



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 19, 2017

Ms. Carah-Beth Bass
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Allison, Bass & Magee
402 West 12th Street
Austin, Texas 78701

OR2017-08363

Dear Ms. Bass:

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# 654019.

The Office of Victoria County Judge Ben Zeller (the "county"), which you represent, received a request for all written communications pertaining to a named individual's retirement or resignation, including all communications containing specified terms, during a specified time period. You state you will withhold some information pursuant to sections 552.136(c) and 552.147(b) of the Government Code.¹ You claim the submitted information is excepted from disclosure under sections 552.102, 552.103, 552.107, 552.108, 552.111, 552.117, 552.130, and 552.137 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

¹Section 552.136(c) of the Government Code allows a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e). Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number without the necessity of requesting a decision from this office. *See id.* § 552.147(b).

²Although 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 Therefore, we assume you have withdrawn your claim that this exception applies to the submitted information. *See* Gov't Code §§ 552.301, .302.

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant 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:

....
(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate[.]

Gov't Code § 552.022(a)(5). The submitted information contains a budget document that is subject to section 552.022(a)(5). The county must release this information pursuant to section 552.022(a)(5) unless it is made confidential under the Act or other law. *See id.* You seek to withhold the information subject to section 552.022(a)(5) under sections 552.103, 552.107, 552.108, and 552.111 of the Government Code. However, these exceptions are discretionary in nature and do 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 Gov't Code § 552.103); *see also* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). Therefore, the county may not withhold the information subject to section 552.022(a)(5) of the Government Code under section 552.103, section 552.107, section 552.108, or section 552.111 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence are “other law” within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider your assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence for the information subject to section 552.022(a)(5). Additionally, as sections 552.102, 552.117, 552.130, and 552.137 of the Government Code make information confidential under the Act, we will address the applicability of these sections to the information at issue. Further, we will consider your arguments against disclosure of the remaining information not subject to section 552.022 of the Government Code.

Texas Rule of Evidence 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

(A) between the client or the client's representative and the client's lawyer or the lawyer's representative;

(B) between the client's lawyer and the lawyer's representative;

(C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;

(D) between the client's representatives or between the client and the client's representative; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if it is 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).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding).

You generally assert the information subject to section 552.022(a)(5) of the Government Code is protected under the attorney-client privilege. However, upon review, we find you have failed to demonstrate the information at issue consists of a communication between privileged parties that was made to further the rendition of legal services to the county. Therefore, we find the county has not established the information at issue constitutes privileged attorney-client communications under rule 503. Thus, the county may not withhold the information subject to section 552.022(a)(5) pursuant to rule 503 of the Texas Rules of Evidence.

Section 552.102(a) of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). The Texas Supreme Court held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). Upon review, we find no portion of

the submitted information is subject to section 552.102(a) of the Government Code, and the county may not withhold any of the submitted information on that basis.

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). The 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 on the date the governmental body received the request for information 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, 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). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

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 demonstrate litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, an attorney for a potential opposing party making a demand for payment and asserting an intent to sue if such payments are not made. Open Records Decision Nos. 555 at 3 (1990), 346 (1982). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party threatened to sue on several occasions and hired an attorney. *See* Open Records Decision No. 288 at 2 (1981). However, an individual publicly threatening to bring suit against a governmental body, but who does not actually take objective steps toward filing suit, is not concrete evidence that litigation is reasonably anticipated. *See* Open Records Decision No. 331 at 1-2 (1982).

The county argues the submitted information not subject to section 552.022(a)(5) is protected by section 552.103 of the Government Code. You state the press has alleged that the Victoria County Commissioners Court may “have violated the Texas Open Meeting Act when [it] considered ousting the elections administrator.” You contend the county “reasonably anticipates litigation regarding this matter and has sought legal advice pertaining to this issue[.]” However, we find the county has not demonstrated any party had taken concrete steps toward filing litigation to which the county would be a party when the county received the request for information. Therefore, we conclude the county has failed to demonstrate it reasonably anticipated litigation when it received the request for information. Therefore, the county may not withhold the information not subject to section 552.022(a)(5) under section 552.103(a) of the Government Code.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. The elements of the privilege under section 552.107 are the same as those discussed above for rule 503. 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). 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 submitted information not subject to section 552.022(a)(5) consists of communications between county attorneys, outside counsel for the county, county employees, and an attorney with the county’s district attorney’s office, a privileged party with respect to the communications at issue. You state the communications were made for the purpose of providing legal services to the county. You state the communications were intended to be confidential and have remained confidential. Upon review, we find the county has demonstrated the applicability of the attorney-client privilege to some of the information at issue. Therefore, the county may withhold the information we have marked under section 552.107(1) of the Government Code.³ However, the remaining information at issue was sent to individuals you have not identified and we are not able to discern are privileged parties. Thus, we find you have failed to demonstrate the remaining information at issue constitutes a privileged attorney-client communication for the purposes of section 552.107(1). Accordingly, the county may not withhold the remaining information under section 552.107(1) of the Government Code.

The county contends that some of the remaining information is excepted from disclosure under section 552.108 of the Government Code, which provides in part:

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

(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:

...

(2) it is information that the deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication; [or]

...

(4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

...

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a)(2), (a)(4), (b)(2)-(3). Section 552.108 protects certain specific types of law enforcement information. A governmental body that claims an exception to disclosure under section 552.108 must 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)

(governmental body must provide comments explaining why exceptions raised should apply to information requested); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

A governmental body claiming sections 552.108(a)(2) and 552.108(b)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See* Gov't Code § 552.108(a)(2), (b)(2). You state the information at issue relates to a closed criminal investigation of the district attorney's office that did not result in conviction or deferred adjudication. This office has concluded section 552.108 may be invoked by any proper custodian of information that relates to the incident. *See* Open Records Decision Nos. 474 (1987), 372 (1983). Where a non-law enforcement agency is in the custody of information relating to a concluded criminal case of a law enforcement agency, the custodian of the records may withhold the information if it provides this office with a demonstration that the information relates to the criminal case that has reached a conclusion other than a conviction or deferred adjudication and a representation from the law enforcement entity that it wishes to withhold the information. However, you have not provided this office with a representation from the district attorney's office stating it objects to disclosure of the information at issue. Accordingly, we find you have failed to demonstrate the applicability of sections 552.108(a)(2) and 552.108(b)(2) to the information at issue, and, therefore, the county may not withhold the information not subject to section 552.022(a)(5) of the Government Code under section 552.108(a)(2) or section 552.108(b)(2).

Sections 552.108(a)(4) and 552.108(b)(3) are applicable to information that was prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation or that reflects the mental impressions or legal reasoning of an attorney representing the state. Gov't Code § 552.108(a)(4), (b)(3). However, you do not specify which portions of the remaining information at issue, if any, were actually "prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation." *See id.* § 552.108(a)(4)(A), (b)(3)(A). Likewise, you have not demonstrated any of the information at issue "represents the mental impressions or legal reasoning of an attorney representing the state." *Id.* § 552.108(a)(4)(B), (b)(3)(B). Thus, we find you have not shown any of the information at issue actually consists of prosecutorial work product. *See id.* § 552.301(e)(1)(A), (e)(2) (governmental body must label copy of requested information to indicate which exceptions apply to which parts of the copy). Therefore, as you have not established that the information not subject to section 552.022(a)(5) of the Government Code falls within the scope of sections 552.108(a)(4) or 552.108(b)(3), we conclude the county may not withhold any of the remaining information under section 552.108(a)(4) or section 552.108(b)(3) of the Government Code.

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

You state some of the remaining information contains agency memorandum between county attorneys and county employees regarding the Elections Administrator position. Thus, you assert the information at issue consists of advice, opinions, and recommendations pertaining to the policymaking functions of the county. Upon review, however, we find the remaining information is general administrative and purely factual information or does not pertain to policymaking. Further, some of the remaining information was received from individuals with whom you have not demonstrated the county shares a privity of interest or common deliberative process. Thus, we find you have failed to demonstrate the remaining information consists of internal communications containing advice, opinions, or recommendations on the policymaking matters of the county. Accordingly, the county may not withhold any portion of the remaining information under section 552.111 of the Government Code.

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). Upon review, we find you have failed to demonstrate section 552.117(a)(1) is applicable to any of the remaining information.

Accordingly, the county may not withhold any of the remaining information under section 552.117(a)(1) of the Government Code.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title or registration, or a personal identification document issued by an agency of this state or another state or country is excepted from public release. *Id.* § 552.130. Upon review, we find none of the remaining information is subject to section 552.130, and the county may not withhold any of the remaining information on that basis.

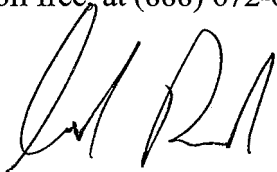
Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *Id.* § 552.137(a)-(c). The e-mail address we have marked is not one of the types specifically excluded by section 552.137(c). *See id.* § 552.137(c). Accordingly, the county must withhold the e-mail address we have marked under section 552.137 unless the owner of the address affirmatively consents to its release.

In summary, the county must release the information we have marked pursuant to section 552.022(a)(5) of the Government Code. The county may withhold the information we have marked under section 552.107(1) of the Government Code. The county must withhold the e-mail address we have marked under section 552.137 unless the owner of the address affirmatively consents to its release. The county must 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, 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,



Sidney M. Pounds
Assistant Attorney General
Open Records Division

SMP/sdk

Ref: ID# 654019

Enc. Submitted documents

c: Requestor
(w/o enclosures)