Texas Rules of Civil Procedure.

THE ATTORNEY WORK PRODUCT PRIVILEGE OF RULE 192.5

WHAT INFORMATION IS PROTECTED?

- If information is subject to section 552.022, then a governmental body should claim the attorney work product privilege under rule 192.5 because rule 192.5 is “other law” for purposes of section 552.022.
- Rule 192.5 protects only “core” attorney work product, which is defined as the work product of an attorney or an attorney’s representative, developed in anticipation of litigation or for trial, that contains the attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories.

WHAT MUST A GOVERNMENTAL BODY DEMONSTRATE?

- Explain the information was created for trial or in anticipation of civil litigation, *and*
- Explain the information consists of mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney’s representative.

IMPORTANT POINTS TO REMEMBER

- The core attorney work product privilege under rule 192.5 is waived by failure to comply with the procedural requirements of section 552.301.
- Rule 192.5 can apply only to information that is subject to section 552.022. A governmental body should claim the attorney work product privilege under section 552.111 for information that is not subject to section 552.022.

THE ATTORNEY WORK PRODUCT PRIVILEGE OF SECTION 552.111 AND RULE 192.5

- An attorney's or party's representatives can include legal assistants, paralegals, consultants, insurers, agents, indemnitors, or sureties.
- In *Curry v. Walker*, 873 S.W.2d 379, 381 (Tex. 1994), the Texas Supreme Court held that a request for a district attorney's "entire file" was "too broad" and, citing *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458, 460 (Tex. 1993), held that "the decision as to what to include in [the file] necessarily reveals the attorney's thought processes concerning the prosecution or defense of the case." *Id.* at 380. Accordingly, a request for an attorney's entire litigation file implicates the attorney work product privilege. If the litigation file is not subject to section 552.022, you may assert the file is excepted from disclosure in its entirety under section 552.111 because such a request implicates the work product aspect of the privilege. If the litigation file is subject to section 552.022, you may instead assert the file is excepted from disclosure in its entirety under rule 192.5.
- Unlike section 552.103, the attorney work product privilege continues after litigation has concluded or is no longer anticipated.

WHAT MUST A GOVERNMENTAL BODY DEMONSTRATE?

- Explain the information was created for trial or in anticipation of litigation. You must demonstrate that
 - A reasonable person would have concluded from the totality of the circumstances that there was a substantial chance that litigation would ensue, **and**
 - The party resisting discovery believed in good faith there was a substantial chance litigation would ensue and created or obtained the information for the purpose of preparing for such litigation.
 - A substantial chance of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear."
- The applicability of the work product privilege depends on the facts and circumstances that existed when the information was created.

II. Transactional Records

INTRODUCTION

The purpose of part II of these materials is to set forth certain exceptions in the Act that pertain to the governmental procurement and transactional processes.

RELEVANT EXCEPTIONS TO DISCLOSURE UNDER THE ACT

SECTION 552.104

WHAT INFORMATION IS PROTECTED?

Section 552.104 of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.”

The “test under section 552.104 is whether knowing another bidder’s [or competitor’s information] would be an advantage, not whether it would be a decisive advantage.” *Boeing Co. v. Paxton*, 466 S.W. 3d 831 (Tex. 2015).

Section 552.104 protects two interests of a governmental body:

- (1) A governmental body’s interest in receiving competitive bids from bidders seeking to contract with the governmental body.
- (2) A governmental body’s interest when it is actually itself competing in the marketplace.

Because section 552.104 is designed to protect a governmental body’s competitive interests, this section is inapplicable when there is only one bidder for a government contract or where the governmental body is the only bidder on a contract.

Section 552.104 also now protects the interests of third parties, such as those entities that submit bids to a governmental body in response to a request for proposals (“RFP”). This is a significant change in the law regarding section 552.104, brought about by a decision of the Texas Supreme Court.

In *Boeing Co. v. Paxton*, while considering whether a private third party may assert section 552.104, the supreme court reasoned, because section 552.305(a) of the Government Code includes section 552.104 as an example of an exception that involves a third party’s property interest, a private third party may invoke this exception. Accordingly, the attorney general will now consider section 552.104 arguments submitted by third parties to withhold their information in response to a request to a governmental body under the Act.

WHAT MUST A GOVERNMENTAL BODY DEMONSTRATE?

INTEREST IN RECEIVING COMPETITIVE BIDS:

- There is a competitive bidding situation in which the governmental body is seeking competitive bids, and the contract has not been executed.
- There is more than one bidder.
- Release of information would give an advantage to one bidder over another.
- Examples: a city puts out an RFP for computer software; a school district issues an RFP for athletic equipment; a police department issues an RFP to upgrade video recording equipment and software.

MARKETPLACE INTEREST:

- The governmental body is actually competing in the marketplace and has a specific marketplace interest.
- Release of information would give an advantage to a competitor of the governmental body.
- Examples: a city competes with other cities to contract with a musical act to perform at a city-owned venue; a university markets its research discoveries and licenses its patented technology; a state agency competes with agencies from other states for federal grant funding.

WHAT MUST A THIRD PARTY DEMONSTRATE?

- The third party has competitors with respect to the product or service that is at issue in the procurement.
- Release of the third party's information would give an advantage to a competitor of the third party.

IMPORTANT POINTS TO REMEMBER ABOUT SECTION 552.104

- This section protects a governmental body's interests, as well as the interests of third parties that submit information to the governmental body as part of a procurement process. In order for a governmental body to withhold information under section 552.104 on the basis of a third party's competitive interests, the third party must make arguments under section 552.104 against release of its information.
- A governmental body's violation of the procedural requirements of section 552.301, for example, by failing to timely request a decision from the attorney general, waives section 552.104 with respect to the governmental body's own interests under that exception. However, because a third party's interests can provide a compelling reason to overcome the presumption of openness caused by a failure to comply with section 552.301, the attorney general will consider a third party's arguments under section 552.104, despite a governmental body's failure to comply with section 552.301.
- Section 552.104(b) specifically provides that section 552.022, which makes certain information expressly public, does not apply to information excepted from disclosure under section 552.104. Thus, section 552.104 can be relied upon to withhold information otherwise subject to section 552.022.
- State agencies, including university systems or institutions of higher education as defined by section 61.003 of the Education Code, are subject to recently enacted sections 2261.253 and 2157.0685 of the Government Code. Section 2261.253(a) provides in part that, for each contract for the purchase of goods or services from a private vendor, a state agency shall post on its Internet website each contract the agency enters into, including contracts entered into without inviting, advertising for, or otherwise requiring competitive bidding before selection of the contractor, until the contract expires or is completed. Section 2261.253(b) further provides that a state agency monthly may post contracts that are valued at less than \$15,000. Section 2157.0685(b)(2) provides that, for a contract awarded by the Texas Department of Information Resources (the "department") under section 2157.068 that requires a state agency to develop and execute a statement of work to initiate services under the contract, the state agency must post each statement of work entered into by the agency on the agency's Internet website, in the manner required by department rule. Because the exceptions to disclosure found in the Act do not generally apply to information that other statutes make public, information required to be posted under sections 2261.253 or 2157.0685 may not be withheld under section 552.104 of the Government Code.

SECTION 552.105

WHAT INFORMATION IS PROTECTED?

Information relating to a governmental body's planning and negotiating position regarding certain real or personal property transactions. Section 552.105 of the Government Code specifically excepts from disclosure:

- (1) the location of real or personal property for a public purpose prior to public announcement of the project, or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Section 552.105 may continue to except information about one parcel of land even after completion of the transaction, if release of the information would harm negotiations regarding related parcels for which transactions are not complete.

WHAT MUST A GOVERNMENTAL BODY DEMONSTRATE?

- The governmental body seeks to acquire property;
- No public announcement on the location of the project has been made or no contract has been executed; AND
- The governmental body made a good faith determination that its negotiating position regarding property acquisition would be damaged by release of the information.

IMPORTANT POINTS TO REMEMBER ABOUT SECTION 552.105:

- Section 552.105 protects a governmental body's interests, NOT the interests of third parties that submit information to a governmental body.
- A governmental body's violation of the procedural requirements of section 552.301 waives this exception.
- Section 552.105 cannot be used to withhold information made expressly public by section 552.022. However, completed appraisal reports and attachments are not "completed reports" for purposes of section 552.022(a)(1).
- This section is temporal in nature and ends once the location of the property in question is publicly announced or the relevant transaction is completed.

SECTION 552.110

WHAT INFORMATION IS PROTECTED?

Proprietary information of third parties.

Section 552.110 of the Government Code protects:

- (1) **TRADE SECRET INFORMATION**, and
- (2) **COMMERCIAL OR FINANCIAL INFORMATION** the release of which would cause substantial competitive harm to the third party (not the governmental body).

IMPORTANT POINTS TO REMEMBER ABOUT SECTION 552.110:

- The third party, not the governmental body, must argue and demonstrate the applicability of this exception.
- A third party may raise both sections 552.104 and 552.110 in seeking to have its information withheld from disclosure.
- A governmental body's violation of the procedural requirements of section 552.301 does not waive section 552.110.
- Information subject to section 552.022 may be withheld under section 552.110.
- Section 552.110 protects third party interests, NOT those of a governmental body.
- Section 552.110 does NOT incorporate the Texas Uniform Trade Secrets Act, section 134A.001 of the Texas Civil Practice and Remedies Code.
- Because the exceptions to disclosure found in the Act do not generally apply to information that other statutes make public, information required to be posted under sections 2261.253 or 2157.0685 of the Government Code, as discussed previously, may also not be withheld under section 552.110 of the Government Code.

WHAT MUST A THIRD PARTY DEMONSTRATE?

(1) Trade Secret Information under section 552.110(a):

A third party must:

- show the information meets the definition of a trade secret, AND
- make a *prima facie* case according to the six factors set out in the Restatement of Torts (need not demonstrate all six factors).

(2) Commercial or Financial Information under section 552.110(b):

- A third party must make a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from disclosure.

SECTION 552.305

WHAT INFORMATION IS PROTECTED?

Section 552.305 of the Government Code IS NOT an exception to disclosure under the Act. It does NOT protect information from public disclosure. Rather, section 552.305 sets out a governmental body's notice obligations when a third party's proprietary interests may be implicated.

WHAT MUST A GOVERNMENTAL BODY DO WHEN A REQUEST IMPLICATES THE PROPRIETARY INTERESTS OF A THIRD PARTY?

- A governmental body must make a good faith attempt to notify each third party that may have an interest in the requested information pursuant to section 552.305.
 - This can include contractors, sub-contractors, vendors, and bidders.
- The notice under section 552.305 must:
 - (1) Be in writing;
 - (2) Be sent within 10 business days of the governmental body's receipt of the request;
 - (3) Include a copy of the written request for information;AND

- (4) Include the “Notice Statement to Persons Whose Proprietary Information is Requested” prescribed by the attorney general, which is found in the attorney general’s Public Information Handbook and at https://www.texasattorneygeneral.gov/open/pro_info.shtml
- Communicate with the third party regarding the requested information.
 - (1) Determine whether or not the third party objects to release of its information.
 - (2) If the third party objects, ask the third party what information it believes is excepted from disclosure.
 - (3) Inform the third party what information is being sent to the attorney general for a ruling, so the third party may tailor its arguments to that specific information.
 - (4) After the attorney general has ruled, let the third party know what information will be released.
 - Tell the attorney general that all interested third parties have been notified pursuant to section 552.305, and provide the identity and mailing address of each third party.
 - Within fifteen business days of receiving the request for information, the governmental body must submit to the attorney general all of the responsive information at issue. The attorney general will not rule on information submitted by a third party. Further, the attorney general will limit its ruling to information submitted to the attorney general by the governmental body as responsive to a request. If a third party makes arguments to withhold information not submitted by the governmental body, the attorney general’s ruling will not address such arguments, or such information.
 - When submitting responsive information to the attorney general for a ruling, a governmental body should generally not submit representative samples of third party information, as each third party must establish the applicability of raised exceptions to each part of its own information.

III. “Proper Custodian”

INTRODUCTION

In part III of these materials, we will discuss the situation that sometimes arises in the public information context in which a governmental body holds information subject to the Act that relates to a pending or closed case of an outside law enforcement agency. In such a situation, the governmental body holding the information is known as a “proper custodian” of the information at issue.

“PROPER CUSTODIAN”

Section 552.108 of the Government Code excepts from disclosure information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime. This exception generally applies to the records created by an agency, or a portion of an agency, whose primary function is to investigate crimes and enforce the criminal laws. It generally does not apply to the records created by a non-law enforcement agency, or an agency whose chief function is essentially regulatory in nature.

- However, where a non-law enforcement agency has in its custody information that would otherwise qualify for exception under section 552.108 of the Government Code as information relating to the case of a law enforcement agency, the custodian of the records may withhold the information if it provides the attorney general with a demonstration that the information relates to the particular case and a representation from the law enforcement entity that it wishes to have the information withheld.

IMPORTANT POINT TO REMEMBER ABOUT A GOVERNMENTAL BODY AS “PROPER CUSTODIAN”

- If a governmental body holds information that relates to a pending criminal investigation or prosecution, the governmental body may withhold the information under section 552.108(a)(1) of the Government Code, if in its request for a ruling from the attorney general, it provides the attorney general with a representation from the law enforcement agency with the pending case that such agency seeks to have the information withheld to preserve its law enforcement interests.
- A governmental body may also withhold information as proper custodian relating to a concluded case that did not result in conviction or deferred adjudication under section 552.108(a)(2) of the Government Code if it presents the attorney general with a representation from the agency with the law enforcement interest that such agency seeks to have the information at issue withheld under that exception.
- Upon receipt of a request for information that pertains to a pending or closed case of an outside law enforcement agency, the governmental body should contact the agency with the law enforcement interest and seek a representation from that agency that the agency seeks to have the information withheld under section 552.108. It should then notify the

attorney general of this representation in seeking a ruling to withhold the information from the requestor.

- Outside agencies whose interests can provide the basis for a governmental body to withhold information under section 552.108 as proper custodian include:
 - The Texas Department of Public Safety (Texas Rangers)
 - A county district attorney's office
 - The Federal Bureau of Investigation
 - The United States Department of Justice
 - A city police department
 - A county sheriff's department