



May 3, 2002

Ms. Peggy D. Rudd
Director and Librarian
Texas State Library and Archives Commission
P.O. Box 12927
Austin, Texas 78711-2927

OR2002-2312

Dear Ms. Rudd:

The Texas State Library and Archives Commission (“TSLAC”) seeks a ruling from this office concerning whether certain records of former Governor George W. Bush must be released to the public under chapter 552 of the Government Code. Your request was assigned ID# 161509.

Pursuant to section 441.201 of the Government Code, Governor George W. Bush designated the George Bush Presidential Library as the repository for his gubernatorial records in December 2000.¹ Since the former Governor designated the George Bush Presidential Library as the repository for his records, disputes have arisen concerning the ownership of the records, the role of TSLAC in the designation process, and the applicability of the Public Information Act (the “Act”) to the records. Consequently, the Governor’s Office and TSLAC have requested an Attorney General’s Opinion under section 402.042 of the Government Code to help resolve these disputes.

During the pendency of the opinions process, the NARA, TSLAC, a representative of President George W. Bush, and the Governor’s Office entered into an Interim Memorandum of Understanding (“IMOU”) under which the NARA agreed to continue to maintain former

¹The George Bush Presidential Library is a part of the National Archives and Records Administration, a federal agency, and is not a “governmental body” for the purpose of the Public Information Act. *See* Gov’t Code § 552.003. We will collectively refer to the George Bush Presidential Library and the National Archives and Records Administration as the NARA.

Governor Bush's records and forward to TSLAC any request for the records within 72 hours of the NARA's receipt of the request. The terms of the agreement specify that TSLAC was given legal title to former Governor Bush's records as well as the authority and responsibilities afforded it under Texas law. Specifically, TSLAC agreed to review any requested records for information that could be excepted from disclosure under the Act and request a decision from this office if and when the public availability of the information came into question. The IMOU may be terminated under its terms by any of the parties thereto upon the issuance of a formal Attorney General Opinion.

During the effective term of the IMOU, TSLAC received the following requests for information:

- (1) The Public Citizen Litigation Group ("Public Citizen") seeks records of former Governor George W. Bush concerning contacts or communications between Bush and Enron Corporation. Public Citizen also seeks copies of any of former Governor Bush's documents concerning global warming.
- (2) The Houston Chronicle seeks correspondence between former Governor Bush or his staff and several named individuals associated with Enron. The Houston Chronicle also seeks Governor's office files relating to electric deregulation in Texas and sports stadium construction.
- (3) The New York Times seeks all documents of former Governor Bush pertaining to Enron and its officials, global warming, and energy deregulation.
- (4) The Dallas Morning News seeks all documents exchanged between former Governor Bush and Enron officers regarding environmental issues, global warming, and utility deregulation.
- (5) The Associated Press seeks communications involving former Governor Bush and his staff concerning global warming and electric deregulation.

TSLAC contends that some of the requested information may be excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code.²

² TSLAC states that it has received some of the responsive records from the NARA. TSLAC does not state, however, whether the NARA has completed its search for responsive records. Therefore, we understand that the submitted records are merely a representative sample of the requested records as a whole. This letter ruling assumes that the submitted "representative sample" of records is truly representative of the requested records as a whole. This ruling neither reaches nor authorizes TSLAC to withhold any responsive records that are substantially different from the submitted records. See Gov't Code § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

We begin by addressing whether you have timely requested a decision from our office with regard to each of the requests. Section 552.301 provides in relevant part:

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [Act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

Gov't Code § 552.301(a), (b). You indicate that each of the requests was submitted to the NARA. You further indicate that Public Citizen Litigation Group, the Dallas Morning News, and the Associated Press sent TSLAC copies of their requests. On the other hand, you state that the requests from the Houston Chronicle and the New York Times were forwarded to TSLAC by the NARA. We must first determine the point at which the ten-business-day deadline began to run for TSLAC. You contend that the deadline should not begin to run until the requested records at issue are available to TSLAC, within its actual reach. However, you do not cite any authority, nor are we aware of any, supporting this position. *See id.* § 552.301(b) (governmental body must request decision within ten-business days of receipt of request for information).

You also contend that “[t]his situation is somewhat analogous to that discussed in ORD-617.” In Open Records Decision No. 617, this office discussed open records procedures applicable to the Records Management Division (the “RMD”) of TSLAC. There, a request was made to TSLAC for microfilm copies of certain records produced by the Texas State Board of Veterinary Medical Examiners (“TSBVME”). Open Records Decision No. 617 at 2 (1993). TSBVME had transferred the source records to the RMD for microfilming before the records were destroyed. *Id.* at 1-2. The RMD then provided TSBVME with microfiche copies of the microfilm duplicates and kept the master microfilm copies. *Id.* at 2. This office found that the RMD served as a mere warehousing facility for TSBVME, which still had legal custody of the documents, and the RMD was not in a position to respond to public information requests for the information it warehoused. *Id.* at 3. Although the NARA is serving, in part, as a warehousing facility under the terms of the IMOU, the NARA's role extends beyond the mere warehousing function of the RMD in Open Records Decision No. 617.

In Open Records Decision No. 576, this office determined that an entity performing document maintenance services for a governmental body can become that governmental body's agent for purposes of receiving a public information request under certain

circumstances. Open Records Decision No. 576 at 3-4 (1990). There, the legislature had recently shifted the duty of administering and enforcing the Bingo Enabling Act from the Comptroller of Public Accounts (the "comptroller") to the Texas Alcoholic Beverage Commission ("TABC"). *Id.* at 1. The comptroller and TABC entered into an interagency agreement under which the comptroller agreed to continue to maintain certain computer and microfilm records created prior to the transfer of bingo regulation to TABC. *Id.* The comptroller further agreed to notify TABC promptly upon its receipt of an open records request for the information it maintained. *Id.* On the other hand, TABC agreed to be responsible for replying to any open records requests. *Id.* Based on the express written agreement between the two parties, this office found that the comptroller was the agent of TABC for the purpose of receiving open records requests. *Id.* at 4. However, "[r]esponsibility for responding to the open records request remain[ed] with [TABC]." *Id.* We further found that, for the purposes of the Act, an open records request was considered received by TABC when it was received by the comptroller. *Id.* at 4-5.

We find the facts in Open Records Decision No. 576 analogous to the facts before us in this file. Pursuant to the IMOU, the NARA and TSLAC agreed that the NARA would continue to maintain former Governor Bush's records and forward to TSLAC any request for the records within 72 hours of the NARA's receipt of a request. On the other hand, TSLAC was given legal title to former Governor Bush's records, and TSLAC agreed to be responsible for reviewing the records and requesting a ruling from this office when necessary under the Act. Based on the agreement between the NARA and TSLAC, we find that the NARA was the agent of TSLAC for the purpose of receiving requests for former Governor Bush's records during the time that the IMOU was in effect. *See id.* at 4. Therefore, during the term of the agreement, TSLAC's ten-business-day period for requesting a decision from this office was triggered by the NARA's receipt of the requests. *See id.* at 4-5; Gov't Code § 552.301(b). Because all of the requests at issue in this instance were received by the NARA during the time that the IMOU was in effect, we find that TSLAC's period for requesting a decision from this office began the day after the NARA received the requests.

You indicate that the NARA received these requests in the following order: the Houston Chronicle request was received on January 17, 2002; Public Citizen's request was received on January 25, 2002; the New York Times request was received on February 4, 2002; the Dallas Morning News request was received on February 12, 2002; and the Associated Press request was received on February 14, 2002. TSLAC's request for a decision was sent to this office on February 14, 2002. Thus, while TSLAC's request for a decision was made within ten business days of the NARA's receipt of the requests from the New York Times, the Dallas Morning News, and the Associated Press,³ TSLAC's request for a decision was sent more than ten business days from the date the NARA received the requests from Public Citizen and the Houston Chronicle. Because TSLAC did not timely submit its request for

³ For the purpose of this ruling, we assume that TSLAC, a state agency, was closed for the Martin Luther King, Jr. holiday.

a decision with respect to either the Houston Chronicle's request or Public Citizen's request for information, the information requested by those two entities is presumed to be public information. Gov't Code § 552.302.

In order to overcome the presumption that requested information is public information, a governmental body must provide compelling reasons why the information should not be disclosed. *Id.*; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ); *see* Open Records Decision No. 630 (1994). You raise sections 552.103, 552.107, and 552.111 as possible exceptions to the disclosure of the information requested by Public Citizen and the Houston Chronicle. However, sections 552.103, 552.107, and 552.111 of the Government Code are discretionary exceptions and do not provide compelling reasons for overcoming the presumption of openness. *See* Open Records Decision Nos. 630 at 4-7 (1994) (fact that information falls under section 552.107 does not provide compelling reason for overcoming presumption of openness), 473 at 2 (1987) (failure to meet 10-day deadline waived protections of section 552.103 and 552.111). Consequently, we find that TSLAC must release the information requested by Public Citizen and the Houston Chronicle, including records of former Governor Bush concerning contacts or communications between former Governor Bush and Enron Corporation; correspondence between former Governor Bush or his staff and the individuals listed in the Houston Chronicle's request; and former Governor Bush's documents concerning global warming, electric deregulation, and sports stadium construction. To the extent the requests of the New York Times, the Dallas Morning News, and the Associated Press encompass the same information sought by Public Citizen and the Houston Chronicle, you must release that information to the New York Times, the Dallas Morning News, and the Associated Press as well.

With respect to any remaining information responsive to the requests, we address whether the information sought is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code.

Section 552.103 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.

TSLAC 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 is pending or reasonably anticipated, 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, no pet.); *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). TSLAC must meet both prongs of this test for information to be excepted under 552.103(a). Although you state that the documents are apparently marked to assert section 552.103, you do not establish either prong of the section 552.103 test. You do not indicate that litigation was reasonably anticipated or pending on the date that TSLAC received the requests nor do you contend that the requested information relates to pending or reasonably anticipated litigation. Consequently, we find that the requested information may not be withheld under section 552.103. See Gov't Code § 552.301(e)(1)(A); *Univ. of Tex. Law Sch.*, 958 S.W.2d at 481; *Heard*, 684 S.W.2d at 212; ORD 551 at 4.

Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 at 5 (1990). A governmental body that raises section 552.107 bears the burden of explaining how the particular information requested is protected by the attorney-client privilege. Here, you do not explain, nor is it apparent from the face of the documents, whether the communication is to or from an attorney, a client, or a representative of either. Consequently, we find that you have not adequately demonstrated that the requested information consists of either confidential client communications or attorney advice or opinion. See Gov't Code § 552.301(e)(1)(A) (a governmental body must submit to this office, among other information, written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld); *In re Monsanto Co.*, 998 S.W.2d 917, 926 (Tex. App.--Waco 1999, orig. proceeding). Therefore, you may not withhold the requested information under section 552.107 of the Government Code.

Section 552.111 provides that "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency is excepted from [required public disclosure]." This section encompasses both the deliberative process and attorney work product privileges. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000). The deliberative process privilege, as incorporated into the Act by section 552.111, protects from disclosure interagency and intra-agency communications consisting of advice, opinion, or recommendations on policymaking matters of a governmental body. See *id.*; Open Records Decision No. 615 at 5 (1993). An agency's

policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, the deliberative process privilege does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.--Austin 2001, no pet.); ORD 615 at 4-5. You do not explain whether the submitted documents are interagency or intra-agency communications, nor do you explain how the documents relate to an agency's policymaking functions. Therefore, we find that you have not met your burden under the deliberative process privilege of section 552.111. *See* Gov't Code § 552.301(e)(1)(A); *City of Garland*, 22 S.W.3d at 360-64.

A governmental body may withhold attorney work product from disclosure under section 552.111 if it demonstrates that the material was (1) created for trial or in anticipation of civil litigation, and (2) consists of or tends to reveal an attorney's mental processes, conclusions, and legal theories. *Id.* In order for this office to conclude that information was created 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.

See 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. The second requirement that must be met is that the work product "consists of or tends to reveal the thought processes of an attorney in the civil litigation process." Open Records Decision No. 647 at 4 (1996). You have failed to demonstrate either that the information at issue was created for trial or in anticipation of civil litigation or that the information consists of or tends to reveal an attorney's mental processes, conclusions, and legal theories. *See id.*; Gov't Code § 552.301(e)(1)(A); *Nat'l Tank*, 851 S.W.2d at 204. Consequently, we find that TSLAC may not withhold the requested information under either the deliberative process privilege or the work product privilege as incorporated into the Act by section 552.111.

In conclusion, we find that because TSLAC failed to timely request a decision from this office with respect to the Houston Chronicle's and Public Citizen's requests for information, TSLAC must release the information requested by these two organizations to all of the requestors who sought this information. Although TSLAC timely requested a decision from this office with respect to the remainder, if any, of the requested information, you have not

adequately demonstrated that any of the exceptions you raised apply to that information. Thus all of the responsive information must be released.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

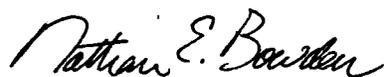
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



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Open Records Division

NEB/sdk

Ref: ID# 161509

Enc. Submitted documents

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