



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 5, 2011

Ms. Jana Clift Williams
Allison, Bass & Associates, L.L.P.
402 West 12th Street
Austin, Texas 78701

OR2011-17817

Dear Ms. Williams:

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# 437914.

The Texas Schools Property & Casualty Cooperative Intergovernmental Risk Pool (the "cooperative"), which you represent, received a request for twenty-two categories of information pertaining to school districts that made a claim for damages with the cooperative for damage to track or other outdoor property during a specified time period. You indicate the cooperative has released some of the requested information. You further indicate the cooperative has no information responsive to portions of the request for information.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.104, 552.110, and 552.111 of the Government Code, as well as privileged under rule 192.5 of the Texas Rules of Civil Procedure.² We have considered the submitted arguments and reviewed the submitted information.

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *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).

²Although you also raise section 552.101 of the Government Code in conjunction with Texas Rule of Civil Procedure 192.5, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

Initially, you argue portions of the request require the cooperative to answer questions. The Act does not require a governmental body to answer general questions, perform legal research, or create new information in response to a request for information. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). The Act does require the governmental body to make a good faith effort to relate a request to information that the governmental body holds or to which it has access. *See* Open Records Decision Nos. 563 at 8, 561 at 8-9 (1990), 555 at 1-2, 534 at 2-3 (1989). In this instance, we assume the cooperative has made a good faith effort to locate any information responsive to this request.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) 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]

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, § 2 (to be codified as an amendment to Gov't Code § 552.022(a)). You state Exhibits A through D and G through W consist of adjuster reports prepared for the cooperative. These documents consist of completed reports that are subject to subsection 552.022(a)(1). The cooperative must release the completed reports pursuant to subsection 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or are expressly made confidential under the Act or other law. *See id.* Further, portions of Exhibits F and Y consist of information in an account relating to the receipt or expenditure of funds by a governmental body. These documents, which we have marked, are subject to subsection 552.022(a)(3) and must be released unless they are made confidential under the Act or other law. *Id.* You seek to withhold the information subject to subsection 552.022(a)(1) under sections 552.103 and 552.111 of the Government Code and rule 192.5 of the Texas Rules of Civil Procedure. You seek to withhold the information subject to section 552.022(a)(3) under sections 552.101, 552.103, 552.104, and 552.110 of the Government Code. Sections 552.103 and 552.111 are discretionary and do not make information confidential under the Act. *Id.* §§ 3-26, 28-37 (providing for “confidentiality” of information under specified exceptions); *Dallas Area Rapid Transit v. Dallas Morning News*, S.W.3d 69, 475-6 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code

§ 552.103); *see also* Open Records Decision Nos. 663 at 5 (1999) (governmental body may waive section 552.111), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the information subject to section 552.022 may not be withheld under section 552.103 or section 552.111 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Civil Procedure are “other law” within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider your argument under rule 192.5 of the Texas Rules of Civil Procedure for Exhibits A through D and G through W. Because information subject to subsection 552.022(a)(3) may be withheld under section 552.104 of the Government Code, we will consider your claim under this exception for the information at issue in Exhibits F and Y. *See Gov’t Code* § 552.104(b) (information protected by section 552.104 not subject to required public disclosure under section 552.022(a)). Further, because section 552.101 of the Government Code protects information made confidential under law, and sections 552.110 and 552.136 of the Government Code makes information confidential under the Act, we will consider the applicability of these sections to the information subject to section 552.022(a)(3).³ *See Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, § 5* (to be codified as an amendment to Gov’t Code § 552.110) (providing for “confidentiality” of trade secrets and certain commercial or financial information under section 552.110). We will also consider your arguments under sections 552.103 and 552.111 of the Government Code, as well as your remaining arguments, for the information not subject to section 552.022.

Rule 192.5 of the Texas Rules of Civil Procedure encompasses the attorney work product privilege. For purposes of section 552.022 of the Government Code, information is confidential under rule 192.5 only to the extent the information implicates the core work product aspect of the work product privilege. *See Open Records Decision No. 677 at 9-10* (2002). Rule 192.5 defines core work product as the work product of an attorney or an attorney’s representative, developed in anticipation of litigation or for trial, that contains the mental impressions, opinions, conclusions, or legal theories of the attorney or the attorney’s representative. *See TEX. R. CIV. P. 192.5(a), (b)(1)*. Accordingly, in order to withhold attorney core work product from disclosure under rule 192.5, a governmental body must demonstrate that the material was (1) created for trial or in anticipation of litigation and (2) consists of the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney’s representative. *Id.*

The first prong of the work product test, which requires a governmental body to show the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that (1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See Open Records Decision Nos. 481* (1987), *480* (1987), *470* (1987).

litigation would ensue, and (2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See Nat'l Tank 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 part of the work product test requires the governmental body to show the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney’s representative. *See* TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both parts of the work product test is confidential under rule 192.5, provided the information does not fall within the scope of the exceptions to the privilege enumerated in rule 192.5(c). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You claim Exhibits A through D and G through W consist of attorney core work product that is protected by rule 192.5 of the Texas Rules of Civil Procedure. You explain at the time the information at issue was created, the cooperative reasonably believed litigation would ensue because the cooperative had received notices of claims from the various school districts to which the reports pertain. You explain each time the cooperative receives a claim for damages, the cooperative, in anticipation of litigation, requests an adjuster prepare a report of the type at issue. You inform us the reports at issue are part of investigations made for the cooperative at the direction of the cooperative’s attorney. Thus, you state the information at issue was created at the direction of an attorney for the cooperative in anticipation of litigation. Upon review, we find you have demonstrated the information at issue constitutes core attorney work product. We therefore conclude the cooperative may withhold Exhibits A through D and G through W under Texas Rule of Civil Procedure 192.5.

We next address your argument under section 552.104 of the Government Code for the remaining information, as it is potentially the most encompassing exception. Section 552.104 excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). This exception protects a governmental body’s interests in connection with competitive bidding and in certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). This office has held a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the “competitive advantage” aspect of this exception if it can satisfy two criteria. *See id.* First, the governmental body must demonstrate it has specific marketplace interests. *See id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *See id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body’s legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body’s demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *See id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

You state the cooperative is in competition with other intergovernmental risk pools and private insurance carriers to provide liability coverage for Texas school districts and other governmental entities. You inform us, “the statements of value contain the property values and other specific information obtained by [the cooperative] from school districts.” You further explain, “The checks and correspondence regarding payment to the school districts contain the values [the cooperative] has placed on the school districts’ claims.” You argue “release of the documents would likely result in [the cooperative] being underbid by competitors because the documents would reveal [the cooperative]’s basis for calculating member contributions and its underwriting formula.” You argue, “release of the documents could cause specific harm to [the cooperative]’s marketplace interests in its particular competitive situation.” Based on these representations and our review, we find you have demonstrated the cooperative has specific marketplace interests and may be considered a “competitor” for purposes of section 552.104. Further, we find you have demonstrated release of portions of the submitted correspondence regarding payment to the school districts would cause specific harm to the cooperative’s marketplace interests. We therefore conclude the cooperative may withhold the information we have marked within Exhibits F and Y under section 552.104 of the Government Code. However, we find you have not demonstrated how release of any of the remaining information in Exhibits E, F, X, Y, and Z, would cause specific harm to the cooperative’s marketplace interests. Accordingly, the cooperative may not withhold any of the remaining information under section 552.104 of the Government Code.

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *See id.* at 681-82. We note common-law privacy protects the interests of individuals, not those of business and governmental entities. *See* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (cited in *Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989), *rev’d on other grounds*, 796 S.W.2d 692 (Tex. 1990) (corporation has no right to privacy). You argue portions of the remaining information in Exhibits E, F, X, and Y are confidential under common-law privacy because they relate to a school district’s participation in a voluntary intergovernmental risk pool and background financial information. Upon review, we find the information the cooperative seeks to withhold relates to a governmental entity. Thus, we find no portion of the information at issue is highly intimate or embarrassing and not of legitimate public concern. Therefore, none of the

information at issue may be withheld under section 552.101 in conjunction with common-law privacy.

Section 552.103 of the Government Code provides in relevant part 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.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show section 552.103(a) is applicable in a particular situation. The test for meeting this burden is a showing that (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. *See 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). *See* ORD 551.

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." *See* Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, or when an individual threatened to sue on several occasions and hired an attorney. *See* Open Records Decision Nos. 346 (1982), 288 (1981). On the other hand, this office has determined if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331

(1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

You state, and provide documentation showing, prior to the date the cooperative received the instant request for information, the requestor filed a notice of claim with the cooperative, and the cooperative denied the claim. You explain the requestor requested the cooperative reconsider its denial of the claim, and the cooperative denied the requestor's request for reconsideration. However, you have not provided this office with evidence the requestor had taken any objective steps toward filing a lawsuit prior to the date the cooperative received the request for information. *See* Gov't Code § 552.301(e); ORD 331. Upon review, therefore, we find you have not established litigation was reasonably anticipated for purposes of section 552.103 on the date the cooperative received the request for information. Therefore, the cooperative may not withhold any portion of the remaining information under section 552.103 of the Government Code.

Next, the cooperative argues portions of the remaining information are protected from disclosure by section 552.110 of the Government Code. Section 552.110(a) excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision. Gov't Code § 552.110(a). Section 552.110 (b) excepts from disclosure "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(b). However, we note section 552.110 is designed to protect the interests of third parties, not the interests of a governmental body. In this instance, we have not received correspondence from any third party arguing a proprietary interest in the information at issue. Accordingly, we do not address the cooperative's arguments under section 552.110 of the Government Code, and no portion of the remaining information may be withheld on that basis.

Section 552.111 of the Government Code excepts from disclosure "an interagency or intra-agency 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, no writ); 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 that are 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.

You state Exhibit Z contains "internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the [cooperative.]" Thus, you argue Exhibit Z should be excepted from disclosure under the deliberative process privilege of section 552.111 of the Government Code. Upon review, we find the information at issue has been shared with school districts with which you have not demonstrated a privity of interest. Thus, this information consists of communications with third parties with whom you have not established a privity of interest or common deliberative process. Therefore, because the information at issue has been shared with individuals whom you have not demonstrated to have a privity of interest, we find you have failed to show how the information at issue consists of internal advice, opinions, or recommendations on the policymaking matters of the cooperative. Accordingly, the cooperative may not withhold Exhibit Z under section 552.111 of the Government Code.

The remaining information includes information that is subject to section 552.136 of the Government Code. Section 552.136 provides, "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected,

assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b). Accordingly, the cooperative must withhold the routing and bank account numbers we have marked under section 552.136 of the Government Code.

In summary, the cooperative may withhold Exhibits A through D and G through W under Texas Rule of Civil Procedure 192.5. The cooperative may withhold the information we have marked within Exhibits F and Y under section 552.104 of the Government Code. The district must withhold the bank account and routing numbers we have marked under section 552.136 of the Government Code. The remaining information must be released.

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 http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/agn

Ref: ID# 437914

Enc. Submitted documents

c: Requestor
(w/o enclosures)