



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 5, 2012

Ms. Susan Fillion
Assistant County Attorney
Harris County
1019 Congress, 15th Floor
Houston, Texas 77002

OR2012-08569

Dear Ms. Fillion:

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# 455505 (C.A. File No. 12PIA0141).

The Harris County Attorney's Office (the "county attorney's office") received a request for four categories of information pertaining to (1) injunctions related to Special Prosecutions ("SP"), (2) e-mails sent to and from three named individuals, (3) videos created for or used by SP, and (4) the work product of a fourth named individual. You state you have released some responsive information. You claim the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, 552.117, and 552.137 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹Although you also raised section 552.1175 of the Government Code, you provided no arguments in support of the applicability of this exception. Therefore, we assume you no longer urge this exception. *See* Gov't Code §§ 552.301(b), (c), .302.

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Initially, we note some of the submitted information, which we have marked, is not responsive to the instant request for information because it does not pertain to any of the individuals, injunctions, or videos named in the request. This ruling does not address the public availability of any information that is not responsive to the request and the county attorney's office is not required to release such information in response to this request.

Next, we note the county attorney's office has redacted portions of the submitted information. We note Open Records Decision No. 684 (2009) serves as a previous determination to all governmental bodies allowing them to withhold the e-mail address of a member of the public under section 552.137 of the Government Code without requesting a decision from this office. Accordingly, the county attorney's office had the authority to redact e-mail addresses without first seeking a decision. You do not assert, nor does our review of our records indicate, the county attorney's office has been authorized to withhold any of the remaining redacted information without seeking a ruling from this office. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 (2000). Because we can discern the nature of the information that has been redacted, being deprived of this information does not inhibit our ability to make a ruling in this instance. Nevertheless, be advised that a failure to provide this office with requested information generally deprives us of the ability to determine whether information may be withheld and leaves this office with no alternative other than ordering that the redacted information be released. *See* Gov't Code §§ 552.301(e)(1)(D) (governmental body must provide this office with copy of "specific information requested"), 552.302.

We next 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;

...

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

Id. § 552.022(a)(1), (17). The responsive information includes a completed appraisal report and documents filed with a court. The completed appraisal report must be released pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code, the Act, or other law. We note you do not claim section 552.108. In addition, a document that has been filed with a court is expressly public under section 552.022(a)(17) of the Government Code and may not be withheld unless it is

confidential under other law or the Act. *See id.* § 552.022(a)(17). You seek to withhold these records under section 552.103 of the Government Code, which is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Section 552.103 does not make information confidential under the Act. Therefore, the county attorney's office may not withhold any of the information encompassed by section 552.022 under section 552.103. As you raise no other exception for these records, the appraisal report and the court documents, which we have marked, must be released.

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 that the section 552.103 exception 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 that 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, 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). The governmental body must meet both prongs of this test for information to be excepted under section 552.103.

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." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that 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. Open Records Decision No. 555 (1990); *see* Open

Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined that 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. 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 that litigation is reasonably anticipated. Open Records Decision No. 361 (1983). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. ORD 452 at 4.

You state the marked records “relate to ongoing litigation and/or anticipated litigation.” You have provided an affidavit from the chief of staff of the county attorney’s office asserting the marked records “relate to legal matters where [the county attorney’s office] reasonably anticipated that an action would [need] to be filed on behalf of [a client, or] to pending litigation[.]” However, upon review of the submitted information and submitted arguments, we find the county attorney’s office has failed to demonstrate litigation was reasonably anticipated or pending on the date it received the request for information. Thus, the county attorney’s office may not withhold any of the marked information under section 552.103 of the Government Code.

You claim some of the submitted information is protected by the attorney-client privilege. Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. 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* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. *See* 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. *See 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. *See* TEX. R. EVID. 503(b)(1)(A)-(E). 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.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of 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).

You have marked the information you claim is protected by the attorney-client privilege and excepted under section 552.107(1) of the Government Code. You state the marked e-mails and attachments consist of attorney-client communications that were made between and among employees of the county attorney's office, employees and officers of Harris County (the "county"), the county's outside attorneys, and client representatives for the purpose of rendering professional legal services to the county. You state these communications were intended to be and remain confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to some of the marked information.

We note, however, some of the responsive e-mails consist of communications with parties you have not identified, and whose identities we are not able to discern as privileged parties. We find the county attorney's office has failed to demonstrate that these communications are privileged, and they may not be withheld under section 552.107(1) on that basis. Further, some of the privileged e-mail strings include communications with individuals whom you have not shown to be privileged parties. Consequently, to the extent these non-privileged e-mails, which we have marked, exist separate and apart from the privileged e-mail strings in which they were included, the county attorney's office may not withhold these records under section 552.107(1) of the Government Code. If these e-mails do not exist separate and apart from the privileged e-mail strings in which they were included, the county attorney's office may withhold them as privileged attorney-client communications under section 552.107(1) of the Government Code. The remaining information you seek to withhold as attorney-client privileged communications may be withheld under section 552.107(1).

You have marked the information you seek to withhold under section 552.111 of the Government Code as attorney work product. Section 552.111 excepts from disclosure "an 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); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as:

(1) [M]aterial 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. *Id.*; ORD 677 at 6-8. In order for this office to conclude that 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.

You argue the marked information constitutes the core work product of attorneys in the county attorney's office. However, some of the information at issue was communicated to non-privileged parties. Upon review, we find you have failed to demonstrate the non-privileged communications consist of material prepared or mental impressions developed in anticipation of litigation or for trial by a party or a representative of a party. Accordingly, the county attorney's office may not withhold any of the non-privileged communications, which we have marked, under the work product privilege of section 552.111 of the Government Code. Upon further review, we find some of the remaining e-mails at issue consist of material prepared or mental impressions developed in anticipation of litigation or for trial by a party or a representative of a party. You have failed to demonstrate, however, that any of the remaining records constitute core work product. Therefore, except for the records we have marked, the county attorney's office may withhold the information you have marked under the work product privilege of section 552.111 of the Government Code.

Section 552.111 of the Government Code also encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of this exception

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, opinions, recommendations, 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 Garland*, 22 S.W.3d 351 (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 Nos. 631 at 2 (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body's consultants). 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.

Upon review, we find the information you seek to withhold consists of general administrative and purely factual information or has been sent to third parties who you have failed to demonstrate share a privity of interest or common deliberative process with the county attorney's office. Therefore, we conclude you have failed to demonstrate how the deliberative process privilege applies to the remaining information you seek to withhold, and the county attorney's office may not withhold this information pursuant to the deliberative process privilege under section 552.111 of the Government Code.

The remaining documents include a CR-3 accident report form completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer's accident report). Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information made confidential by other statutes, including chapter 550 of the Transportation Code. Section 550.065(b) of the Transportation Code states that except as provided by subsection (c), accident reports are privileged and confidential. *See* Transp. Code § 550.065. Section 550.065(c)(4) provides for the release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. *Id.* § 550.065(c)(4). In this instance, the requestor has not provided the county attorney's office with two of the three requisite pieces of information specified by the statute. Accordingly, the county attorney's office must withhold the submitted CR-3 accident report form, which we have marked, under section 552.101 of the Government Code in conjunction with section 550.065(b) of the Transportation Code.

Section 552.101 of the Government Code also encompasses the common-law right of privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is 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 satisfied. *Id.* at 681-82.

The types of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision No. 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities protected from disclosure). Upon review, we find some of the remaining information is highly intimate or embarrassing and not a matter of legitimate public interest. Accordingly, the county attorney's office must withhold this information, which we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.102(a) of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."³ Gov't Code § 552.102(a). The Texas Supreme Court held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll

³The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). Having carefully reviewed the information at issue, we find the information we have marked must be withheld under section 552.102(a) of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024. *See Gov't Code* § 552.117(a)(1). Section 552.117 is also applicable to personal pager and cellular telephone numbers, provided the cellular telephone service or pager service is not paid for by a governmental body. *See Open Records Decision No. 506 at 5-6 (1988)* (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See Open Records Decision No. 530 at 5 (1989)*. Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request under section 552.024 the information be kept confidential. Thus, the information we have marked must be withheld on the basis of section 552.117(a)(1) to the extent it pertains to a current or former city official or employee who timely requested confidentiality for the information under section 552.024 of the Government Code, including cellular telephone numbers if the cellular telephone service is not paid for by a governmental body.

Section 552.130(a) of the Government Code excepts from disclosure information relating to an operator's license, driver's license, motor vehicle title or registration, or a personal identification document issued by an agency of this state or another state or country. *Gov't Code* § 552.130(a)(1), (2). The county attorney's office must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

Section 552.137 of the Government Code provides that "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). *Id.* § 552.137(a)-(c). Upon review, we find the e-mail addresses we have marked in the remaining e-mails are not of the type specifically excluded by section 552.137(c) of the Government Code. Accordingly, the county attorney's office must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners consent to disclosure.

Finally, we note some of the remaining information appears to be subject to copyright law. A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See* Open Records Decision No. 180 at 3 (1977); *see also* Open Records Decision No. 109 (1975). A custodian of public records also must comply with copyright law, however, and is not required to furnish copies of records that are copyrighted. *See* ORD 180 at 3. A member of the public who wishes to make copies of copyrighted materials must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, with the exception of the non-privileged e-mails we have marked for release, the county attorney's office may withhold the information you have marked under section 552.107(1) of the Government Code. To the extent the non-privileged e-mails exist separate and apart from the privileged e-mail strings in which they were included, the county attorney's office may not withhold these records under section 552.107(1) of the Government Code. If these e-mails do not exist separate and apart from the privileged e-mail strings in which they were included, the county attorney's office may withhold them as privileged attorney-client communications under section 552.107(1) of the Government Code. Except for the records we have marked for release, the county attorney's office may withhold the information you have marked under the work product privilege of section 552.111 of the Government Code. The county attorney's office must withhold (1) the marked CR-3 accident report form under section 552.101 of the Government Code in conjunction with section 550.065(b) of the Transportation Code; (2) the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy; (3) the information we have marked under section 552.102(a) of the Government Code; (4) the information we have marked under section 552.117(a)(1) of the Government Code, to the extent it pertains to a current or former city official or employee who timely requested confidentiality for the information under section 552.024 of the Government Code, including cellular telephone numbers if the cellular telephone service is not paid for by a governmental body; (5) the motor vehicle record information we have marked under section 552.130 of the Government Code; and (6) the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners consent to disclosure. The county attorney's office must release the remaining responsive information but may only release copyrighted information in accordance with copyright law.⁴

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.

⁴We note the information to be released contains social security numbers. Section 552.147 of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office. *See* Gov't Code § 552.147(b).

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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 455505

Enc. Submitted documents

c: Requestor
(w/o enclosures)