



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 18, 2020

Mr. Joseph Behnke
Public Information Coordinator
Office of the Governor of the State of Texas
P.O. Box 12428
Austin, Texas 78711

OR2020-16346

Dear Mr. Behnke:

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# 833066 (OOG ID# 135-20 and 143-20).

The Office of the Governor of the State of Texas (the "governor's office") received two requests from different requestors for specified communications pertaining to specified subjects.¹ We understand you will withhold e-mail addresses of members of the public under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).² You claim the submitted information is excepted from disclosure under

¹ We note the governor's office sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

² Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. You also state you notified interested third parties of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have received comments from Texas Department of Housing and Community Affairs (the "department") and the Harris County Judge's Office (the "judge's office"). We have considered the submitted arguments and reviewed the submitted representative sample of information.³

Initially, you inform us some of the submitted information was the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2020-15328 (2020) and 2020-14833 (2020). We have no indication the law, facts, or circumstances on which the prior rulings were based have changed. Accordingly, the governor's office must continue to rely on Open Records Letter Nos. 2020-15328 and 2020-14833 as previous determinations and withhold or release the requested information in accordance with those rulings. *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). To the extent the submitted information was not subject to the prior rulings, we will address your arguments against disclosure.

Next, we note some of the information at issue is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

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

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The information at issue includes a completed report subject to section 552.022(a)(1) of the Government Code. The governor's office must release this information pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. Although you raise section 552.111 of the Government Code for the information at issue, this section is a discretionary exception to disclosure and does not make information confidential under the Act. *See* Open Records Decision Nos. 665 at 2 n.5

³ 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 that those records contain substantially different types of information than that submitted to this office.

(discretionary exceptions generally), 663 at 5 (waiver of discretionary exceptions), 470 at 7 (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver). Therefore, the department may not withhold any portion of the completed report subject to section 552.022(a)(1) under section 552.111 of the Government Code. However, because section 552.101 of the Government Code makes information confidential, we will consider your argument under this section for the information at issue. We will also address your arguments for the remaining information, which is not subject to section 552.022 of the Government Code.

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). The governmental body has the burden of providing relevant facts and documents to show section 552.103(a) 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).

You state a portion of the submitted information is related to pending litigation. You inform us prior to the receipt of the instant request, a lawsuit was filed against the governor's office styled *Planned Parenthood Center for Choice v. Abbott*, Case No. 1:20-cv-00323, in the United States District Court for the Western District of Texas, Austin Division. Based upon your representation and our review, we find litigation was pending at the time the governor's office received the present request. Further, we agree the information at issue relates to the pending litigation for the purposes of section 552.103. Therefore, we conclude

the governor's office may withhold the information you marked under section 552.103 of the Government Code.⁴

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 pending 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 552.107(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. *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. 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 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 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. 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: (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).

⁴ As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

You state the remaining information you marked consists of communications between governor's office attorneys and employees that were made for the purpose of providing legal services to the governor's office. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the remaining information you marked consists of privileged attorney-client communications. Additionally, the department states the information it indicated consists of communications between a department attorney and employee and a governor's office employee, who it indicates is a privileged party. The department indicates that the information at issue was made for the purpose of providing legal services to the department. The department states the communications were intended to be confidential and have remained confidential. Based on the department's representations and our review, we find the information the department indicated, which we marked, consists of privileged attorney-client communications. Therefore, the governor's office may withhold the remaining information you marked, and the additional information we marked, under section 552.107(1) of the Government Code.⁵

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 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,

⁵ As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

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).

This office has also concluded a preliminary draft of a document intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

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.

The governor's office, the department, and the judge's office seek to withhold some of the submitted information under section 552.111. You state the information you marked consists of advice, opinions, and recommendations of governor's office employees and officials and employees of other state agencies with whom you state you share a privity of interest regarding policymaking matters. You further state some of the information at issue consists of draft documents that were intended to be released in their final forms. Furthermore, the department and the judge's office argue portions of the remaining information consists of the advice, opinions, or recommendations of their employees or officials regarding department or judge's office policymaking matters. Upon review, we find, with the exception of the information subject to section 552.022(a)(1) of the Government Code, the governor's office may withhold the information you marked and the additional information we marked under section 552.111 of the Government Code.⁶ Upon review, however, we find the department and the judge's office failed to demonstrate the remaining information they indicated pertains to policymaking matters for the purposes section 552.111 of the Government Code. Accordingly, the governor's office may not withhold any portion of the remaining information the department or the judge's office indicated under section 552.111 of the Government Code.

⁶ As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

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. *Id.*; 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.

The work product doctrine under section 552.111 of the Government Code is applicable to litigation files in criminal and civil litigation. *Curry v. Walker*, 873 S.W.2d 379, 381 (Tex. 1994); see *U.S. v. Nobles*, 422 U.S. 225, 236 (1975). Upon review, we find the judge's office failed to establish the remaining information it indicated consists of material prepared, mental impressions developed, or a communication made in anticipation of litigation or for trial by or for the judge's office or representatives of the judge's office. Therefore, the governor's office may not withhold any of the remaining information at issue as attorney work product under section 552.111 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that is made confidential by other statutes. You raise section 552.101 in conjunction with sections 418.176, 418.177, and 418.182 of the Texas Homeland Security Act (the "HSA"), chapter 418 of the

Government Code. Sections 418.176 through 418.182 were added to chapter 418 as part of the HSA. These provisions make certain information related to terrorism confidential. Section 418.177 provides that information is confidential if it:

(1) is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity; and

(2) relates to an assessment by or for a governmental entity, or an assessment that is maintained by a governmental entity, of the risk or vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity.

Id. § 418.177. The fact that information may relate to a governmental body's security concerns does not make the information per se confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the HSA must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You explain the Nonprofit Security Grant Program ("NGSP") is a grant program issued by the Federal Emergency Management Agency's Grant Program Directorate to provide funding support for physical security enhancements and other security related activities to nonprofit organizations with a high risk of terrorist attack. You state the information at issue "relates to an assessment for the [governor's office] of the risk or vulnerability of nonprofit organizations to an act of terrorism or related criminal activity." You assert a list of applicants who have not been awarded funds constitutes a list of self-identified high-risk targets with security vulnerabilities that have not yet been addressed through NGSP. Upon review, we find the information at issue was collected, assembled, or maintained by a governmental entity for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity and relates to an assessment of the risk or vulnerability of persons and property to an act of terrorism or related criminal activity. Accordingly, the governor's office must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 418.177 of the Government Code.⁷

Section 552.101 of the Government Code also encompasses section 81.046 of the Health and Safety Code, which provides, in part:

(a) Reports, records, and information received from any source, including from a federal agency or from another state, furnished to a public health

⁷ As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

district, a health authority, a local health department, or the [Texas Department of State Health Services] that relate to cases or suspected cases of diseases or health conditions are confidential and may be used only for the purposes of this chapter.

(b) Reports, records, and information relating to cases or suspected cases of diseases or health conditions are not public information under [the Act], and may not be released or made public on subpoena or otherwise except as provided by Subsections (c), (c-1), (d), and (f).

Health & Safety Code § 81.046(a)-(b). In Open Records Decision No. 577 (1990), this office concluded that any information acquired or created during an investigation under chapter 81 of the Health and Safety Code is confidential and may not be released unless an exception set out in the statute applies. *See id.* § 81.046(b)-(d), (f); ORD 577. You state the information subject to section 552.022(a)(1) of the Government Code relates to cases of contagious diseases that were reported to the governor's office by the Texas Department of State Health Services, thus, section 81.046 governs the release of the information at issue. Based on your representations and our review, we agree section 81.046 governs the release of this information. Additionally, you state none of the release provisions of section 81.046 are applicable in this instance. Accordingly, we determine the governor's office must withhold the information subject to section 552.022(a)(1) of the Government Code under section 552.101 of the Government Code in conjunction with section 81.046 of the Health and Safety Code.

In summary, the governor's office must continue to rely on Open Records Letter Nos. 2020-15328 and 2020-14833 as previous determinations and withhold or release the requested information in accordance with those rulings. The governor's office may withhold the information you have marked under section 552.103 of the Government Code. The governor's office may withhold the remaining information you marked, and the additional information we marked, under section 552.107(1) of the Government Code. With the exception of the information subject to section 552.022(a)(1) of the Government Code, the governor's office may withhold the information you marked and the additional information we marked under section 552.111 of the Government Code. The governor's office must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 418.177 of the Government Code. The governor's office must withhold the information subject to section 552.022(a)(1) of the Government Code under section 552.101 of the Government Code in conjunction with section 81.046 of the Health and Safety Code. The governor's office 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 <https://www.texasattorneygeneral.gov/open->

[government/members-public/what-expect-after-ruling-issued](#) or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Ashley Crutchfield
Assistant Attorney General
Open Records Division

AC/gw

Ref: ID# 833066

Enc. Submitted documents

c: Requestor
(w/o enclosures)

c: Third Parties
(w/o enclosures)