



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 28, 2009

Mr. Bryan P. Neal
Thompson & Knight, L.L.P.
1700 Pacific Avenue, Suite 3300
Dallas, Texas 75201-4693

OR2009-01077

Dear Mr. Neal:

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# 333530.

Dallas CASA, Inc. ("CASA"), which you represent, received three requests for eight categories of information pertaining to a particular incident involving the requestor and to CASA's operation during two particular time periods. You state you have released some information to the requestor. You claim the remaining information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information, a portion of which consists of a representative sample.² We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

¹Although you also raise the attorney-client privilege under section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence, we note that section 552.107 is the proper exception to raise for your attorney-client privilege claim in this instance. *See* Open Records Decision No. 676 (2002).

²We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

Initially, we note a portion of the submitted information is subject to section 552.022 of the Government Code, which provides in relevant part:

(a) the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

Id. § 552.022(a)(1). Exhibit C-2 is a completed report made by CASA, which is expressly public under section 552.022(a)(1). Although you seek to withhold Exhibit C-2 under sections 552.103 and 552.111 of the Government Code, these sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). As such, sections 552.103 and 552.111 are not other laws that make information confidential for the purposes of section 552.022(a)(1). Therefore, CASA may not withhold Exhibit C-2 under section 552.103 or section 552.111. However, because information subject to section 552.022(a)(1) may be withheld under section 552.101, we will address that claim for Exhibit C-2 and Exhibits C-1 and C-3, for which you also assert confidentiality.

You assert Exhibits C-1, C-2, and C-3 are excepted from disclosure under section 552.101 of the Government Code in conjunction with section 264.613 of the Family Code. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. Section 264.613 of the Family Code pertains to court-appointed volunteer advocate programs that provide children's advocacy services and states:

(a) The files, reports, records, communications, and working papers used or developed in providing services under this subchapter are confidential and not subject to disclosure under Chapter 552, Government Code, and may only be disclosed for purposes consistent with this subchapter.

(b) Information described by Subsection (a) may be disclosed to:

(1) the department, department employees, law enforcement agencies, prosecuting attorneys, medical professionals, and other state agencies that provide services to children and families;

(2) the attorney for the child who is the subject of the information; and

(3) eligible children's advocacy centers.

(c) Information related to the investigation of a report of abuse or neglect of a child under Chapter 261 and services provided as a result of the investigation are confidential as provided by Section 261.201.

Fam. Code § 264.613. You state CASA is a court-appointed volunteer advocate program for purposes of subchapter G of chapter 264 of the Family Code. *See id.* § 264.601(2) (defining volunteer advocate program). You assert Exhibits C-1, C-2, and C-3 are representative samples of information developed in the course of providing volunteer advocate services, and therefore, are confidential under section 264.613 because “[n]othing in [section 264.613] limits the confidentiality requirement to information related to a specific child.” We find this interpretation to be inconsistent with a close reading of the section in its entirety. We note the release provision of section 264.613(b)(2) refers to the attorney of the “*child who is the subject of the information.*” *Id.* § 264.613(b)(2) (emphasis added). In light of this language, we conclude section 264.613(a) applies only to information that directly relates to the provision of specific services provided to or for a child under Family Code chapter 264, subchapter G. This statute does not make administrative information confidential, except to the extent such information reveals the identity of a child to whom or for whom such services were provided. Thus, we conclude Exhibits C-1 and C-2 consist of files, reports, records, communications, or working papers used or developed in providing services under subchapter G to a specific child and are confidential under section 264.613. The requestor is not one of the individuals or entities granted a right of access to the information under section 264.613(b). CASA must therefore withhold Exhibits C-1 and C-2 under section 552.101 of the Government Code in conjunction with section 264.613(a) of the Family Code.³ However, we conclude Exhibit C-3 is an administrative record and does not reveal the identity of any child receiving services under subchapter G. Therefore, Exhibit C-3 is not made confidential by section 264.613(a) of the Family Code.

Next, you assert the remaining information is excepted under section 552.103 of the Government Code, which provides:

(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.

³Because our determination on this issue is dispositive, we need not address your remaining argument against disclosure of this information.

...

(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.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *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.*, 684S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, *writ ref'd n.r.e.*); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under 552.103(a).

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 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.” *Id.* Concrete evidence to support a claim litigation is reasonably anticipated may include, for example, the governmental body’s receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.⁴ Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

You explain the requestor is a former CASA volunteer whose services CASA has ceased using. You state CASA received a letter from the requestor, dated October 28, 2008, in which the requestor stated, “[if you wish to discharge me] please be advised that I will

⁴In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); 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 threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

challenge it, not only in complaining to the court which appointed me but in a complaint to the national CASA and in civil court.” You state CASA received another letter from the requestor, dated October 29, 2008, in which the requestor stated, “Inasmuch as you have not rescinded my suspension by noon today, I am proceeding with appropriate complaints as I stated.” We understand you view the requestor’s statements as a threat to sue CASA and, therefore, assert CASA reasonably anticipates litigation involving the requestor. We note, however, that a person’s threat to sue without any further action is not sufficient to establish reasonably anticipated litigation. *See* ORD 331. In this instance, you have not informed us the requestor has taken any other concrete steps toward the initiation of litigation. *See id.* Additionally, a request for information by a potential opposing party or that party’s attorney is not by itself enough to establish reasonably anticipated litigation. *See* ORD 361. Consequently, after reviewing your arguments, we find you have not established CASA reasonably anticipated litigation when it received the requests for information. Accordingly, CASA may not withhold any of the remaining information under section 552.103 of the Government Code.

Next, you assert the information in Exhibit C-3 is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 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. Section 552.111 encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). In Open Records Decision No. 615, this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, and opinions reflecting the policymaking processes of the governmental body. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *see also Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin, 2001, no pet.). The purpose of section 552.111 is “to protect from public disclosure advice and opinions on policy matters and to encourage frank and open discussion within the agency in connection with its decision-making processes.” *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref’d n.r.e.).

An agency’s policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. *See* ORD 615 at 5-6. 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).

Section 552.111 can also encompass communications between a governmental body and a third 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). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See* ORD 561 at 9.

You explain CASA is a “non-profit agency within Dallas County that trains volunteers who are appointed by judges to represent the best interests of abused and neglected children.” You assert Exhibit C-3 consists of item-by-item discussions of CASA policy issues to be addressed along with advice, opinions, or recommendations of the juvenile court judge, CASA, or both. Upon review, we agree Exhibit C-3 reflects the advice, opinions, and recommendations of CASA and juvenile court judges pertaining to policy issues in which CASA and the judges share a privity of interest or common deliberative process. Accordingly, CASA may withhold Exhibit C-3 under section 552.111.

Next, we address your argument that the addresses of CASA donors, located in Exhibit D, are excepted from disclosure under section 552.101 of the Government Code in conjunction with the United States Constitution’s First Amendment right to freedom of association. We note the requestor has narrowed his request to exclude the addresses of private individual donors, and as such, the addresses of private individual donors need not be released and we do not address them. In the opinion, *In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d 371 (Tex. 1998), the Texas Supreme Court determined the First Amendment right to freedom of association could protect an advocacy organization’s list of contributors from compelled disclosure through a discovery request in pending litigation. In reaching this conclusion, the court stated:

Freedom of association for the purpose of advancing ideas and airing grievances is a fundamental liberty guaranteed by the First Amendment. *NAACP v. Alabama*, 357 U.S. 449, 460, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958): Compelled disclosure of the identities of an organization’s members or contributors may have a chilling effect on the organization’s contributors as well as on the organization’s own activity. *See Buckley v. Valeo*, 424 U.S. 1, 66-68, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). For this reason, the First Amendment requires that a compelling state interest be shown before a court may order disclosure of membership in an organization engaged in the advocacy of particular beliefs. *Tilton*, 869 S.W.2d at 956 (citing *NAACP*, 357 U.S. at 462-63, 78 S.Ct. 1163). “[I]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.” *Id.*

Bay Area Citizens, 982 S.W.2d at 375-76 (footnote omitted). The court held the party resisting disclosure bears the initial burden of making a *prima facie* showing that disclosure will burden First Amendment rights but noted "the burden must be light." *Id.* at 376. Quoting the United State Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1, 74 (1976), the Texas court determined the party resisting disclosure must show "a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Id.* Such proof may include "specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself." *Id.* We note *Bay Area Citizens* does not make confidential information pertaining to the donations themselves, such as the amount donated or types of donations. *Id.* at 376-77 (only the names of contributors were at issue).

You argue that, although the donors at issue have consented to reveal their names, their addresses should be withheld pursuant to the right of association. You assert, "a name in itself does not necessarily identify an individual. Providing a name and an address does." We are baffled by and disagree with your assertion. The court held the First Amendment right of association protects the identities of an organization's members. *See id.* at 375-76. By consenting to the release of their names, the donors at issue have waived their right of association, and their organizations' addresses may not be withheld under section 552.101 pursuant to the right of association.

Next, we address your argument that the amounts the individual and business donors contributed, located in Exhibit D, are excepted from disclosure under section 552.101 of the Government Code in conjunction with common-law privacy. Common-law privacy protects information 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 legitimate concern to the public. *Indus. Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Personal financial information concerning an individual, and not involving a transaction with a governmental body, generally meets both prongs of this test, and is therefore protected by a common law right of privacy. *See* Open Records Decision Nos. 545 (1990), 523 (1989). However, the public has a legitimate interest in financial transactions with governmental bodies. Further, privacy rights do not protect business interests. Open Records Decision No. 192 at 4 (1978) (right of privacy protects feelings of human beings, not property, business or other monetary interests). As privacy rights do not protect business interests, we find the amounts donated by business donors are not protected by common-law privacy.

CASA cites to Open Records Letter No. 2006-07935 (2006), and argues this ruling mandates that the amount of money the individuals have donated is a private financial transaction protected under common-law privacy. Open Records Letter No. 2006-07935 involved individuals' contributions to a private, non-profit organization, not a financial transaction between individuals and a governmental body. However, in Open Records Decision

No. 590, this office concluded a donation to a governmental body is not private because such a financial transaction is a matter of legitimate public concern "as the public has an interest in knowing who funds and therefore potentially influences public entities." Open Records Decision No. 590 (1991). In the present case, the individuals' donations are to CASA, a governmental body. Therefore, we rule in accordance with Open Records Decision No. 590 and find the amounts the individuals contributed are not protected by common-law privacy. Therefore, CASA may not withhold Exhibit D under section 552.101 of the Government Code.

Finally, you assert the information in Exhibit E is excepted under section 552.107 of the Government Code. Section 552.107(1) 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. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate 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. 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 Texas 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 a 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 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. *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).

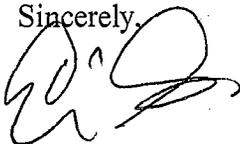
You inform us the information in Exhibit E is a representative sample of communications between CASA's legal counsel and a CASA management-level employee regarding the requestor. You assert this communication was made in furtherance of the rendition of professional legal services and is subject to the attorney-client privilege. After reviewing CASA's arguments and the submitted information, we agree Exhibit E constitutes a privileged attorney-client communication that CASA may withhold under section 552.107.

In summary, CASA must withhold Exhibits C-1 and C-2 under section 552.101 of the Government Code in conjunction with section 264.613(a) of the Family Code. CASA may withhold Exhibit C-3 under section 552.111 of the Government Code and Exhibit E under section 552.107 of the Government Code. The remaining information must be released.

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 http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Emily Sitton
Assistant Attorney General
Open Records Division

EBS/eeg

Ref: ID# 333530

Enc. Submitted documents

c: Requestor
(w/o enclosures)