



GOVERNOR GREG ABBOTT

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OPEN RECORDS DIVISION

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June 16, 2016

Justin Gordon
Office of the Attorney General
Open Records Division
P.O. Box 12548
Austin, Texas 78711-2548

Re: Open Records Letter Ruling Request
OOG ID#: 16-149
OAG ID#: 622513

Dear Mr. Gordon:

On May 25, 2016, the Office of the Governor (the "OOG") received a request under the Public Information Act (the "PIA") from Mr. Smith.¹ A copy of the request is attached as Exhibit A.

The OOG is releasing some responsive documents to the requestor.² The OOG asserts portions of the remaining responsive information are excepted from required public disclosure under the PIA. Pursuant to section 552.301(a) of the Government Code, this brief is submitted to seek a decision as to whether sections 552.101, 552.103, 552.107, and 552.111 of the Government Code apply to the information at issue. Representative samples of this information are attached as Exhibit B. The OOG has notified the Office of the Attorney General ("OAG") of the request pursuant to sections 552.304 and 552.305 of the Government Code, to allow them an opportunity to submit arguments against release of the information at issue, which is included in Exhibit B. The OOG has also notified the Office of the Lieutenant Governor, the Texas Education Agency, and the Texas Juvenile Justice Department ("TJJD") of the request pursuant to section 552.305 of the Government Code, to allow them an opportunity to submit their arguments against release of the information at issue, which is attached in full as Exhibit C. The OOG has provided the requestor a copy of this brief pursuant to sections 552.301(d) and 552.301(e-1) of the Government Code.

¹ For purposes of calculating deadlines, please note the OOG was closed in observance of Memorial Day on May 30, 2016.

² The OOG has redacted private email addresses pursuant to section 552.137 of the Government Code and the previous determination issued by the Open Records Division of the OAG in Open Records Decision No. 684 (2009).

I. Information Excepted From Required Public Disclosure Under Section 552.101: Common-Law Privacy

Section 552.101 of the Government Code excepts from required public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses the doctrine of 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). The OOG asserts the information marked within Exhibit B consists of information that is confidential under common-law privacy, such as specific references to an individual’s medical history or an experience that allows a person to be identified as a survivor of abuse. Therefore, this information must be withheld under section 552.101 of the Government Code.

II. Information Excepted From Required Public Disclosure Under Section 552.103: Pending or Reasonably Anticipated Litigation

Information related to pending or reasonably anticipated litigation involving a governmental body is excepted from required public disclosure. Section 552.103 of the Government Code provides, in 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.

Id. § 552.103(a), (c). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate 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 the pending or anticipated 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.). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a). *See Tex. Att’y Gen. ORD-551 at 4 (1990)*. However, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *Tex. Att’y Gen. ORD-349*

(1982), Tex. Att’y Gen. ORD-320 (1982). Further, the applicability of section 552.103(a) ends once the litigation has concluded. Tex. Att’y Gen. Op. MW-575 (1982); Tex. Att’y Gen. ORD-350 (1982).

The requested information relates to a pending case. Included as part of Exhibit D is documentation showing that a lawsuit styled *State of Texas, et al., v. United States of America, et al.*, Cause No. 7:16-cv-00054-O, was filed in the United States District Court for the Northern District of Texas, Wichita Falls Division, on May 25, 2016, the same date the OOG received the public information request. The OOG attorneys serve as legal counsel to the Governor with regard to cases involving federal funding to state agencies. Thus, the OOG shares a common litigation interest with the OAG and affected state agencies. However, the OOG is not a party to this litigation. *See* Gov’t Code § 552.103(a); Tex. Att’y Gen. ORD-575 at 2 (1990) (stating that predecessor to section 552.103 only applies when governmental body is party to litigation). In such a situation, the OOG has notified the OAG, to give the OAG an opportunity to state that it seeks to withhold the information from disclosure under section 552.103 and to demonstrate how that exception applies to the requested information. The OOG asserts the litigation was pending on the date the OOG received the public information request and the information at issue relates to the pending litigation in which the State of Texas is a party. The information marked has not been obtained by all parties to the litigation through discovery or other means. To date, the litigation is still pending and is not at or near conclusion. Accordingly, the information marked in Exhibit B may be withheld in its entirety under section 552.103 of the Government Code.

III. Information Excepted From Required Public Disclosure Under Section 552.107: Privileged Attorney-Client Communications

The OOG asserts the information marked within Exhibit B consists of privileged attorney-client communications. Section 552.107(1) of the Government Code excepts from required public disclosure information “that the attorney general . . . is prohibited from disclosing because of a duty to the client under the Texas Rules of Evidence or the Texas Disciplinary Rules of Professional Conduct.” Gov’t Code § 552.107. Section 552.107 protects information that falls 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. Tex. Att’y Gen. ORD-676 at 6-7 (2002). First, a governmental body must demonstrate that 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. Tex. R. Evid. 503(b)(1). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *Id.* 503(b)(1)(A), (B), (C), (D), (E). 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).

Section 552.107(1) applies to communications between a governmental body and its attorney made in confidence to further the attorney’s rendering of professional legal services to the governmental body. Attorney General opinions applying section 552.107(1) have permitted

governmental bodies to withhold information their attorneys have received or generated in the capacity of a legal advisor. *See* Tex. Att’y Gen. ORD-462 at 10-11 (1987) (applying section 3(a)(7), predecessor to Section 552.107(1)). 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). Further, communications with a governmental body and third parties with whom the governmental body shares a privity of interested are protected under attorney-client privilege. *See* Tex. Att’y Gen. ORD-464 and 429.

The information marked within Exhibit B consists of such privileged communications. First, the information includes communications between and among OOG attorneys and OOG employees on various legal matters. Some of these include communications involving coordination of legal services to the Governor and officials from other states in multi-state legal projects. Second, other communications are between OOG attorneys and OAG attorneys representing the State of Texas on the coordination of legal services to the Governor. Third, additional communications are between OOG attorneys and TJJD attorneys and employees concerning the State of Texas and the coordination of legal services to the Governor. These communications also reflect coordination with the OAG. The OOG, as chief executive of the State of Texas, coordinates with Texas state agencies on public education, including public education provided in juvenile facilities. Accordingly, the OOG and TJJD share a common interest with respect to the communications. All of this information constitutes or reveals communications between privileged parties that were made for the purpose of providing professional legal services to the Governor and the OOG. Further, these communications were not intended to be disclosed and have not been disclosed to non-privileged parties. *See* Tex. R. Evid. 503(a)(5). Therefore, the OOG contends the information marked within Exhibit B may be withheld in its entirety under section 552.107(1) of the Government Code.

IV. Information Excepted From Required Public Disclosure Under Section 552.111: Deliberative Process Privilege

Section 552.111 of the Government Code excepts from required public disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. Your office has construed section 552.111 to encompass the deliberative process privilege by excepting from disclosure internal communications consisting of advice, recommendations, or opinions reflecting the policy-making processes of a governmental body. Tex. Att’y Gen. ORD-615 at 5 (1993); *accord City of Garland v. Dallas Morning News*, 969 S.W.2d 548, 556 (Tex. App.—Dallas 1998) (“Section 552.111 . . . excepts only those internal communications consisting of advice, recommendations, and opinions reflecting the policy-making processes of the governmental body at issue.”), *affirmed*, 22 S.W.3d 351 (Tex. 2000). 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* Tex. Att’y Gen. ORD-313 at 3 (1982). The purpose of section 552.111 is “to protect advice and opinions on policy matters and to encourage frank and open discussion within an agency in connection with its decision-making processes.” *Dallas Morning News*, 969 S.W.2d at 556.

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* Tex. Att’y Gen. ORD-561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process).

Your office has also concluded that a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Tex. Att’y Gen. ORD-559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policy-making document that will be released to the public in its final form. *See id.* at 2.

The information marked within Exhibit B consists of such privileged communications. First, the information includes communications between OOG policy directors, analysts, and employees, communicating in their official policy-making capacities. Second, the information marked includes a draft document of a press statement intended for public release in its final form, reflecting communications between OOG employees, also communicating in their official policy-making capacities. Finally, the information marked includes a draft document intended for release in its final form that reflects communications between the OOG and officials from other states. The OOG, in representing the interests of the State of Texas within multi-state projects, also shares a privity of interest with other states with regard to specific policy-making matters. Therefore, the communications marked within Exhibit B consist of advice, recommendations, and opinions regarding these policy-making matters. The OOG asserts the information marked is excepted from disclosure under section 552.111 of the Government Code and the deliberative process privilege.

V. Information Excepted From Required Public Disclosure Under Section 552.111: Attorney Work Product

The OOG also asserts portions of Exhibit B are excepted from disclosure pursuant to section 552.111 of the Government Code, which excepts from required public 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 at Rule 192.5 of the Texas Rules of Civil Procedure. *See* Tex. R. Civ. P. 192.5; *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Tex. Att’y Gen. ORD-677 at 4-8 (2002). Rule 192.5 defines attorney work product as consisting of:

- (1) material 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 governmental body that seeks to withhold information on the basis of the attorney work product privilege under section 552.111 bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *See id.*; Tex. Att'y Gen. ORD-677 at 6-8. In order to meet our burden of proving it anticipated litigation, the OOG must establish 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 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; Tex. Att'y Gen. ORD-677 at 7.

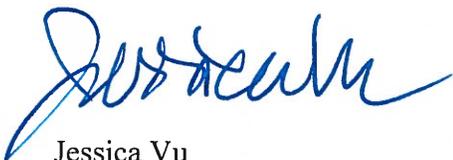
Exhibit B consists of communications between the OOG and the OAG. These communications were created by OAG and OOG attorneys in response to the pending case. This information contains mental impressions, opinions, conclusions, and legal theories of the attorneys. Therefore, the OOG asserts the information is excepted from disclosure under section 552.111 of the Government Code.

VI. Conclusion

On behalf of the OOG and pursuant to section 552.301 of the Government Code, I respectfully request an open records letter ruling as to the applicability of the above raised exceptions.

If you have any questions or need additional information, please contact me at (512) 463-8470.

Sincerely,



Jessica Vu
Assistant General Counsel
Office of the Governor

cc: Isaiah Smith
 Isaiah Smith Campaign
 P.O. Box 163411

Fort Worth, Texas 76161
iscampaign@usa.com
(without Exhibits)

Lauren Downey
Public Information Coordinator
Office of the Attorney General
P.O. Box 12548
Austin 78711-2548
lauren.downey@texasattorneygeneral.gov

Chris Sterner
Deputy General Counsel
Office of Lieutenant Governor Dan Patrick
P.O. Box 12068
Austin, TX 78711
Chris.sterner@ltgov.texas.gov

Karol Davidson
Assistant General Counsel
Texas Juvenile Justice Department
P.O. Box 12757
Austin, TX 78711
Karol.Davidson@tjjd.texas.gov

Montgomery Meitler
Assistant General Counsel
Texas Education Agency
1701 N. Congress Ave.
Austin, TX 78701
(512) 463-9720
Montgomery.Meitler@tea.texas.gov
PIR@tea.texas.gov

Attachments: Exhibit A – Copy of original request
Exhibit B – Rep. sample of information at issue
Exhibit C – Information sent to Office of the Lieutenant Governor, Texas
Education Agency, and Texas Juvenile Justice Department
Exhibit D – Information sent to Office of Attorney General