



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 23, 2012

Mr. Bob Davis
Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2012-07853

Dear Mr. Davis:

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# 453560 (OOG ID# 064-12 Mann).

The Office of the Governor (the "governor's office") received a request for correspondence between employees of the governor's office and employees of the Department of State and Health Services ("DSHS") during a specified time period. You state you have released most of the requested information. You also state the governor's office has redacted personal information of employees subject to section 552.117 of the Government Code pursuant to section 552.024 of the Government Code and personal e-mail addresses under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code. Additionally, you state some of the requested information may implicate the interests of other government agencies. Accordingly, you notified DSHS and the Office of the Attorney General (the "OAG") of the

¹Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. See Gov't Code § 552.024(c)(2). Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

request and of their right to submit comments to this office as to why the information at issue should not be released to the requestor. *See* Gov't Code § 552.304 (providing that any person may submit comments stating why information should or should not be released). We have received comments from DSHS and the OAG. We have considered the submitted arguments and reviewed the submitted information, part of which is a representative sample.²

Initially, we note Exhibit D-1 contains copies of a court order that is subject to section 552.022 of the Government Code. Section 552.022 provides in part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

(17) information that is also contained in a public court record[.]

Id. § 552.022(a)(17). The copies of the court order in Exhibit D-1 constitute documents that have been filed with a court and are subject to section 552.022(a)(17). Although DSHS seeks to withhold this information under section 552.103 the Government Code, this section is discretionary and does not make information confidential under the Act. *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 Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, the copies of the court order in Exhibit D-1 may not be withheld under section 552.103. As no other exceptions are raised for this information, it must be released.

Section 552.107(1) of the Government Code 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 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

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 those submitted to this office.

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.³ 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, orig. proceeding). 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 and DSHS explain Exhibits B and D-2 consist of confidential communications sent between and among an attorney for the governor’s office, attorneys and staff representing DSHS, and attorneys for the OAG and these parties share a common interest concerning the legal matters at issue. *See* Tex. R. Evid. 503(b)(1)(c) (discussing privilege among parties “concerning a matter of common interest”); *see also In re Auclair*, 961 F.2d 65, 69 (5th Cir. 1992) (citing *Hodges, Grant & Kaufmann v. United States Government*, 768 F.2d 719, 721 (5th Cir. 1985)) (attorney-client privilege not waived if privileged communication is shared with third person who has common legal interest with respect to subject matter of communication). You further state these communications were not intended to be, and have not since been, disclosed to third persons other than those to whom disclosure was made in furtherance of the rendition of legal services. Based on these representations and our review of the submitted documents, we find Exhibits B and D-2 consist of privileged attorney-client communications that the governor’s office may withhold

³Specifically, the privilege applies only to confidential communications between the client or a representative of the client and the client’s lawyer or a representative of the lawyer; between the lawyer and the lawyer’s representative; by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein; between representatives of the client or between the client and a representative of the client; or among lawyers and their representatives representing the same client. *See* TEX. R. EVID. 503(b)(1); *see also id.* 503(a)(2), (a)(4) (defining “representative of the client,” “representative of the lawyer”).

under section 552.107.⁴ See *In re Monsanto*, 998 S.W.2d 917, 922 (Tex. App.—Waco 1999, orig. proceeding) (discussing the “joint-defense” privilege incorporated by rule 503(b)(1)(c)).

Section 552.103 of the Government Code provides in relevant part 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 has the burden of providing relevant facts and documents to show 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 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.

⁴As our ruling is dispositive for this information, we do not address DSHS’s arguments against the release of any of this information that is also submitted elsewhere nor do we address the OAG’s arguments against the release of this information.

In situations such as this, in which the governmental body that received the request has no litigation interest in the information at issue, we require a representation from the governmental body whose litigation interests are at stake. DSHS asserts the remaining information in Exhibit D-1 is excepted from disclosure under section 552.103 of the Government Code. DSHS explains it was involved in a lawsuit styled *Floyd Taylor, et. al. v. David L. Lakey, M.D., in his official capacity as Commissioner of the Department of State Health Services*, Cause No. D-1-GN-07-837. DSHS informs us on February 2, 2012, the district court issued a summary judgment ruling in the lawsuit at issue. DSHS established it was contemplating filing a motion for new trial before the governor's office received the instant request. Thus, we find DSHS has shown it anticipated filing litigation at the time the request was received. DSHS states the information at issue relates directly to the litigation at issue. Thus, we find the governor's office may withhold the remaining information in Exhibit D-1 under section 552.103 on behalf of DSHS.

The OAG asserts some of the remaining information is excepted under section 552.103 of the Government Code because at the time the request was received, the OAG anticipated filing litigation against the United States Department of Health and Human Services ("USHHS"). The OAG explains the information at issue relates to the Texas Women's Health Program and that in order to receive federal funds to pay for this program, a Medicaid eligibility waiver must be received from USHHS; however, that waiver was denied on December 12, 2011. The OAG states that after USHHS denied the waiver, the OAG, in coordination with the governor's office, DSHS, and other state agencies, began the process of working towards filing litigation against USHHS. Thus, we find the OAG has shown it anticipated filing litigation at the time the request was received. We find Exhibit C and the information we have marked in Exhibit D-3 relate directly to the litigation at issue. Thus, we find the governor's office may withhold Exhibit C and the information we have marked in Exhibit D-3 under section 552.103 on behalf of the OAG.⁵

However, 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 once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

DSHS asserts the remaining information in Exhibit D-3 is excepted from disclosure under section 552.111 of the Government Code, which 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

⁵As our ruling is dispositive for this information, we need not address the remaining arguments against its release.

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); *see also* 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 section 552.111 excepts only those internal communications that consist of advice, opinions, recommendations 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. *See id.*; *see also City of Garland v. The 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).

Section 552.111 can also encompass communications between a governmental body and a third-party, including a consultant or other 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.

DSHS asserts the remaining information in Exhibit D-3 consists of communications between DSHS and the governor's office. DSHS states with respect to these communications, DSHS and the governor's office share a common interest in proper implementation, operation, and legality laws enacted by the state. Upon review, we find the information we have marked consists of advice, opinion, and recommendations relating to policy matters. Thus, we find the governor's office may withhold the information we have marked in Exhibit D-3 under section 552.111 of the Government Code. However, we find the remaining information at issue in Exhibit D-3 does not consist of advice, opinion, or recommendation, but rather consists of general administrative or purely factual information. Thus, we conclude DSHS

failed to demonstrate how the remaining information at issue in Exhibit D-3 is excepted under section 552.111. Consequently, the governor's office may not withhold any of the remaining information at issue in Exhibit D-3 under section 552.111.

In summary, the governor's office must release the copies of the court order in Exhibit D-1 pursuant to section 552.022(a)(17) of the Government Code. The governor's office may withhold Exhibits B and D-2 under section 552.107 of the Government Code. The governor's office may withhold the remaining information in Exhibit D-1 under section 552.103 of the Government Code on behalf of DSHS. The governor's office may also withhold Exhibit C and the information we have marked in Exhibit D-3 under section 552.103 of the Government Code on behalf of the OAG. The governor's office may further withhold the information we have marked in Exhibit D-3 under section 552.111 of the Government Code on behalf of DSHS. 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,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/bhf

Ref: ID# 453560

Enc. Submitted documents

c: Requestor
(w/o enclosures)