



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 5, 2020

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

OR2020-19571

Dear Mr. Behnke and Mr. Hillis:

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# 837026 (OOG ID# 228-20, 246-20, 256-20, 305-20).

The Office of the Governor of the State of Texas (the "governor's office") received four requests from different requestors for communications pertaining to the plan to reopen Texas made during a specified time period; communications to or from the governor containing certain key terms made during a specified period of time; communications from constituents containing certain key terms made during a specified period of time; and communications involving members of the governor's Strike Force to Open Texas containing certain key terms made during a specified period of time.¹ We note the

¹ We note the governor's office sought and received clarification of some of the requests. *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). You also state, and provide documentation demonstrating, the governor's office sent one of the requestors a cost estimate of charges pursuant to section 552.2615 of the Government Code, and the requestor accepted the cost estimate. *See* Gov't Code § 552.2615. The estimate of charges required the requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. *See id.* § 552.263(a). You inform us the governor's office received the required deposit on May 22, 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).

governor's office has redacted personal e-mail addresses under section 552.137 of the Government Code pursuant to the previous determination issued to all governmental bodies in Open Records Decision No. 684 (2009).² You state the governor's office has released some of the requested information. You claim some of the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 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 and considered comments from the Texas Health and Human Services Commission (the "HHSC") and the Texas Military Department (the "TMD"). We have considered the submitted arguments and reviewed the submitted representative sample of information.³

Initially, we note in a letter dated June 22, 2020, the governor's office states it wishes to withdraw its request for an open records decision with regard to some of the information at issue because the fourth requestor narrowed her request and the governor's office has released the information to this requestor that is responsive to the narrowed request.

Next, you inform us some of the remaining requested information was the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2020-16329 (2020) and 2020-17633 (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. 2020-16329 and 2020-17633 as previous determinations and withhold or release the information previously ruled upon in accordance with those rulings.⁴ *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.

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

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.

⁴ As we are able to make this determination, we need not address the arguments against disclosure of this information.

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 third party except the HHSC and the TMD explaining why the remaining information should not be released. Therefore, we have no basis to conclude any other 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 remaining information on the basis of any proprietary interest any other notified third party may have in the information.

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 information made confidential by other statutes, such as 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 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. ORD 577; *see* Health & Safety Code § 81.046(b)-(d), (f). You state some of the submitted information, which you marked, relates to cases or suspected cases of contagious diseases. Further, the HHSC states the information it indicated relates to cases or suspected cases of contagious diseases. Thus, we find section 81.046 governs the release of the information at issue. The governor's office and the HHSC state the release provisions of section 81.046 are not applicable. Accordingly, the governor's office must withhold the information you marked and the information we marked under section 552.101 of the Government Code in conjunction with section 81.046(b) of the Health and Safety Code.⁵

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

Section 552.101 of the Government Code also 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. This office has found that personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990). 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 find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, the governor's office has failed to demonstrate the remaining information it marked is highly intimate or embarrassing and not of legitimate public interest. Therefore, the department may not withhold any portion of the remaining information under section 552.101 in conjunction with common-law privacy.

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).

You assert some of the remaining information at issue, which you marked, consists of communications between attorneys of the governor’s office, employees of the governor’s office, and other parties you have established are privileged that were made for the purpose of providing legal services to the governor’s office. You state the communications were intended to be, and have remained, 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. Accordingly, the governor’s office may withhold the information you marked under section 552.107(1) of the Government Code.⁶

Section 552.103 of the Government Code provides 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 that the section 552.103(a) exception 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. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig.

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

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).

You state that prior to the receipt of the instant requests by the governor's office, a lawsuit against the governor's office styled *Texas Criminal Defense Lawyers Assoc. v. Abbot*, Cause No. D-1-GB-20-002034 was filed and is currently pending in the 459th Judicial District of Travis County, Texas. You further state the information you marked is related to the pending litigation because it pertains to the claims in the lawsuit. Upon review of your arguments and the information at issue, we find the information you marked relates to litigation that was pending when the governor's office received this request for information. Accordingly, the governor's office may withhold the information you marked under section 552.103 of the Government Code.

We note 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 the opposing party in the litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. 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[.]” *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 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.

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.

You state some of the remaining information, which you marked, consists of advice, opinions, and recommendations of governor's office employees and officials and other individuals, including employees of other state agencies, with whom you state the governor's office shares a privity of interest regarding policymaking matters. You further state the information at issue includes draft documents that will be released in their final forms. Based on your representations and our review of the information at issue, we find you have demonstrated most of the information you marked consists of advice or recommendations on the policymaking matters of the governor's office. Thus, with the exception of the information we marked for release, the governor's office may withhold the information you marked under section 552.111 of the Government Code.⁷ However, we find the remaining information at issue, which we marked for release, is either factual in nature, consists of internal administrative matters that do not rise to the level of policymaking, or was shared with or received by third parties with whom you have not

⁷ As our ruling on this information is dispositive, we need not address the TMD's argument against disclosure of this information.

demonstrated the governor's office shares a privity of interest. Therefore, we find the governor's office has failed to demonstrate the remaining information at issue constitutes internal communications containing advice, recommendations, or opinions reflecting the policymaking processes of the city. Accordingly, the governor's office may not withhold the remaining information at issue, which we marked for release, under section 552.111 of the Government Code.

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).⁸ See Gov't Code § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, an e-mail address that a governmental entity maintains for one of its officials or employees, or a personal e-mail address belonging to a district employee or official used to conduct official government business. See *Austin Bulldog v. Leffingwell*, 490 S.W.3d 240 (Tex. App.—Austin 2016, no pet.) (holding personal e-mail addresses of government officials used to conduct official government business are not e-mail addresses of "members of the public" for purposes of section 552.137(a)). Because we are unable to discern whether the e-mail addresses within the information at issue are maintained by a governmental body for its officials or employees or fall within the scope of section 552.137(c), we must rule conditionally. To the extent the e-mail addresses you have not redacted belong to members of the public, the governor's office must withhold such e-mail addresses under section 552.137, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release. See *id.* § 552.137(b). However, to the extent the e-mail addresses at issue are excluded by subsection 552.137(c) or re maintained by a governmental body for its officials or employees, the e-mail addresses may not be withheld under section 552.137 of the Government Code.

In summary, the governor's office must continue to rely on Open Records Letter Nos. 2020-16329 and 2020-17633 as previous determinations and withhold or release the information previously ruled upon in accordance with those rulings. The governor's office must withhold the information you marked and the information we marked 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 withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. The governor's office may withhold the information you marked under section 552.107(1) of the Government Code. The governor's office may withhold the information you marked under section 552.103 of the Government Code. With the exception of the information we marked for release, the governor's office may withhold the information you marked under section 552.111 of the Government Code. To the extent the e-mail addresses you have not redacted belong to members of the public, the governor's office must withhold such e-mail addresses under section 552.137, unless the individuals to whom the e-mail addresses belong

⁸ The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

affirmatively consent to their release. 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,

Jennifer Copeland
Assistant Attorney General
Open Records Division

JC/be

Ref: ID# 837026

Enc. Submitted documents

c: Requestor
(w/o enclosures)

4 Third Parties
(w/o enclosures)