



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 22, 2020

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

OR2020-18334

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# 836968 (OOG ID#s 230-20 & 237-20).

The Office of the Governor (the "governor's office") received two requests for records and communications related to coronavirus and the Texas Department of Criminal Justice.¹ You indicate the governor's office will release some information. We understand the governor's office will redact information pursuant to section 552.136 of the Government Code and withhold information subject to section 552.117(a)(1) of the Government Code as permitted by section 552.024(c) of the Government Code.² You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.103,

¹ We note the governor's office sought and received clarifications of the requests for information. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request). You also inform us the governor's office sent the second requestor an estimate of charges pursuant to section 552.2615 of the Government Code. *See id.* § 552.2615. The estimate of charges required the second requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. *See id.* § 552.263(a). You also inform us the department received the required deposit on May 21, 2020. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date governmental body receives bond or deposit).

² Section 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 id.* § 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 552.117 of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, emergency contact information, and family member information of current or former officials or employees of a governmental body. *See id.* § 552.117(a)(1). Section 552.024 of the Government Code authorizes a governmental body to withhold information subject to section 552.117 without requesting a decision from this office if the employee or official or former employee or official chooses not to allow public access to the information. *See id.* § 552.024(c).

552.107, and 552.111 of the Government Code. You also state you notified third parties of the requests 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), .305; *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from the Texas Department of State Health Services. We have considered the submitted arguments and reviewed the submitted representative sample of information.³

Initially, you note the first requestor specifically excluded constituent communications from his request. Thus, the portions of the submitted information that consist of constituent communications are not responsive to the first request. This ruling does not address the public availability of any information that is not responsive to the first request, and the governor's office is not required to release that information in response to the first request.

Next, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from any remaining third parties explaining why the submitted information should not be released. Therefore, we have no basis to conclude any remaining third party has a protected proprietary interest in the remaining information. *See, e.g., id.* § 552.110 (requiring the provision of specific factual evidence demonstrating the applicability of the exception). Accordingly, the governor's office may not withhold any portion of the submitted information on the basis of any proprietary interest any remaining notified third party may have in the information.

Next, we note some of the responsive information is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part, the following:

(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[.]

Gov't Code § 552.022(a)(17). The submitted information contains a court-filed document that is subject to section 552.022(a)(17). This information must be released unless it is

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.

made confidential under the Act or other law. *See id.* You seek to withhold the information subject to section 552.022(a)(17) under section 552.107 of the Government Code. However, this section is discretionary in nature and does not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 6 (2002) (attorney-client privilege under section 552.107 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the governor's office may not withhold any of the information subject to section 552.022 under section 552.107. However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Thus, we will consider the applicability of the attorney-client privilege under Texas Rule of Evidence 503 for the information subject to section 552.022 of the Government Code. Further, we will address the governor's office's arguments against disclosure of the remaining information.

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).

The governor's office asserts the information subject to section 552.022 consists of an attachment to a privileged attorney-client communication. You state the communication was between attorneys for the governor's office and governor's office employees and was made for the purpose of facilitating the rendition of professional legal services to the governor's office. You also state the communication was intended to be confidential and has remained confidential. Upon review, we find the governor's office has demonstrated the attachment is part of a privileged e-mail communication for purposes of rule 503 of the Texas Rules of Evidence. However, we note the court-filed document subject to section 552.022(a)(17) is separately responsive to the request and was disclosed to non-privileged parties. Therefore, if the court-filed document we marked is maintained by the governor's office separate and apart from the otherwise privileged e-mail communication to which it is attached, then the governor's office may not withhold the court-filed document under rule 503. However, if the court-filed document is not maintained separate and apart from the otherwise privileged e-mail communication, then the governor's office may withhold this information under rule 503 of the Texas Rules of Evidence.

Next, we address your argument under section 552.107 of the Government Code for the information at issue not subject to section 552.022. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. The elements of the privilege under section 552.107 are the same as those discussed for Texas Rule of Evidence 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* ORD 676 at 6-7. 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*, 922 S.W.2d at 923.

You state the remaining information you marked consists of communications between attorneys for the governor's office, governor's office employees and officials, and other privileged parties that were made for the purpose of facilitating the rendition of professional legal services to the governor's office. You also state the communications were intended to be confidential and have remained confidential. Based upon your representations and our review, we find you demonstrated the applicability of the attorney-client privilege to the communications at issue. Accordingly, the governor's office may generally withhold the information you marked under section 552.107(1) of the Government Code.⁴ However, we note one of these otherwise privileged e-mail strings include an e-mail and attachments received from or sent to non-privileged parties. Furthermore, if this e-mail and attachments are removed from the otherwise privileged e-mail string and stand alone, they are responsive to the instant request. Therefore, if the governor's office maintains the non-privileged e-mail and attachments, which we have marked, separate and apart from the

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

otherwise privileged e-mail string in which they appear, then the non-privileged e-mail and attachments are not excepted under section 552.107(1), and the governor's office may not withhold them 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). A 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 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, 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.

To establish litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing the claim that litigation may ensue is more than mere conjecture." ORD 452 at 4. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See id.* Concrete evidence to support a claim litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.⁵ *See* ORD 555; *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact a

⁵ In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983). In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the concrete evidence must at least reflect litigation is “realistically contemplated.” *See* Open Records Decision No. 518 at 5 (1989); *see also* Attorney General Opinion MW-575 (1982) (finding investigatory file may be withheld if governmental body attorney determines it should be withheld pursuant to section 552.103 and 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.

You assert some of the remaining information is related to pending litigation involving the governor’s office. The governor’s office states, and provides documentation showing, prior to the governor’s office’s receipt of the instant requests, lawsuits styled *Texas Democratic Party v. Abbott*, Case No. 5:20-cv-00438, and *Texas Criminal Defense Lawyers Association v. Abbott*, Cause No. D-1-GN-20-002034 were pending against the governor’s office in the United States District Court for the Western District of Texas, San Antonio Division and the 459th Judicial District Court of Travis County, Texas, respectively. You also state the governor’s office is involved in a lawsuit styled *Sanchez v. Brown*, Case No. 3:20-cv-00832. You state the information you marked is related to the pending lawsuits. Based on your representations, the submitted documentation, and our review of the information at issue, we find litigation was pending when the governor’s office received the requests for information, and the submitted information is related to the pending litigation for the purposes of section 552.103. Therefore, we find section 552.103(a) of the Government Code is generally applicable to the information you marked that is not subject to section 552.022 of the Government Code.

We note, however, the opposing party has seen or had access to some of the information at issue. The purpose of section 552.103 of the Government Code is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. *See* ORD 551 at 4-5. Thus, once the opposing party in pending litigation has seen or had access to information that is related to the litigation, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Accordingly, the governor’s office may not withhold the information seen by the opposing party, which we have marked for release, under section 552.103. However, the governor’s office may withhold the remaining information under section 552.103 of the Government Code.⁶ We note the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); 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

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

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, 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.

You state some of the remaining information, which you marked, consists of advice, opinions, and recommendations of governor's office employees and officials regarding policymaking matters. You further state the information at issue consists of a draft document that was intended for release in its final form. Based on your representations and our review of the information at issue, we find you have demonstrated the remaining information you marked consists of advice or recommendations on the policymaking matters of the governor's office. Thus, the governor's office may withhold the remaining information you marked 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. Section 552.101 encompasses the doctrine of common-law privacy, which

protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). Upon review, we conclude the information you marked, and the additional information we have marked, meets the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the governor's office must withhold the information you marked and the additional information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses the constitutional right to privacy. Constitutional privacy protects two kinds of interests. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first is the interest in independence in making certain important decisions related to the "zones of privacy," pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. *See Fadlo v. Coon*, 633 F.2d 1172 (5th Cir. 1981); ORD 455 at 3-7. The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. *See Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual's privacy interest against the public's interest in the information. *See* ORD 455 at 7. Constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492).

This office has applied privacy to protect certain information about incarcerated individuals. *See* Open Records Decision Nos. 430 (1985), 428 (1985), 185 (1978). Citing *State v. Ellefson*, 224 S.E.2d 666 (S.C. 1976) as authority, this office held that those individuals who correspond with inmates possess a "first amendment right . . . to maintain communication with [the inmate] free of the threat of public exposure;" and that this right would be violated by the release of information that identifies those correspondents, because such a release would discourage correspondence. ORD 185. The information at issue in Open Records Decision No. 185 was the identities of individuals who had corresponded with inmates, and our office found that "the public's right to obtain an inmate's correspondence list is not sufficient to overcome the first amendment right of the inmate's correspondents to maintain communication with him free of the threat of public exposure." ORD 185. Implicit in this holding is the fact that an individual's association with an inmate may be intimate or embarrassing. In Open Records Decision Nos. 428 and 430, our office determined that inmate visitor and mail logs which identify inmates and those who choose to visit or correspond with inmates are protected by constitutional privacy because people who correspond with inmates have a First Amendment right to do so that would be threatened if their names were released. ORDs 428 and 430. Further, we recognized that inmates had a constitutional right to visit with outsiders and could also be threatened if their names were released. *See also* ORD 185. The rights of those individuals to anonymity was found to outweigh the public's interest in this information. *Id.*; *see* ORD

430 (list of inmate visitors protected by constitutional privacy of both inmate and visitors). Accordingly, the governor's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the constitutional right to privacy.

We note some of the remaining information may contain personal e-mail addresses subject to section 552.137 of the Government Code.⁷ 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). *See* Gov't Code § 552.137(a)-(c). The e-mail addresses at issue are not a type specifically excluded by section 552.137(c). Accordingly, the governor's office must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their disclosure.

In summary, the governor's office may generally withhold the information we have marked under Texas Rule of Evidence 503; however, if this information is maintained by the governor's office separate and apart from the otherwise privileged e-mail in which it appears, then the governor's office may not withhold this information under Texas Rule of Evidence 503. The governor's office may generally withhold the information you marked under section 552.107(1) of the Government Code; however, if the non-privileged e-mail and attachments we have marked are maintained by the governor's office separate and apart from the otherwise privileged e-mail string in which they appear, then the governor's office may not withhold the non-privileged e-mail and attachments under section 552.107(1) of the Government Code. The governor's office may withhold the information you marked that is not subject to section 552.022 under section 552.103(a) of the Government Code. The governor's office may withhold the information you marked under section 552.111 of the Government Code. The governor's office must withhold the information you marked and the additional information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The governor's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the constitutional right to privacy. The governor's office must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their disclosure. 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

⁷ The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. Open Records Decision Nos. 481 (1987), 480 (1987), 470.

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,

Erin Groff
Assistant Attorney General
Open Records Division

EMG/gw

Ref: ID# 836998

Enc. Submitted documents

c: Requestors
(w/o enclosures)

c: Third Party
(w/o enclosures)