



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 3, 2016

Ms. Patsy Spaw
Secretary of the Senate
The Senate of the State of Texas
Post Office Box 12068
Austin, Texas 78711

OR2016-22148

Dear Ms. Spaw:

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 originally received by the Open Records Division ("ORD") of this office and assigned ID# 627317. Preparation of the ruling has been assigned to the Opinion Committee of this office.

You received a request for certain documents in the possession of the Texas Senate, specifically "all correspondence, including emails, between Senator Charles Schwertner (District 5) and any member of the Texas Health and Human Services Commission (HHSC)." You state you are releasing some information to the requestor. You assert in your request for a ruling that the submitted information is excepted from disclosure under sections 552.103, 552.106, 552.107, and 552.111 of the Government Code, and you have submitted a supporting brief of written comments. We have considered your arguments and reviewed the submitted information.

We first address section 552.103, which provides, in relevant part:

(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.

TEX. 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(a) exception applies 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 requested information 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, 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.); Tex. Att'y Gen. ORD-551 (1990) at 4. The governmental body must meet both parts of this test for information to be excepted under section 552.103(a). *See Tex. Att'y Gen. ORD-551 (1990) at 4.* To establish litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” Tex. Att'y Gen. ORD-452 (1986) at 4. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See Tex. Att'y Gen. ORD-551 (1990) at 4–5.* No section 552.103(a) interest generally exists with respect to information that has been obtained by the prospective parties to pending or anticipated litigation. Tex. Att'y Gen. ORD-349 (1982) at 2, Tex. Att'y Gen. ORD-320 (1982) at 1.

You state that the withheld documents relate to litigation to which the Senate reasonably anticipated being a party when it received the request. You further state, however, that the information has been provide to the entity with whom the Senate anticipated litigation. Upon review of your arguments and the information at issue, we find you have not demonstrated the applicability of section 552.103 to the information at issue. Thus, the submitted information may not be withheld from disclosure under section 552.103.

We next address section 552.106 of the Government Code. Section 552.106(a) protects “[a] draft or working paper involved in the preparation of proposed legislation.” TEX. GOV'T CODE § 552.106(a). Section 552.106(a) “ordinarily applies only to persons with a responsibility to prepare information and proposals for a legislative body.” Tex. Att'y Gen. ORD-460 (1987) at 1. The purpose of this exception “is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body” and the members of the legislative body; therefore, section 552.106 is applicable only to the policy judgments, recommendations, and proposals of persons who are involved in the preparation of proposed legislation and who have an official responsibility to provide such information to members of the legislative body. *Id.* at 1–2; *see also* Tex. Att'y Gen. ORD-429 (1985) at 5 (statutory predecessor to section 552.106 not applicable to information relating to governmental

entity's efforts to persuade other governmental entities to enact particular ordinances), Tex. Att'y Gen. ORD-367 (1983) at 2 (statutory predecessor applicable to recommendations of executive committee of State Board of Public Accountancy for possible amendments to Public Accountancy Act). Section 552.106 "does not protect purely factual information" from public disclosure. Tex. Att'y Gen. ORD-460 (1987) at 2; *see also* Tex. Att'y Gen. ORD 344 (1982) at 3–4 (for purposes of statutory predecessor, factual information prepared by State Property Tax Board did not reflect policy judgments, recommendations, or proposals concerning drafting of legislation).

You assert that the withheld documents are exempted from disclosure as communications prepared for the purpose of enacting legislation. You state that the documents have not been made public or distributed to any person beyond the Senator, his staff, Health and Human Services Commission staff, and the staff of the Office of the Attorney General. You further state that the withheld documents relate to advice and opinions given, and policy judgments and recommendations made, specifically in the preparation of proposed legislation. Upon review of your arguments and the information at issue, however, we find you have not demonstrated that the information constitutes a draft or working paper involved in the preparation of proposed legislation that is excepted for public disclosure by section 552.106(a). Thus, the submitted information may not be withheld from disclosure under section 552.106(a).

Next, we address your assertion of section 552.107 of the Government Code. Although you invoked section 552.107 in your initial request for a decision from this office, you have not submitted any arguments in your request or your subsequent brief explaining how this section applies to the submitted information. We therefore assume you are no longer claiming section 552.107 as an exception to disclosure for the information at issue. *See* TEX. GOV'T CODE §§ 552.301, .302, .305.

Finally, we address your claims under section 552.111 of the Government Code. Section 552.111 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." TEX. GOV'T CODE § 552.111. This exception encompasses the deliberative process privilege. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 361 (2000). The "deliberative process privilege covers only communications that are predecisional and deliberative." *Id.* The purpose of this privilege 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.); Tex. Att'y Gen. ORD-538 (1990) at 1–2. In Open Records Decision No. 615, this office reexamined 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, and opinions that reflect the policymaking processes of the governmental body. *See* Tex. Att’y Gen. ORD-615 (1993) at 5. Further, section 552.111 “exempts those documents, and only those documents, normally privileged in the civil discovery context.” *Gilbreath*, 842 S.W.2d at 413.

You assert that the “withheld documents are memoranda and communications between Senator Schwertner, his staff, and [the respective staffs] of the Health and Human Services Commission and Office of the Attorney General[;] . . . concern the gathering of information for the purposes of policy making”; and “contain advice, opinions, and recommendations” concerning policy-related matters. Having considered your arguments and reviewed the information at issue, however, we conclude that you have not established that the submitted information constitutes an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency. Thus, the information may not be withheld from disclosure under section 552.111.

In summary, because we conclude that none of the exceptions you have invoked exempt the submitted information from disclosure, we conclude the Senate is required to release the submitted information to the requestor.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



William A. Hill
Assistant Attorney General
Opinion Committee

WAH/sdk

Ref: ID# 627317

Enc. Submitted documents

c: Requestor
(w/o enclosures)