



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 2, 2009

Mr. Mark Fenner
General Counsel
Texas Racing Commission
P.O. Box 12080
Austin, Texas 78711-2080

OR2009-13889

Dear Mr. Fenner:

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# 355715.

The Texas Racing Commission (the "commission") received a request for any complaints filed with the commission or correspondence pertaining to several named entities for a specified time period.¹ You state the commission does not have information responsive to the requested complaints.² You also state that some of the information responsive to the remaining portion of the request has been released. You claim that the remaining information is excepted from disclosure under sections 552.103, 552.108, and 552.111 of the Government Code.³ We have considered the submitted arguments and reviewed the

¹You inform us the commission received clarification of the request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

²We 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 dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

³We note that you raise sections 552.101 and 552.110 of the Government Code. However, as you make no arguments to support these exceptions, we assume you have withdrawn your claims that these sections apply to the submitted information. Furthermore, although you claim some of the submitted information is privileged under Texas Rule of Civil Procedure 192.5, in this instance, the proper exception to raise when asserting the attorney work product privilege for information not subject to section 552.022 is section 552.111. *See* Open Records Decision Nos. 677 (2002), 676 at 6 (2002).

submitted information. We have also received comments submitted by the Texas Department of Public Safety ("DPS"). *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, you state that Exhibits D and E were the subject of two previous requests, as a result of which this office issued Open Records Letter No. 2008-12311 (2008). In that ruling, we determined that the commission may withhold the submitted information on behalf of the Office of the Attorney General (the "OAG") under section 552.108(a)(1) of the Government Code. *See* Gov't Code § 552.108(a)(1). However, the OAG informs us it no longer asserts a law enforcement interest in the information at issue. Therefore, the circumstances on which Open Records Letter No. 2008-12311 was based have changed, and the commission may not rely on that ruling as a previous determination. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). Accordingly, we will consider the arguments against disclosure of the submitted information.

We understand DPS to assert that Exhibit E, which consists of a subpoena and the supporting court documents, may constitute grand jury records that are not subject to the Act. The judiciary is expressly excluded from the requirements of the Act. *See* Gov't Code § 552.003(1)(B). This office has determined that a grand jury, for purposes of the Act, is a part of the judiciary and therefore not subject to the Act. *See* Open Records Decision No. 411 (1984). Further, records kept by another person or entity acting as an agent for a grand jury are considered to be records in the constructive possession of the grand jury and, therefore, are not subject to the Act. *See* Open Records Decisions Nos. 513 (1988), 398 (1983). *But see* ORD 513 at 4 (defining limits of judiciary exclusion). We understand that the subpoena was sent to the commission to direct the production of certain information. Thus, we find Exhibit E is held in the commission's capacity as a governmental body in the course of official commission business, and not as an agent of the grand jury. Therefore, Exhibit E is subject to the Act. *See* Gov't Code § 552.002 (providing that information collected, assembled, or maintained in connection with the transaction of official business by a governmental body is "public information"). Accordingly, we will address the Act's applicability to this information.

Section 552.103 of the Government Code provides as follows:

- (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 that claims an exception to disclosure under section 552.103 of the Government Code has the burden of providing relevant facts and documents to show that this exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request, 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.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must satisfy both prongs of this test for information to be excepted under section 552.103(a). See ORD 551 at 4.

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." *Id.* Concrete evidence to support a claim that 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 that 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 that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

In this instance, you generally assert that litigation is reasonably anticipated. However, you do not state, or provide any evidence demonstrating, that any party had taken any concrete steps toward initiating litigation as of the date the commission received the request. See Gov't Code § 552.301(e)(1)(A) (governmental body has the burden of proving that the requested information must be withheld under the stated exception). Accordingly, after reviewing your arguments, we find that you have failed to establish by concrete evidence that

⁴Among 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, 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).

the commission reasonably anticipated litigation when it received this request for information. *See id.* § 552.103(c). Accordingly, none of the submitted information may be withheld under section 552.103 of the Government Code.

You claim that Exhibits D and E are excepted from public disclosure under section 552.108 of the Government Code, which provides, in part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]

Id. § 552.108(a)(1). A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information that the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

By its terms, section 552.108 applies only to a law enforcement agency or a prosecutor. The commission is not a law enforcement agency. This office has determined, however, that where an incident involving alleged criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information that relates to the incident. *See* Open Records Decision Nos. 474 at 4-5 (1987), 372 (1983). Where a non-law enforcement agency has custody of information relating to a pending case of a law enforcement agency, the agency having custody of the information may withhold the information under section 552.108 if the agency (1) demonstrates that the information relates to the pending case and (2) provide this office with a representation from the law enforcement entity that the law enforcement agency wishes to withhold the information.

You state that Exhibits D and E pertain to an ongoing criminal investigation. DPS informs us that Exhibit D relates to an ongoing criminal investigation, and requests this information be withheld from disclosure. Based on this representation, we find that release of Exhibit D would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e.*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). Accordingly, we conclude the commission may withhold Exhibit D under section 552.108(a)(1). However, DPS does not object to the release of the remaining information at issue. Thus, you have failed to demonstrate the applicability of section 552.108(a)(1) to Exhibit E, and it may not be withheld on that basis.

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, 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, opinions, and other material reflecting the policymaking processes of the governmental body. *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. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 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). Further, 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 Exhibits B is excepted from disclosure based on the deliberative process privilege. However, the information at issue relates to an internal administrative and personnel matter, not a policymaking issue. You have failed to demonstrate, and the information at issue does not reflect on its face, that it consists of advice, recommendations, or opinions that pertain to policymaking. Accordingly, the deliberative process privilege of section 552.111 is not applicable to this information and the commission may not withhold any part of it on that basis.

Section 552.111 of the Government Code also encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *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 work product as:

- (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 seeking to withhold information under this exception 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. TEX. R. CIV. P. 192.5; ORD 677 at 6-8. In order for this office to conclude that the information was made 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 claim that Exhibits B and C, which consist of an administrative letter and a related e-mail chain, are subject to the work product privilege. Although you argue that the information at issue reflects legal advice and guidance, you have failed to demonstrate how this information was created or developed by the commission in anticipation of litigation or for trial. Consequently, you have failed to establish the applicability of the attorney work product privilege, and Exhibits B and C may not be withheld under section 552.111 of the Government Code.

We note the remaining information includes an e-mail address subject to section 552.137 of the Government Code.⁵ Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See Gov't Code* § 552.137. The e-mail address in the remaining information is not of a type specifically excluded by section 552.137(c). *See Act of May 15, 2001, 77th Leg., R.S., ch. 356, § 1, 2001 Tex. Gen. Laws 651, 651-52, amended by Act of May 27, 2009, 81st Leg., R.S., ch. 962, § 7, 2009 Tex. Sess. Law Serv. 2555, 2557 (Vernon) (to be codified as an amendment to Gov't Code* § 552.137(c)). As such, this e-mail address must be withheld under section 552.137, unless the owner of the address has affirmatively consented to its release.

⁵The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).*

In summary, the commission may withhold Exhibit D under section 552.108(a)(1) of the Government Code. The commission must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner of the e-mail address has affirmatively consented to its release. 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, toll free, at (888) 672-6787.

Sincerely,



Christina Alvarado
Assistant Attorney General
Open Records Division

CA/rl

Ref: ID# 355715

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

c: Mr. Jesse Adams
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(w/o enclosures)