



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 13, 2008

Ms. Holly C. Lytle  
Assistant County Attorney  
El Paso County Attorney's Office  
500 East San Antonio Room 503  
El Paso, Texas 79901

OR2008-06519

Dear Ms. Lytle:

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# 309949.

The El Paso County Medical Examiner's Office (the "medical examiner") and the El Paso County Purchasing Department (the "purchasing department") received separate requests from the same requestor for information pertaining to tissue recovery services. You state that the medical examiner does not maintain some of the requested information.<sup>1</sup> You also state that some of the requested information will be released. You inform us that some of the responsive information is the subject of Open Records Letter No. 2008-03632 (2008). On behalf of the medical examiner and the purchasing department (collectively "the county"), you claim that the rest of the requested information is excepted from disclosure under sections 552.103, 552.104, 552.107, and 552.111 of the Government Code. You also believe that some of the remaining information may implicate the interests of third parties under sections 552.101 and 552.110 of the Government Code. You notified the interested parties of this request for information and of their right to submit arguments to this office as

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<sup>1</sup>We note that the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

to why the information should not be released.<sup>2</sup> We have considered your arguments and have reviewed the information you submitted.

You inform us that some of the submitted information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2008-03632 (2008). You do not indicate that there has been any change in the law, facts, and circumstances on which the previous ruling is based. Therefore, to the extent that the submitted information is the subject of Open Records Letter No. 2008-03632, the county must dispose of all such information in accordance with the prior ruling. See Gov't Code § 552.301(a); Open Records Decision No. 673 at 6-7 (2001) (listing elements of first type of previous determination under Gov't Code § 552.301(a)). To the extent that the submitted information is not encompassed by the prior ruling, we will consider your exceptions to disclosure.

Section 552.103 of the Government Code provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

*Id.* § 552.103(a), (c). A governmental body that raises section 552.103 has the burden of providing relevant facts and documents sufficient to show that this exception is applicable to the information at issue. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of the governmental body's receipt of the request for the information, and (2) the information at issue is related to the pending or anticipated litigation. See *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684

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<sup>2</sup>See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). You inform us that the parties who received notice are American Donor Services, Inc.; Bio-Tissue, Inc.; Musculoskeletal Transplant Foundation; South Texas Blood and Tissue Center; and VitalGift Tissue Services. As of the date of this decision, this office has received no correspondence from any of the interested parties.

S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See* Open Records Decision No. 551 at 4 (1990). The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.”<sup>3</sup> *Id.*

You inform us, and have provided documentation demonstrating, that the county is the plaintiff in a pending lawsuit that was filed prior to the receipt of these requests for information. You also contend, and have submitted documentation for the purpose of demonstrating, that another lawsuit was anticipated when the county received these requests for information. You contend that the medical examiner’s Attachments C, D, E, F, G, and H and the purchasing department’s Attachments C, D, E, K, and L are related to the pending and anticipated litigation. Having considered your arguments and documentation, we find that some of the submitted information is related to the pending lawsuit. The county may withhold that information, which we have marked, under section 552.103. We find, however, that you have not sufficiently demonstrated that any of the remaining information at issue is related to the pending lawsuit. *See* Open Records Decision Nos. 551 at 5 (1990) (attorney general will determine whether governmental body has reasonably established that information at issue is related to litigation), 511 at 2 (1988) (information “relates” to litigation under statutory predecessor if its release would impair governmental body’s litigation interests). We also find that you have not demonstrated that any other litigation was reasonably anticipated when the county received these requests for information. *See* Open Records Decision No. 331 at 1-2 (1982) (mere chance of litigation not sufficient to trigger Gov’t Code § 552.103). We therefore conclude that the county may not withhold any of the remaining information under section 552.103.

In concluding that the county may withhold the marked information under section 552.103, we assume that the opposing party in the pending litigation has not seen or had access to any of the information in question. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to the litigation through discovery procedures. *See* ORD 551 at 4-5. If the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Furthermore, the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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<sup>3</sup>Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission (“EEOC”), *see* Open Records Decision No. 336 (1982); (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

Section 552.104 of the Government Code exempts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). This exception protects a governmental body's interests in competitive bidding situations. See Open Records Decision No. 592 (1991). Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. See Open Records Decision No. 541 at 4 (1990). Section 552.104 does not protect information relating to competitive bidding once a contract has been awarded and is in effect. See Open Records Decision Nos. 306 (1982), 184 (1978).

You indicate that the medical examiner's Attachments C, D, E, and H and the purchasing department's Attachments C, D, and E are related to a competitive bidding process. You inform us that the county has selected the winning bidder but is still in the process of negotiating a contract with the chosen vendor. You contend that the release of information relating to the bidding while the negotiations are ongoing may harm the county's bargaining position or provide an advantage to one of the vendors. Based on your representations, we conclude that the county may withhold the medical examiner's Attachments C, D, E, and H and the purchasing department's Attachments C, D, and E under section 552.104. We note that the county may no longer withhold the information on this basis once the related contract has been executed and is in effect.

Section 552.107(1) of the Government Code protects information that comes 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 Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. See 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. See *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. See TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). 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.* 503(b)(1), meaning it 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." *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, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that 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).

You contend that the remaining information in the medical examiner's Attachment G and the document in the purchasing department's Attachment L are privileged attorney-client communications. You have identified the parties to the communications. You also state that the privilege has not been waived. Based on your representations and our review of the information at issue, we conclude that the county may withhold the remaining information in the medical examiner's Attachment G and the document in the purchasing department's Attachment L under section 552.107(1).

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." 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, no writ); *Open Records Decision No. 538 at 1-2 (1990)*. In *Open Records Decision No. 615 (1993)*, 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 that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, and opinions that reflect a governmental body's policymaking processes. *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. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (Gov't Code § 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)*. Moreover, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *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)*.

You seek to withhold the remaining information in the medical examiner's Attachment F and the purchasing department's Attachment K under section 552.111. Having considered your

representations, we have marked information that the county may withhold under this exception. We conclude that you have not demonstrated that any of the remaining information at issue implicates the county's policymaking processes, and therefore the county may not withhold any of the remaining information under section 552.111.

In summary: (1) to the extent that the submitted information is the subject of Open Records Letter No. 2008-03632, the county must dispose of all such information in accordance with the prior ruling; (2) the county may withhold the information that we have marked under section 552.103 of the Government Code; (3) the county may withhold the medical examiner's Attachments C, D, E, and H and the purchasing department's Attachments C, D, and E under section 552.104 of the Government Code; and (4) the county may withhold the information that we have marked under sections 552.107(1) and 552.111 of the Government Code. The rest of the submitted information must be released.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

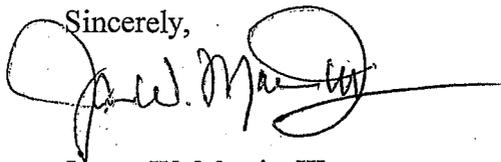
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/ma

Ref: ID# 309949

Enc: Submitted documents

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