



KEN PAXTON
ATTORNEY GENERAL *of* TEXAS

Common Discretionary Exceptions

Meredith Coffman, Assistant Attorney General, Open Records Division

Jennifer Copeland, Assistant Attorney General, Open Records Division

What is Different About Discretionary Exceptions?

- OAG will not raise a discretionary exception on behalf of a governmental body
- A governmental body has the burden to provide the representations and information necessary for each exception to apply
- Does not generally apply to information subject to section 552.022 of the Government Code
- Most discretionary exceptions are waived by a failure to comply with the requirements of section 552.301 of the Government Code
- Designed to protect the interests of the governmental body as opposed to the interests of a third party or the privacy of an individual

Section 552.103

(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.

The Basics

What Does it protect?

- Any information not subject to section 552.022 of the Government Code or subject to a statutory right of access

What does an argument need to contain?

- Whether the litigation is pending or anticipated
- Identities of parties to the litigation
- Date on which the litigation commenced or was anticipated
- If anticipated, why litigation is anticipated
- How the information at issue is related to the litigation

Common Errors

- Failure to comply the requirements and deadlines of section 552.301 of the Government Code
- Arguing litigation was pending but the litigation commenced *after* the request was received
- Arguing the litigation was anticipated but the concrete steps that gave rise to that anticipation occurred *after* the request was received
- Failure to establish the governmental body that received the request is a party to the pending litigation or will be a party to anticipated litigation
- Failure to explain how the information at issue is related to the anticipated or pending litigation
- Attempting to withhold information the opposing party has seen or had access to after the litigation commenced or litigation was anticipated

What is not protected under section 552.103?

- Information subject to section 552.022
 - court-filed documents
 - completed investigations or reports
 - employee evaluations
 - contracts relating to the receipt or expenditure of funds by a governmental body
- Information subject to a statutory right of access
- Basic information of a criminal incident held to be public in *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976)
- Information to which the opposing party has seen or had access after the litigation commenced or concrete steps that gave rise to the anticipation of litigation were taken



Hypothetical: Question

A city receives a request for information and is sued two days afterward. The city complies with section 552.301 and makes the following representations

- The city is a party to pending litigation and provides a copy of the original petition
- The information requested is related to the pending litigation and explains why

Will section 552.103 apply to the information?



Hypothetical: Answer

NO

Section 552.103 is temporal in nature. The litigation must be pending or anticipated *on the date of the receipt of the request for information*.

In this case, the city should have argued anticipated litigation and provided evidence a party had taken concrete steps towards litigation before or on the date the request was received. For example:

- If the city is the plaintiff, provide proof of the date on which the city decided to sue. This can be in the form of an affidavit from the litigating attorney or even an e-mail discussing the upcoming lawsuit
- If the city is the defendant, any evidence the city knew the plaintiff would sue. For example, an EEOC claim or a claim letter with a demand for payment of damages

Section 552.104

Information is excepted from the requirements of Section 552.021 if a governmental body demonstrates that release of the information would harm its interests by providing an advantage to a competitor or bidder in a particular ongoing competitive situation or in a particular competitive situation where the governmental body establishes the situation at issue is set to reoccur or there is a specific and demonstrable intent to enter into the competitive situation again in the future.

The Basics

What Does it protect?

- Information related to an ongoing competitive situation or a competitive situation set to reoccur that, if released, would result in a competitor or bidder gaining a competitive advantage to the detriment of the governmental body

What does an argument need to contain?

- Explanation of the competitive situation and whether it is ongoing or set to reoccur
- Specific information as to when the competitive situation will reoccur and some demonstration of intent to enter into the competitive situation in the future
- Explanation of how release will result in a competitor or bidder gaining an advantage and how that would harm the governmental body

Common Errors

- Failure to comply with the requirements and deadlines of section 552.301 of the Government Code
- When arguing a competitive situation will reoccur, failure to provide a concrete date on which the competitive situation is set to reoccur and a representation of intent to enter into the competitive situation in the future

What is not protected under section 552.104?

- Information subject to section 552.022(a) relating to the receipt or expenditure of public or other funds for a parade, concert, or other entertainment event paid for in whole or part with public funds
 - Note: other information subject to section 552.022 may be withheld under section 552.104 if a governmental body meets its burden of proof
- The interests of 3rd parties



Hypothetical: Question

An independent school district receives a request for information pertaining to a specified bid, including any submitted proposals, internal communications, or evaluative documentation. The district represents:

- The bid remains open because while a winner has been chosen, the district's board of trustees has not authorized a contract and contract negotiations are ongoing
- If the winning bidder knows the content of the other proposals or how it scored, it would gain an advantage. The company could raise its pricing, reduce its offerings, or otherwise negotiate a contract that is less favorable to the district

The information at issue includes the submitted bids and a report evaluating the bids and giving recommendations to the board of trustees.

Will section 552.104 apply to the information?



Hypothetical: Answer

Yes

The district demonstrated the competitive situation was ongoing, a competitor would gain an advantage from release, and that advantage would harm the interests of the district.

Note: While the report evaluating the bid submissions and making recommendations to the board is subject to section 552.022(a)(1), because of section 552.104(b) applies and it may be withheld.

Section 552.105

Protects from disclosure:

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

The Basics

- What Does it protect?
 - Information related to property a governmental body intends to acquire for a public purpose prior to the announcement of the project in order to protect a governmental body's negotiating position
 - Can protect some information about property already purchased, if release would impact the acquisition of related parcels
- What does an argument need to contain?
 - Explanation of the project at issue
 - The project has *not* been publicly announced
 - Representation release of the information would harm the governmental body's negotiation position with respect to the acquisition of the properties

Common Errors

- Failure to comply with the requirements and deadlines of section 552.301 of the Government Code
- Attempting to withhold contracts subject to section 552.022(a)(3) of the Government Code
- Failure to explain the project at issue
- Failure to explain the project has not been publicly announced
- Attempting to withhold information related to a project that has been publicly announced
- Failure to explain how parcels already purchased relate to property not yet purchased
- Failure to explain how the information reveals the location or purchase price of the property

Section 552.108(a)

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication;

...

Section 552.108(a)

(4) is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

The Basics: Protection

What does it protect?

- Section 552.108(a)(1) protects information that relates to *ongoing* investigations or pending prosecutions.
 - Examples: Reports, videos, witness statements, photographs, domestic violence work sheets, e-mails
- Section 552.108(a)(2) protects information that relates to *closed* investigations that did not result in conviction or deferred adjudication.
 - Examples: Reports, videos, witness statements, photographs, domestic violence work sheets, e-mails
- Section 552.108(a)(4) protects work product of a prosecutor and their team
 - Examples: prosecutor's notes, draft versions of court filings, communications between prosecutors and investigating officers, communications between prosecutors, reports
 - Can protect an entire prosecution file in conjunction with *Curry v. Walker*, 873 S.W.2d 379 (Tex. 1994)

The Basics: Representations

What does an argument need to contain?

- Explanation of case status and whether it is open or closed
- Explanation of how the information relates to that open or closed investigation
- For section 552.108(a)(1), an explanation that release of the information would affect the investigation or prosecution
- For section 552.108(a)(2), representation the case did not result in conviction or deferred adjudication
- For section 552.108(a)(4), representations that the information was prepared by an attorney representing the state (or their agent, like a paralegal or investigator) in anticipation of or the course of preparing for criminal litigation or reflects the mental impressions or legal reasoning of an attorney representing the state

Common Errors

- Failure to comply with the requirements and deadlines of section 552.301 of the Government Code
- Failure to explain case status
- Arguing section 552.108(a)(1) for a closed investigation
- Arguing section 552.108(a)(2) for an ongoing investigation or prosecution
- For section 552.108(a)(4), failure to explain who prepared the information and why or a failure to explain how it reveals the mental impressions or legal reasoning of an attorney representing the state

Section 552.108(b)

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [disclosure] if:

- (1) release of the internal record or notation would interfere with law enforcement or prosecution;
- (2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or
- (3) the internal record or notation:
 - (A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or
 - (B) reflects the mental impressions or legal reasoning of an attorney representing the state.

The Basics: Protection

What does it protect?

- Section 552.108(b)(1) protects information relating to the security or operation of a law enforcement agency
 - Examples: lists of types of law enforcement equipment, intelligence bulletins, portions of general orders or policies, some training presentations, cell phone of police officer
- Section 552.108(b)(2) protects information pertaining to closed investigations that did not result in conviction or deferred adjudication, similar to and can overlap with section 552.108(a)(2)
- Section 552.108(b)(3) protects prosecutorial work product, similar to and can overlap with section 552.108(a)(4)

The Basics: Representations

What does an argument need to contain?

- For section 552.108(b)(1), an explanation of how the information relates to law enforcement or the prosecution of crime
 - Additionally, an explanation of how release of the information would interfere with law enforcement
- For section 552.108(b)(2), an explanation of the investigation status
 - Additionally, an explanation of how the information relates to the case
- For section 552.108(b)(3), representation the information was prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation or reflects the mental impressions or legal reasoning of an attorney representing the state

Common Errors

- Failure to comply with the requirements and deadlines of section 552.301 of the Government Code
- For section 552.108(b)(1), failure to explain why release of the information would interfere with enforcing the law
- For section 552.108(b)(1), failure to explain why release of the information would interfere with law enforcement
 - A mere statement is not enough, the governmental body must give details
- For section 552.108(b)(2), failure to explain case status

What is not protected under section 552.108?

- Most information subject to section 552.022
 - Exceptions: if the information is subject to section 552.022(a)(1) or the request is for the entire prosecution file and *Curry* is argued in conjunction with section 552.108(a)(4)
- Information subject to a statutory right of access
- Basic information of a criminal incident held to be public in *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976)

What is the difference?

552.108(a)(1)	552.108(a)(2) 552.108(b)(2)	552.108(b)(1)
Protects information generated as part of an investigation	Protects information generated as part of an investigation	Protects information that is not part of an investigation but which, if released, may interfere with law enforcement
relates to open investigation or pending prosecution	relates to closed investigation that did not result in conviction or deferred adjudication	relates to security or operation of a law enforcement agency
demonstrate release would affect the case	no demonstration of release affecting the case	demonstrate release would interfere with law enforcement

What about non-law enforcement agencies?

- A non-law enforcement agency can receive a request for law enforcement information in its possession
 - To withhold the information, the non-law enforcement agency must provide the OAG with a representation from the law enforcement agency at issue that explains the case status and that states the law enforcement agency wants the information withheld
- If the non-law enforcement agency fails to comply with the requirements and deadlines of section 552.301 of the Government Code, the interests of the law enforcement agency at issue is a compelling reason to overcome the presumption of openness

Section 552.111

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 [disclosure].

This section protects two privileges

- the deliberative process privilege
- the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure

The Basics

What does deliberative process protect?

- advice, opinions, and recommendations on policymaking matters, including drafts intended to be released to the public

What does an argument need to contain?

- Identify all the parties to the communications
- How information relates to policy
- If a draft, explanation of whether intended for public release

What does attorney work product protect?

- attorney notes and research that reflects mental impressions, opinions, conclusions, and legal theories in anticipation of litigation or for trial

What does an argument need to contain?

- Identify attorney(s) and parties involved
- Explanation of why the litigation or trial was anticipated

Common Errors

- Failure to comply with the requirements and deadlines of section 552.301 of the Government Code
- **Failure to identify all parties to the communications or other information**
- For deliberative process, failure to explain how the information relates to policy or if draft was intended for public release
- For deliberative process, arguing to withhold information seen by parties without privity to the governmental body
- For deliberative process, withholding purely factual or general administrative information
- For attorney work product, failure to explain the information was created in anticipation of litigation or for trial
- For attorney work product, information seen by opposing party

Section 552.107

Information is excepted from disclosure if:

- (1) it is information that the attorney general or an attorney of a political subdivision 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; or
- (2) a court by order has prohibited disclosure of the information.

The Basics

What Does it protect?

- Communications between governmental body attorneys and governmental body representatives like employees, officials, or contractors that were made for the provision of legal services to the governmental body
- Can also protect attorney-client communications involving other privileged parties.

What does an argument need to contain?

- The communication is between a governmental body's attorneys and representatives of the governmental body like employees, officials, or contractors
- Was made for the provision of legal services to the governmental body
- The communication was intended to be confidential and has remained confidential
- **The identities and positions of every single party to the communication**

Common Errors

- Failure to identify a party to the communication as an employee, official, attorney, contractor or other privileged individual. We must know the name of the individual, their position, and if they are not an employee or official, why that individual is privileged
- Communication was shared with an individual who is not privileged
- Communication is an e-mail string and portions of the string were sent to or received from non-privileged parties

What is unique about 552.107?

- A governmental body may fail to meet the requirements and deadlines of section 552.301 of the Government Code and still prevail on a claim under section 552.107. Section 552.107 is a compelling reason to overcome a presumption of openness, much like mandatory exceptions
 - We will not raise section 552.107 on behalf of a governmental body
 - The burden of proof still rests with the governmental body and they must make the appropriate representations to prevail
- Information subject to section 552.022 may not be withheld under section 552.107 but may be withheld under Texas Rule of Evidence 503. Rule 503 requires the same representations



Hypothetical: Question

A state agency receives a request for all communications pertaining to a civil lawsuit that recently ended in a judgment. The state agency claims section 552.107 and represents.

- The communications at issue are between agency employees and agency attorneys for the purpose of providing legal services to the agency.
- The communications were intended to be confidential and have remained confidential.

The submitted information is a bundle of e-mails and e-mail strings and letters.

Will section 552.107 apply to the information?



Hypothetical: Answer

Section 552.107 may apply to only some of the communications.

The agency didn't identify any parties to the communications. Only those communications we can discern from their face are between privileged parties may be withheld

- In this instance, we can tell some of the e-mails are between attorneys and privileged parties because the signatures of two employees show they are attorneys and the other e-mail addresses are all from the agency's internet domain
- But some are with outside attorneys and we cannot discern from the content whether those attorneys represent the agency, the opposing party, or someone else
- Others involve personal e-mail addresses. They may be the addresses of employees or officials, but we do not know

Without the identities of each party and an explanation of why they are privileged, we cannot determine any other information is privileged



Bonus Hypothetical: Question 1

An officer of a police department crashes their cruiser into a house while in pursuit of a suspect. The department receives a request for information five months later. The department complies with section 552.301 and argues section 552.103 on the basis of anticipated litigation.

- The department provides our office with a notice of claim letter from an attorney representing the homeowner. The department represents the letter complies with the Texas Tort Claims Act ("TTCA") and was received one month after the accident.
- The responsive information consists of a criminal investigation, including reports and videos, e-mails between department employees, and a completed internal affairs investigation into the officer's conduct. The department explains the information is related to accident that is the subject of the claim letter and the criminal investigation is currently being prosecuted.

Will the department prevail in its claim under section 552.103?



Bonus Hypothetical: Answer 1

Yes, but only for some of the responsive information

The department represents the claim letter was received prior to the request for information and it complies with the TTCA. This is enough to establish the department anticipated litigation. The department has represented the information is related to this anticipated litigation. Because the criminal investigation is not completed, it may be withheld under section 552.103. The e-mails may also be withheld

However, the completed internal affairs investigation is subject to section 552.022(a)(1) and may not be withheld under section 552.103



Bonus Hypothetical: Question 2

A city receives a request for the bids, contracts, and evaluation information for any requests for procurement involving pesticide chemicals for the last 4 years. The city claims section 552.104 and represents

- The city re-bids for these goods every year and the city will be issuing a new RFP in one month. The city provides as a confidential exhibit an internal e-mail supporting these representations
- Release would give competitors an advantage by letting them tailor the pricing for chemicals the city purchases, thus costing the city more to obtain these chemicals

The information at issue includes past bids, evaluation documents, invoices, and several contracts.

Will the city be able to withhold this information under section 552.104?



Bonus Hypothetical: Answer 2

Yes

Although the city is not currently engaged in a competitive situation involving the purchase of pesticides, it has demonstrated:

It intends to engage in a competitive situation in the future and a specific date on which the bid would reoccur

Release would harm the city's interests and give advantage to a competitor

Note: An assertion a governmental body will engage in a bid for goods or services "in the future" or "is set to reoccur" is not sufficient.



Bonus Hypothetical: Question 3

A district attorney's office receives a request for the entirety of its file on a specified criminal case that recently resulted in a dismissal. The responsive information includes

- Incident and supplemental reports
- Photographs depicting the deceased in a state of dismemberment
- Prosecutor notes and e-mails between various prosecutors
- Court-filed documents
- DA case status paperwork
- General orders related to use of force
- Intelligence bulletin on trends in organized crime, including dismemberment of rivals

What arguments could the district attorney's office make for this information?



Bonus Hypothetical: Answer 3

Exception	Representations	Information withheld
552.108(a)(4) in conjunction with <i>Curry</i>	Request is for an entire prosecution file created in the course of litigation by an attorney representing the state. The file, including its organization, reveals the attorney's mental impressions and legal reasoning.	All of the responsive information except basic information
552.108(a)(2)	The information relates to a closed case that did not result in conviction or deferred adjudication	All of the responsive information except basic information and the court-filed documents subject to section 552.022(a)(17)
552.108(b)(1)	Release would interfere with law enforcement by allowing criminals to anticipate the situations under which certain uses of force are permitted and evade law enforcement by knowing what they are looking for in investigating organized crime	Parts of the use of force general orders and the entire intelligence bulletin



Bonus Hypothetical: Question 4

A city receives a request for e-mail communications pertaining to a specified job position during the last 6 months. Responsive information consists of

- E-mails between city attorney, a department head, and city manager about the legalities of firing a specified employee
- E-mails between department head and city manager discussing EEOC complaint
- E-mails between city manager, department heads, and mayor discussing a major overhaul of the pay scale and job positions in the city
- E-mails between employees complaining about job responsibilities

What exceptions can the city claim and what representations must the city make?



Bonus Hypothetical: Answer 4

Exception	Representations	Information withheld
552.107(1)	Communications are between city attorney and city employees for the purpose of providing legal services to the city. The e-mails were made in confidence and remain confidential. Provide a list of everyone's name and position in the city	All e-mails between city attorney, a department head, and city manager about the legalities of firing a specified employee
552.103	City anticipates litigation involving an employee who filed an EEOC complaint. The complaint is pending with the EEOC. Marked e-mails relate to that employee's discrimination complaint. Provide copy of EEOC notice	E-mails between department head and city manager discussing EEOC complaint
552.111-deliberative process	E-mails are between high level employees and a city official discussing a policy issue of broad scope and contain the opinions and recommendations of those employees. Provide a list of everyone's name and position in the city	Portions of e-mails between city manager, department heads, and mayor discussing a major overhaul of the pay scale and job positions in the city

The e-mails between employees complaining about job responsibilities must be released

Questions?

OAG's Open Government Hotline

(877) OPEN TEX

(512) 478-6736

OAG website

www.texasattorneygeneral.gov

