



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

April 5, 2016

Ms. Elizabeth Cater  
Attorney  
Texas Parks and Wildlife Department  
4200 Smith School Road  
Austin, Texas 78744-3291

OR2016-07633

Dear Ms. Cater:

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# 604362 (2016-01-R16).

The Texas Parks and Wildlife Department (the "department") received a request for all documents, investigations, reports, correspondence, and other communications concerning drownings and near-drownings at McKinney Falls State Park during a specified time period. You state you have released some information. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

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

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<sup>1</sup>We 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.

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 sufficient to establish the applicability of section 552.103(a) to the information it seeks to withhold. To meet this burden, the governmental body must demonstrate (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *See 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.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See* ORD 551.

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." *See* Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* In Open Records Decision No. 638 (1996), this office stated a governmental body has met its burden of showing litigation is reasonably anticipated when it received a notice of claim letter and the governmental body represents the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act ("TTCA"), Civil Practices and Remedies Code, chapter 101, or an applicable ordinance.

You inform us, and provide documentation demonstrating, prior to the department's receipt of the instant request, the department received a notice of claim letter from an attorney regarding a drowning death. You state the notice of claim letter meets the requirements of the TTCA. Based on these representations and our review, we find the department reasonably anticipated litigation when it received the instant request for information. Further, you explain the information you marked relates to the claims at issue in the anticipated litigation. Based on your representations, we find you have demonstrated the

information you marked is related to the anticipated litigation. Therefore, the department may withhold the information you marked under section 552.103 of the Government Code.<sup>2</sup>

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to the anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

Section 552.111 of the Government Code excepts from disclosure “[a]n 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, writ ref’d n.r.e.); 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 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. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *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

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

impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

You explain the submitted information is reflective of the deliberative process by which the department examined water safety conditions at state parks. Thus, you state the information at issue consists of advice, opinions, and recommendations pertaining to the policymaking functions of the department. Based on your representations and our review of the information at issue, we find the department has demonstrated portions of the remaining information at issue, which we marked, consist of advice, opinions, or recommendations on the policymaking matters of the department. Therefore, the department may withhold the information we marked under section 552.111 of the Government Code. Upon review, however, we find the remaining information at issue is general administrative and purely factual information. Thus, we find you have failed to establish any portion of the remaining information at issue constitutes advice, opinions, recommendations, or other material reflecting the policymaking processes of the department. Accordingly, the department may not withhold any portion of the remaining information at issue under section 552.111 of the Government Code.

We note some of the remaining information may be subject to section 552.117 of the Government Code.<sup>3</sup> Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. Therefore, to the extent the individuals whose information is at issue timely requested confidentiality under section 552.024 of the Government Code and a governmental body does not pay for the cellular telephone services, the department must withhold the information we marked under section 552.117(a)(1) of the Government Code.

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<sup>3</sup>The 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).

Conversely, to the extent the individuals at issue did not timely request confidentiality under section 552.024 or a governmental body pays for the cellular telephone service, the department may not withhold the marked information under section 552.117(a)(1).

In summary, the department may withhold the information it marked under section 552.103 of the Government Code. The department may withhold the information we marked under section 552.111 of the Government Code. The department must withhold the information we marked under section 552.117(a)(1) of the Government Code if the individuals at issue timely requested confidentiality under section 552.024 of the Government Code and a governmental body does not pay for the cellular telephone service. 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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Ian Lancaster  
Assistant Attorney General  
Open Records Division

IML/akg

Ref: ID# 604362

Enc. Submitted documents

c: Requestor  
(w/o enclosures)