



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

December 10, 2020

Mr. Jonathan Miles  
Open Records Attorney  
Texas Department of State Health Services  
P.O. Box 149347  
Austin, Texas 78714-9347

OR2020-30938

Dear Mr. Miles:

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# 857901 (DSHS Ref. OR-20200529-9618).

The Texas Department of State Health Services (the "department") received a request for information sent to or received by a named individual which include a certain keyword during a specified time period. The department states it will release some information to the requestor. The department claims some of the submitted information is excepted from disclosure under section 552.111 of the Government Code. Additionally, the department states release of some of the submitted information may implicate the interests of the Office of the Governor (the "governor's office"). Accordingly, the department states it notified the governor's office of the request for information and of its right to submit arguments to this office as to why the information at issue should not be released. *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.

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.

*Id.* § 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).

The governor's office states a lawsuit styled *Hotze v. Abbott*, Case No. D-1-GN-20-002146, was pending in the 98th Judicial District Court of Travis County, Texas, when the department received the instant request for information. Therefore, we agree litigation was pending when the department received this request for information. The governor's office also states some of the information at issue is related to the pending lawsuit. Based on the governor's office's representations and our review, we find the information at issue is related to the pending litigation for the purposes of section 552.103. Accordingly, the department may withhold the information we indicated under section 552.103(a) of the Government Code on behalf of the governor's office.<sup>1</sup>

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. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing parties in the pending 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[.]” 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).

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<sup>1</sup> As our ruling is dispositive, we need not address the governor's office's remaining arguments against disclosure of this information.

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).

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.

The department and the governor's office seek to withhold portions of the remaining information under section 552.111 of the Government Code. The department and the governor's office state the information at issue consists of advice, opinions, and recommendations of their respective employees regarding policymaking matters. The governor's office also states it shares a privity of interest with the department regarding the policymaking matters at issue. Based on these representations and our review, we find the department and the governor's office have demonstrated the information at issue consists of advice, opinions, or recommendations on their respective policymaking matters. Thus, the department may withhold the information we indicated under section 552.111 of the Government Code.

In summary, the department may withhold the information we indicated under section 552.103(a) of the Government Code on behalf of the governor's office. The department

may withhold the information we indicated 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,

Gerald A. Arismendez  
Assistant Attorney General  
Open Records Division

GAA/jxd

Ref: ID# 857901

Enc. Submitted documents

c: Requestor  
(w/o enclosures)