



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 23, 2020

Ms. Jennifer Burnett
Senior Attorney and Public Information Coordinator
University of Texas System
210 West Seventh Street
Austin, Texas 78701

OR2020-26760

Dear Ms. Burnett:

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# 850571 (OGC Nos. 197984, 197985, 197986, 197987, and 198731).

The University of Texas System (the "system") received five requests from two requestors for communications between a specified system employee and named third parties including specified key words during a certain date range.¹ You claim some of the submitted information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. You also state release of the submitted information may implicate the interests of the Office of the Governor (the "governor's office") and the Texas Department of State Health Services ("DSHS"). Accordingly, you state, and provide documentation showing, the system notified these interested third parties of the request for information and of their right to submit arguments to this office.² 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 the governor's office. We have considered the submitted arguments and reviewed the submitted information.

¹ You state the system 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 that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

² As of the date of this letter, we have not received comments from DSHS.

You state some of the submitted information may have been the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2020-25181 (2020), 2020-26041 (2020), and 2020-26162 (2020). We have no indication the law, facts, or circumstances on which the prior rulings were based have changed. Accordingly, to the extent the submitted information is identical to the information previously submitted and ruled on by this office, we conclude the system must continue to rely on Open Records Letter Nos. 2020-25181, 2020-26041, and 2020-26162 as previous determinations and withhold or release the information in accordance with these rulings. *See* Open Records Decision No. 673 at 6-7 (2001) (discussing criteria for first type of previous determination). To the extent the submitted information is not subject to the previous rulings, we will address the system's arguments against release of the submitted information.

Section 552.101 of the Government Code exempts 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 [DSHS] 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 and the governor's office state some of the submitted information relates to cases or suspected cases of diseases or health conditions, and 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 and the governor's office state none of the release provisions of section 81.046 are applicable in this instance. Accordingly, we determine the system must withhold the information you marked and we indicated under section 552.101 of the Government Code in conjunction with section 81.046 of the Health and Safety Code.³

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

Section 552.103 of the Government Code provides, in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body claiming section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) litigation was pending or reasonably anticipated on the date of its receipt of 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 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

The governor's office states prior to receipt of the instant request, nine specified lawsuits were filed against the governor's office or involving the governor's office and are currently pending. We note the system is not a party to the pending lawsuits and, thus, does not have a litigation interest in the lawsuits for purposes of section 552.103. *See Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990)* (statutory predecessor to section 552.103 only applies when governmental body is party to litigation). Under these circumstances, we require an affirmative representation from the governmental body with the litigation interest that it wants the information at issue withheld from disclosure under section 552.103. We have received comments from the governor's office stating portions of the remaining information should be withheld from disclosure under section 552.103 of the Government Code. The governor's office also states the information at issue pertains to the substance of the claims in the lawsuits. Based on these representations and our review, we find the information at issue is related to the pending litigation. Therefore, we conclude the system may withhold the information we indicated on behalf of the governor's office under section 552.103 of the Government Code.⁴

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

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 or anticipated 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. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that 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 a 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. *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 that 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).

The governor’s office claims some of the remaining information is protected by section 552.107(1) of the Government Code. The governor’s office states the information at issue consists of communications between attorneys for the governor’s office, governor’s office staff, and other privileged parties. The governor’s office states the communications were made for the purpose of facilitating the rendition of professional legal services to the

governor's office. The governor's office further states these communications were intended to be confidential and have remained confidential. Based on these representations and our review, we find the governor's office demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the system may withhold the information we indicated under section 552.107(1) of the Government Code on behalf of the governor's office.

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, 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 and the governor's office state a portion of the remaining information consists of advice, opinions, and recommendations of system employees and officials, employees of other state agencies, and third parties 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. Based upon your representations and our review, we find the information at issue consists of advice, opinion, or recommendations on policymaking matters of the system. Therefore, the system may withhold the information you marked and we indicated under section 552.111 of the Government Code.

In summary, to the extent the submitted information is identical to the information previously submitted and ruled on by this office, we conclude the system must continue to rely on Open Records Letter Nos. 2020-25181, 2020-26041, and 2020-26162 as previous determinations and withhold or release the information in accordance with these rulings. The system must withhold the information you marked and we indicated under section 552.101 of the Government Code in conjunction with section 81.046 of the Health and Safety Code. The system may withhold the information we indicated on behalf of the governor's office under section 552.103 of the Government Code. The system may withhold the information we indicated under section 552.107(1) of the Government Code on behalf of the governor's office. The system may withhold the information you marked and we indicated under section 552.111 of the Government Code. The system 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,

Kelly McWethy
Assistant Attorney General
Open Records Division

KM/gw

Ref: ID# 850571

Enc. Submitted documents

c: Requestors
(w/o enclosures)

c: Third Parties
(w/o enclosures)