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ATTORNEY GENERAL OF TEXAS

January 20, 2017

Mr. Brad Bowman
General Counsel
Texas Department of Licensing and Regulation
P.O. Box 12157
Austin, Texas 78711

OR2017-01415

Dear Mr. Bowman:

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# 642127 (TDLR # PIR-20170124).

The Texas Department of Licensing and Regulation (the "department") received a request for all e-mail communications between department commissioners and staff during a specified time period and the names and e-mail addresses of department commissioners.¹ You claim the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we note some of the submitted information is not responsive to the instant request because it does not consist of e-mail communications between the specified individuals. This ruling does not address the public availability of any information that is not responsive

¹We note the department sent this requestor a cost estimate of charges pursuant to section 552.2615 of the Government Code, and the requestor accepted the cost estimate. *See* Gov't Code § 552.2615.

²We assume 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.

to the request and the department is not required to release such information in response 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:

...

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

Gov't Code § 552.022(a)(17). The submitted information contains a court-filed document subject to section 552.022(a)(17). This information must be released unless it is made confidential under the Act or other law. *See id.* The department seeks to withhold this information under sections 552.107 and 552.111 of the Government Code. However, these sections are discretionary exceptions and do not make information confidential under the Act. *See Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions).* Therefore, the information at issue may not be withheld under these exceptions. However, the Texas Supreme Court has held the Texas Rules of Evidence and the Texas Rules of Civil Procedure are "other law" that make information expressly confidential for the purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider the department's arguments under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure for the information subject to section 552.022 of the Government Code. We will also consider the arguments against disclosure of the information not subject to section 552.022.

Rule 503(b)(1) of the Texas Rules of Evidence provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

(A) between the client or the client's representative and the client's lawyer or the lawyer's representative;

(B) between the client's lawyer and the lawyer's representative;

(C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;

(D) between the client's representatives or between the client and the client's representative; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made to further the rendition of professional legal services to the client or reasonably necessary to transmit the communication. *Id.* 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must 1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; 2) identify the parties involved in the communication; and 3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. *See* ORD 676. Upon a demonstration of all three factors, the entire communication is confidential under rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

The information subject to section 552.022(a)(17) consists of an attachment to an e-mail communication between department attorneys, legal staff, and clients, that was made for the purpose of providing legal services to the department. You state the communication was intended to be confidential and has remained confidential. Upon review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the department may withhold the court-filed document under rule 503 of the Texas Rules of Evidence.³

³As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

Next, we will address your arguments to withhold the information not subject to section 552.022 of the Government Code. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* Gov't Code § 552.107(1). The elements of the privilege under section 552.107(1) are the same as those discussed above for rule 503. 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. ORD 676 at 6-7. Section 552.107(1) generally excepts from disclosure an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie*, 922 S.W.2d at 923.

The department claims some of the submitted information that is not subject to section 552.022(a)(17) of the Government Code is excepted from disclosure under section 552.107(1) of the Government Code. The department asserts the information at issue consists of communications between department attorneys, legal staff, and clients. The department represents the communications were made for the purpose of facilitating the rendition of professional legal services to the department. Further, the department asserts these communications were not intended to be disclosed and have not been disclosed to non-privileged parties. Based on the department's representations and our review, we find the department has demonstrated the applicability of the attorney-client privilege to the information we have marked. Accordingly, the department may withhold the information we have marked under section 552.107(1) of the Government Code.⁴ However, we find the remaining responsive information at issue was shared with an individual the department has not demonstrated is a privileged party. Therefore, we conclude the department has failed to establish the remaining responsive information at issue constitutes communications between department attorneys, legal staff, and clients for the purposes of section 552.107(1). Thus, the department may not withhold the remaining responsive information at issue on that basis.

Section 552.111 of the Government Code 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[.]” *See* Gov't Code § 552.111. This section 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); ORD 677 at 4-8. 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

⁴As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

(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.

The department asserts the information at issue consists of privileged attorney work product. However, upon review, we find the department has failed to establish the information at issue consists of material prepared, mental impressions developed, or a communication made in anticipation of litigation or for trial by or for the department or representatives of the department. Further, the department has failed to demonstrate all of the individuals in the communications at issue are privileged. Therefore, the department may not withhold any of the remaining information as attorney work product under 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 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, writ ref'd n.r.e.); Open Records Decision No. 538 at 1-2 (1990).

In ORD 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 exempts 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 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. *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).

We note section 552.111 can encompass communications between a governmental body and a third party. *See* Open Records Decision Nos. 631 at 2 (Gov't Code § 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) (Gov't Code § 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (Gov't Code § 552.111 applies to memoranda prepared by governmental body's consultants). In order 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 at 9.

The department asserts the information at issue consists of advice, opinions, and recommendations relating to the department's policymaking. Upon review, we find the department has established the deliberative process privilege is applicable to some of the information at issue, which we have marked. Therefore, the department may withhold the information we have marked under section 552.111 and the deliberative process privilege. However, we conclude the department has not established any of the remaining information consists of advice, opinion, or recommendations, or it is purely factual in nature. Accordingly, the department may not withhold any of the remaining information under section 552.111 and the deliberative process privilege.

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail

address is of a type specifically excluded by subsection (c).⁵ See Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to an institutional e-mail address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address of a vendor who seeks to contract with a governmental body, an e-mail address maintained by a governmental entity for one of its officials or employees, or an e-mail address provided to a governmental body on a letterhead. See *id.* § 552.137(c). Upon review, we find the department must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

In summary, the department may withhold the court-filed document under rule 503 of the Texas Rules of Evidence. The department may withhold the information we have marked under section 552.107(1) of the Government Code. The department may withhold the information we have marked under section 552.111 of the Government Code and the deliberative process privilege. The department must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. The department must release the remaining responsive information.

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,



Sidney M. Pounds
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Open Records Division

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⁵This office 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).

Ref: ID# 642127

Enc. Submitted documents

c: Requestor
(w/o enclosures)