



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

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Ms. Annabel Canchola  
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OR2016-13848

Dear Ms. Canchola:

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# 614673.

The Corpus Christi Independent School District (the “district”), which you represent, received a request for all notes and tally sheets related to interviews for a specified position, personnel records for several named individuals, charts and information created by a named individual for another named individual, and all documents regarding a named individual. You claim the submitted information is excepted from disclosure under sections 552.102, 552.103, 552.107, 552.111, and 552.117 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

Initially, you inform us some of the requested information at issue was the subject of previous requests for information, in response to which this office issued Open

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<sup>1</sup>Although you raise section 552.101 of the Government Code, you make no arguments to support this exception. Therefore, we assume you have withdrawn your claim section 552.101 applies to the submitted information. *See* Gov’t Code §§ 552.301, .302.

<sup>2</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.

Records Letter Nos. 2015-20967 (2015) and 2015-22727 (2015). In Open Records Letter No. 2015-20967, we determined the district may withhold the submitted information under section 552.103 of the Government Code. In Open Records Letter No. 2015-22727, we determined the district, with the exception of information the requestor had seen or had access to, may withhold the information at issue under section 552.103 of the Government Code. However, we note the circumstances have changed and the district may not rely on Open Records Letter Nos. 2015-20967 and 2015-22727 as previous determinations. *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 information is or is not excepted from disclosure). Accordingly, we will consider your arguments against disclosure of the submitted information.

Section 552.103 of the Government Code provides in relevant part:

(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 section 552.103(a) applies in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the requested information 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, orig. proceeding); *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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

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 the claim litigation may ensue is more than mere conjecture." *Id.* This office has concluded litigation was reasonably anticipated when the potential opposing party filed a complaint with the

Equal Employment Opportunity Commission (the “EEOC”). *See* Open Records Decision No. 336 (1982).

You state, and provide documentation showing, prior to the district’s receipt of the instant request for information, a former employee filed a discrimination complaint with the EEOC against the district. You inform us the EEOC issued a Dismissal and Notice of Rights letter dated March 31, 2016. You inform us the 90 day-period to file suit has not expired. Based on these representations and our review, we find the district has demonstrated it reasonably anticipated litigation when it received the request for information. We also find the district has established the submitted information is related to the anticipated litigation for purposes of section 552.103(a).

We note, however, the opposing party has seen or had access to some of the information at issue. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* ORD 551 at 4-5. Thus, once the opposing party has seen or had access to information relating to the anticipated litigation through discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Upon review, we find the information we have marked has been seen by the opposing party and may not be withheld under section 552.103. Therefore, with the exception of the information we have marked, the district may withhold the submitted information under section 552.103 of the Government Code.<sup>3</sup> We note 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).

The district raises section 552.107 of the Government Code for the remaining information. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* Gov’t Code § 552.107(1). 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. *See* 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 “to facilitate the rendition of professional legal services” to the client governmental body. *See* 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. *See In re Tex. 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

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<sup>3</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (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. Finally, 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: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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. *See 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 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 state the information at issue consists of a communication between the district’s attorneys and employees. You state this communication was made in the furtherance of the rendition of professional legal services to the district. You further state this communication has been kept confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Therefore, the district may generally withhold the information at issue under section 552.107(1) of the Government Code. However, we note the e-mail string at issue includes an e-mail received from a non-privileged party. Furthermore, if this e-mail is removed from the e-mail string and stands alone, it is responsive to the request for information. Therefore, if the district maintains this non-privileged e-mail, which we have marked, separate and apart from the otherwise privileged e-mail string in which it appears, then the district may not withhold this non-privileged e-mail under section 552.107(1) of the Government Code.

To the extent the non-privileged e-mail is maintained separate and apart from the otherwise privileged communication, the district also argues 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.” *See* Gov’t Code § 552.111. This section 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) [M]aterial 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). A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *Id.*; ORD 677 at 6-8. In order for this office to conclude 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 argue the remaining information consists of attorney work product. Upon review, we find you have failed to demonstrate any portion of the information at issue was prepared in anticipation of litigation for the purposes of section 552.111. Thus, the district may not withhold any portion of the remaining information under section 552.111 of the Government Code and the attorney work product privilege.

Section 552.111 of the Government Code also 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, orig. proceeding). We determined section 552.111 excepts from disclosure 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. *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 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 which the governmental body establishes it has a privity of interest or common deliberative process. 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.

The district states the remaining information consists of advice, opinions, and recommendations relating to the district's policymaking. However, as noted above, the remaining information has been shared with an individual you have not shown to have a privity of interest. Therefore, we find the district has failed to demonstrate the information at issue is excepted under section 552.111. Accordingly, the district may not withhold the information at issue under section 552.111 of the Government Code.

We note a portion of the non-privileged e-mail is subject to section 552.137 of the Government Code.<sup>4</sup> Section 552.137 of the Government Code 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(a)-(c). The e-mail address at issue is not of a type excluded by subsection (c). Therefore, the district must withhold the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure.

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<sup>4</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).

In summary, with the exception of the information we have marked, the district may withhold the submitted information under section 552.103 of the Government Code. The district may generally withhold the remaining information under section 552.107(1) of the Government Code. However, to the extent the district maintains the non-privileged e-mail we marked separate and apart from the otherwise privileged e-mail string in which it appears, then the district may not withhold this non-privileged e-mail under section 552.107(1) of the Government Code. To the extent the non-privileged e-mail exists separate and apart from the otherwise privileged e-mail string in which it appears, the district must withhold the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure, and release the remaining information.

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,



Kavid Singh  
Assistant Attorney General  
Open Records Division

KVS/som

Ref: ID# 614673

Enc. Submitted documents

c: Requestor  
(w/o enclosures)