



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 27, 2009

Ms. Katherine R. Fite  
Assistant General Counsel  
Office of the Governor  
P.O. Box 12428  
Austin, Texas 78711

OR2009-05544

Dear Ms. Fite:

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# 340984.

The Office of the Governor (the "governor") received a request for all e-mails, memos, and internal records regarding the following: 1) state schools for the disabled from January 1, 2009 to the present; 2) cell phones and prison security from January 1, 2009 to the present; 3) Senator Kay Bailey Hutchison between November 1, 2008 and the present; and 4) Joe Straus and the speakership between January 1, 2009 and the present. You state you are releasing some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.103, 552.106, 552.107, 552.111, 552.136, and 552.137 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence.<sup>1</sup> Furthermore, pursuant to section 552.305 of the Government Code, you state you have notified the Department of Aging and Disability Services ("DADS") and the Health and Human Services Commission ("HHSC") of the request and of their right to submit arguments to this office as to why the information should not be released. *See Gov't Code* § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party

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<sup>1</sup>Although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

to raise and explain applicability of exception to disclosure under Act in certain circumstances). We have received arguments from DADS and HHSC. We have considered the submitted arguments and reviewed the submitted information.

The governor and DADS assert that portions of the submitted information are excepted from disclosure pursuant to section 552.103 of the Government Code. Section 552.103 of the Government Code 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.

...

(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).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). In the context of anticipated litigation by a governmental body, the concrete evidence must at least reflect that litigation is "realistically contemplated." See Open Records Decision No. 518 at 5 (1989); see also Attorney General Opinion MW-575 (1982) (finding that investigatory file may be withheld from disclosure if governmental body attorney determines that it should be withheld pursuant to section 552.103 and that litigation is "reasonably likely to result"). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. See ORD 452 at 4.

The governor and DADS assert that information pertaining to state schools is excepted from disclosure under section 552.103. DADS states that prior to the instant request, it was

subject to action by the United States Department of Justice (the "DOJ") "under the Civil Rights of Institutionalized Persons Act ("CRIPA") . . . by virtue of the DOJ's investigation into and report on conditions at the Lubbock State School." DADS states that under CRIPA, the DOJ's time frame for filing a lawsuit has not elapsed, and "it is likely that the DOJ will file a lawsuit in federal court to incorporate the settlement agreement into a judgment enforceable by the court, as that is the DOJ's usual practice in CRIPA investigations." DADS further explains that it is currently "anticipating federal CRIPA litigation and/or settlement negotiations with respect to [all other state schools]" as well. DADS states that this litigation is anticipated because on March 11, 2008, the DOJ informed the governor that it is commencing an investigation into the "conditions of care and treatment of residents at the Denton State School, pursuant to [its] authority under [CRIPA]." In addition, DADS states that in a similar letter to the governor from the DOJ dated August 20, 2008, the scope of the CRIPA investigation was further expanded to include all other state school facilities. DADS argues that these letters to the governor are analogous to a notice of claim letter under the Texas Tort Claims Act. DADS asserts that based on the procedures employed by the DOJ in its investigation of the Lubbock State School, litigation relating to other state school facilities is reasonably anticipated. Based on DADS's representations and our review, we determine that DADS reasonably anticipated litigation on the date that the governor received this request for information. Furthermore, upon review of the information at issue, we find that most of the submitted information relates to the anticipated litigation. Accordingly, we conclude that the governor may withhold Exhibits B and D, and the information we have marked in Exhibit C pursuant to section 552.103 of the Government Code.<sup>2</sup>

We note, however, that once information has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends when the litigation has concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

Next, the governor seeks to withhold some of the remaining information under section 552.106(b), which excepts from disclosure "[a]n internal bill analysis or working paper prepared by the governor's office for the purpose of evaluating proposed legislation." Gov't Code § 552.106(b). Section 552.106(b) encourages frank discussion on policy matters; however, this section applies to information created or used by employees of the governor's office for the purpose of evaluating proposed legislation. Furthermore, section 552.106(b) only protects policy judgments, advice, opinions, and recommendations involved in the preparation or evaluation of proposed legislation; it does not except purely factual

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<sup>2</sup>As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

information from public disclosure. *See* House Committee on State Affairs, Public Hearing, 5/6/97, H.B. 3157, 75th Leg. (1997) (stating that protection given to legislative documents under section 552.106(a) comparable with protection given to governor's legislative documents under section 552.106(b)); *see also* Open Records Decision No. 460 at 2 (1987).

You state the remaining information in Exhibit C and Exhibit E consist of "internal bill analysis and working papers related to bills concerning the state school system for the 81st Legislature." You further state that the advice, opinions, and recommendations contained within these documents determine the policy position taken by the governor regarding this bill throughout its legislative process. Accordingly, you assert the information at issue should be withheld under section 552.106(b). Upon review, we agree the governor may withhold Exhibit E under section 552.106(b).<sup>3</sup> However, we find the governor has failed to demonstrate how the remaining information in Exhibit C consists of internal bill analysis or working paper prepared by the governor's office for the purpose of evaluating proposed legislation. Accordingly, none of the remaining information may be withheld on this basis.

Next, the governor and HHSC argue that some of the remaining information is excepted from disclosure under section 552.107 of the Government Code.<sup>4</sup> Section 552.107 protects information coming within the attorney-client privilege. Gov't Code § 552.107. 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 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. 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 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,

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<sup>3</sup>As our ruling on this issue is dispositive, we do not address your remaining argument against disclosure for this information.

<sup>4</sup>The governor also argues portions of the remaining information are privileged under rule 503 of the Texas Rules of Evidence. We note that as this information is not subject to section 552.022 of the Government Code, rule 503 does not apply in this instance. *See* Open Records Decision No. 676 at 4 (2002).

lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A)-(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. *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).

Upon review, we find that the governor and HHSC have failed to demonstrate how any of the remaining information at issue constitutes confidential communications between privileged parties made for the purpose of facilitating the rendition of professional legal services. Therefore, the governor may not withhold any of the remaining information under section 552.107 of the Government Code.

We now turn to the governor’s arguments for the remaining information. 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. 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*, 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 claim the remaining information is protected by the deliberative process privilege. Upon review, we agree that portions of the remaining information consist of advice, recommendations, and opinions reflecting the governor's policymaking processes. Therefore, we conclude the governor may withhold the information we have marked in Exhibits C and F under section 552.111. However, we find you have not demonstrated that the remaining information consists of advice, opinions, or recommendations that implicate the governor's policymaking processes. Thus, we find you have failed to demonstrate the applicability of the deliberative process privilege to the remaining information, and the governor may not withhold any of the remaining information on that basis under section 552.111.

Section 552.111 also encompasses the attorney work product privilege found at rule 192.5 of the Texas Rules of Civil Procedure. *See* TEX. R. CIV. P. 192.5; *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines attorney work product as consisting of

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
- (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX.R.CIV.P. 192.5. A governmental body that seeks to withhold information on the basis of the attorney work product privilege under section 552.111 bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *See id.*; ORD 677 at 6-8. In order for this office to conclude that information was created or developed in anticipation of litigation, we must be satisfied that

- (a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and
- (b) the party resisting discovery

believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

*Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). 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." *Id.* at 204; ORD 677 at 7.

You contend that the remaining information in Exhibit C may constitute attorney work product because the information is related to anticipated litigation. Having considered your argument, we conclude that you have not demonstrated that any of the remaining information at issue consists of material prepared, mental impressions developed, or a communication made in anticipation of litigation or for trial. Therefore, the governor may not withhold any of the remaining information as attorney work product under section 552.111.

In summary, the governor may withhold Exhibits B and D, and the information we have marked in Exhibit C pursuant to section 552.103 of the Government Code. The governor may withhold Exhibit E under section 552.106(b) of the Government Code, and the information we have marked in Exhibits C and F pursuant to the deliberative process exception of section 552.111 of the Government Code. The remaining information must be released to the requestor.

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](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,



Amy L.S. Shipp  
Assistant Attorney General  
Open Records Division

ALS/rl

Ref: ID# 340984

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)