



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 13, 2020

Mr. Nicholas Morrell
Assistant General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342-4004

OR2020-28558

Dear Mr. Morrell:

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# 853651 (OGC# JN0109; OOG# 562-20).

The Texas Department of Criminal Justice (the "department") received a request for e-mails pertaining to parole determinations and releases between department employees, employees of the Office of the Governor (the "governor's office"), and named employees of the Texas Board of Pardons and Paroles (the "board") during a stated period of time.¹ You claim the submitted information is excepted from disclosure under section 552.111 of the Government Code. Additionally, you state release of the submitted information may implicate the interests of the governor's office and the board. Accordingly, you state, and provide documentation showing, the department 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 and arguments and reviewed the submitted information.

Initially, we understand you and the governor's office seek to rely on Open Records Letter No. 2020-18447 (2020) for some of the information at issue in this request. However, we note the previous ruling was issued to the governor's office, which is a different governmental body than the department. Therefore, the department may not rely on Open Records Letter No. 2020-18447 as a previous determination with respect to any of the

¹ You state, and provide documentation demonstrating, the department sought and received clarification of the information requested. See Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (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 As of the date of this letter, we have not received comments from the board.

information at issue. *See* Open Records Decision No. 673 (2001) (listing elements of second type of previous determination under Gov't Code § 552.301(a)).

The governor's office asserts some of the information at issue is excepted from disclosure under section 552.103 of the Government Code. Section 552.103 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.

Govt' 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, two lawsuits, styled *Texas Criminal Defense Lawyers Association v. Abbott, et al.*, Cause No. D-1-GN-20-002034 (the "TCDLA litigation"), and *Sanchez, et al. v. Brown*, Case No. 3:20-cv-00832 (the "Sanchez litigation"), were pending in the 459th Judicial District Court of Travis County, Texas, and the United States District Court for the Northern District of Texas, Dallas Division, respectively. The governor's office explains it is a named party in the pending TCDLA litigation and an intervening party in the pending Sanchez litigation. We note the department 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 some 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. Accordingly, the department may withhold the information we marked under section 552.103 of the Government Code on behalf of the governor's office.³

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 552.111 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).

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

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 the information at issue consists of advice, opinions, and recommendations of department employees and officials, as well as other governmental entities with whom you state the department shares a privity of interest regarding policymaking matters. Based upon these representations and our review, we find some of the information at issue, which we marked, consists of advice, opinion, or recommendations on policymaking matters of the department. Accordingly, the department may withhold the information we marked under section 552.111 of the Government Code. However, we find the remaining information at issue is general administrative and purely factual that does not rise to the level of policymaking. Thus, we find you have failed to demonstrate the remaining information at issue constitutes internal communications containing advice, recommendations, or opinions reflecting the policymaking processes of the department. Therefore, the department may not withhold any portion of the remaining information under section 552.111 of the Government Code on the basis of the deliberative process privilege.

In summary, the department may withhold the information we marked under section 552.103 of the Government Code on behalf of the governor's office. The department may withhold the information we marked under section 552.111 of the Government Code. The department 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,

Blake Brennan
Assistant Attorney General
Open Records Division

BBX/eb

Ref: ID# 853651

Enc. Submitted documents

c: Requestor
(w/o enclosures)

c: 2 Third Parties
(w/o enclosures)