



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

November 16, 2020

Mr. Michael Bloch  
Deputy District Attorney  
Ector County  
300 North Grant, Room 305  
Odessa, Texas 79761

Mr. R. Layne Rouse  
Counsel for Ector County  
Shafer, Davis, O'Leary & Stoker  
P.O. Drawer 1552  
Odessa, Texas 79760-1552

OR2020-28662

Dear Mr. Bloch and Mr. Rouse:

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# 854030.

Ector County (the "county") received two requests from the same requestor for (1) any and all items and documents pertaining to the death of a named individual, including sixteen points of information relating to the investigation of the matter; and (2) certain basic information, certain information pertaining to a specified criminal investigation, a specified medical examiner's report and the related autopsy report, and a specified written press release. The county claims the submitted information is excepted from disclosure under sections 552.103, 552.107, 552.108, and 552.111 of the Government Code.<sup>1</sup> We have considered the claimed exceptions and reviewed the submitted information.

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<sup>1</sup> Although the county also raises section 552.101 of the Government Code, it provides no arguments explaining how this exception is applicable to the information at issue. Therefore, we assume the county no longer asserts this exception. *See* Gov't Code §§ 552.301, .302.

Initially, we note some of the information the county submitted in response to the first request, which we marked and indicated, is not responsive to that request for information because it was created after the date the county received the first request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983). With respect to the first request for information, this ruling does not address the public availability of any information that is not responsive to that request and the county is not required to release such information to requestor.

Next, we note the information at issue contains a county press release. Section 552.007 of the Government Code provides information that has been voluntarily released to a member of the public may not subsequently be withheld from another member of the public, unless public disclosure of the information is expressly prohibited by law or the information is confidential under law. *See Gov't Code § 552.007*; Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988). Therefore, the county may not withhold previously released information unless its release is expressly prohibited by law or the information is confidential under law. Although the county seeks to withhold the previously released information under sections 552.103, 552.107, 552.108, and 552.111 of the Government Code, these sections are discretionary exceptions to disclosure that protect a governmental body's interest and do not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision Nos. 677 (2002) (governmental body may waive attorney work product privilege under section 552.111), 665 at 2 n.5 (2000), 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 177 (1977) (governmental body may waive statutory predecessor to section 552.108). Thus, the county may not withhold the submitted press release, which we marked, under sections 552.103, 552.107, 552.108, and 552.111 of the Government Code. As no other exceptions to disclosure have been raised for the press release, the county must release it pursuant to section 552.007 of the Government Code.

Next, we note the submitted information includes autopsy photographs subject to section 11 of article 49.25 of the Code of Criminal Procedure, which provides:

(a) The medical examiner shall keep full and complete records properly indexed, giving the name if known of every person whose death is investigated, the place where the body was found, the date, the cause and manner of death, and shall issue a death certificate. . . . The records may not be withheld, subject to a discretionary exception under Chapter 552, Government Code, except that a photograph or x-ray of a body taken during an autopsy is excepted from required public disclosure in accordance with Chapter 552, Government Code, but is subject to disclosure:

(1) under a subpoena or authority of other law; or

(2) if the photograph or x-ray is of the body of a person who died while in the custody of law enforcement.

(b) Under the exception to public disclosure provided by [s]ubsection (a), a governmental body . . . may withhold a photograph or x-ray described by [s]ubsection (a) without requesting a decision from the attorney general under [s]ubchapter G, Chapter 552, Government Code. This subsection does not affect the required disclosure of a photograph or x-ray under [s]ubsection (a)(1) or (2).

Crim. Proc. Code art. 49.25, § 11. We note the submitted autopsy photographs pertain to an individual who died while in the custody of law enforcement. Photographs taken of the body of a person who died while in the custody of law enforcement are public and not confidential. *Id.* § 11(a)(2). Although the county seeks to withhold these photographs under section 552.103 of the Government Code, this exception to disclosure found in the Act does not generally apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Thus, the county must release the submitted autopsy photographs pursuant to section 11(a)(2) of article 49.25 of the Code of Criminal Procedure.

Next, we note the remaining responsive information includes information subject to section 552.022 of the Government Code, which provides, in relevant part:

(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:

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

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(1), (17). Some of the remaining responsive information consists of a completed autopsy report that is subject to section 552.022(a)(1). This information must be released unless it is excepted from disclosure under section 552.108 of the Government Code, or is made confidential under the Act or other law. *See id.* § 552.022(a)(1). Additionally, some of the remaining responsive information consists of court-filed documents that are subject to section 552.022(a)(17). This information must be released unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(17). Although the county asserts the information subject to section 552.022 is excepted from disclosure under section 552.103 of the Government Code, this section is discretionary and

does not make information confidential under the Act. *See Dallas Area Rapid Transit*, 4 S.W.3d at 475-76; Open Records Decision No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* ORD 665. Thus, none of the information subject to section 552.022, which we marked, may be withheld under section 552.103. As the county raises no further exceptions to disclosure of this information, the county must release the information we marked pursuant sections 552.022(a)(1) and 552.022(a)(17) of the Government Code.

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

(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 the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (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. 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.

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. ORD 452 at 4. To establish litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* In Open Records Decision No. 638 (1996), this office stated a governmental body has met its burden of showing litigation is reasonably anticipated by representing it received a notice-of-claim letter that is in compliance with the Texas Tort Claims Act ("TTCA"), chapter 101 of the Civil Practices and Remedies Code. If that representation is not made, the receipt of the claim letter is a factor we will consider in determining, from the totality of the circumstances presented, whether the governmental body has established litigation is reasonably anticipated. *See* ORD 638 at 4.

The county states, and provides documentation showing, simultaneous with the county's receipt of the requestor's first request for information, the county received a notice of claim letter from the requestor, an attorney, claiming damages regarding a specified incident. The notice instructs the county to preserve evidence regarding the specified incident and states a failure to preserve the evidence would constitute spoliation of evidence. The county further states the notice complies with the requirements of the TTCA. Based upon the county's representations and our review, we find the county established it reasonably anticipated litigation on the date it received the requests for information. We further find the information at issue is related to the anticipated litigation for purposes of section 552.103. Therefore, the county may generally withhold the remaining responsive information pursuant to section 552.103(a) of the Government Code.

We note the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information related to litigation through the discovery process. *See* ORD 551 at 4-5. Thus, any information obtained from or provided to all other parties in the anticipated or pending litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. We note the opposing party to the anticipated litigation has seen or had access to some of the information at issue, which we marked. Additionally, the submitted DIC-24 and DIC-25 forms were provided to the arrestee; thus, the DIC-24 and DIC-25 forms were inevitably seen by the opposing party to the litigation. Therefore, the county may not withhold the information we marked for release or the DIC-24 and DIC-25 forms under section 552.103. Additionally, we note the information at issue involves alleged criminal activity. Information normally found on the front page of an offense or incident report is generally considered public. *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); *see* Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). This office has stated basic information about a crime may not be withheld under section 552.103 of the Government Code, even if it is related to litigation. ORD 362. Thus, we find the basic information from the information at issue may not be withheld on the basis of section 552.103 of the Government Code. Basic information refers to the information held to be public in *Houston Chronicle*. *See* 531 S.W.2d at 186-187; *see also* ORD 127. Accordingly, with the exception of the information we marked for release, the submitted DIC-24 and DIC-25 forms, and the basic information, which must be released, the county may withhold the remaining responsive information under section 552.103(a) of the Government Code.<sup>2</sup> We also note the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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<sup>2</sup> As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information or the applicability of section 1701.661(a) of the Occupations Code to the submitted video recordings. *See generally* Occ. Code § 1701.661(a), (e).

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* Gov't Code § 552.107(1). 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. 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).

The county states the remaining responsive information consists of communications between attorneys and employees for the county that were made for the purpose of providing legal services to the county. Further, the county states these communications have not been disclosed to non-privileged parties and have remained confidential. However, we note the information at issue was shared with parties the county has not shown to be privileged. Therefore, upon review, we find the county may not withhold any portion of the remaining responsive information under section 552.107(1) of the Government Code.

Section 552.108 of the Government Code provides the following:

- (a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

...

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication; [or]

...

(4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:

...

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a)(2), (a)(4), (b)(2)-(3). A governmental body raising section 552.108 must explain the applicability of section 552.108. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). Section 552.108 is generally not applicable to purely administrative records that do not involve the investigation or prosecution of crime. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.); *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in

criminal investigation or prosecution); *see also* ORD 350 at 3-4. The county asserts the remaining responsive information consists of internal notations and records prepared by the county and reflects the mental impressions or legal reasoning of attorneys representing the state. However, upon review, we find the county has failed to demonstrate the applicability of section 552.108 to the information at issue, and the county may not withhold it on that basis.

Section 552.111 of the Government Code exempts 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. Section 552.111 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); ORD 677. 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). A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party’s representative. TEX. R. CIV. P. 192.5; ORD 677 at 6-8. In order for this office to conclude 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 county claims the attorney work-product privilege of section 552.111 of the Government Code for the remaining responsive information. The county states the information at issue consists of materials prepared by attorneys for the county in anticipation of litigation. However, as previously noted, the information at issue was shared

with parties the county has not shown to be privileged. Thus, because non-privileged parties had access to this information, the work product privilege under section 552.111 has been waived. Therefore, the county may not withhold the remaining responsive information as attorney work product under section 552.111 of the Government Code.

In summary, the county must release the press release we marked pursuant to section 552.007 of the Government Code. The county must release the submitted autopsy photographs pursuant to section 11(a)(2) of article 49.25 of the Code of Criminal Procedure. The county must release the information we marked pursuant sections 552.022(a)(1) and 552.022(a)(17) of the Government Code. With the exception of the information we marked for release, the submitted DIC-24 and DIC-25 forms, and the basic information, which must be released, the county may withhold the remaining responsive information under section 552.103(a) of the Government Code.

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,

James M. Graham  
Assistant Attorney General  
Open Records Division

JMG/be

Ref: ID# 854030

Enc. Submitted documents

c: Requestor  
(w/o enclosures)