



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 7, 2017

Ms. Kathleen Decker
Director
Litigation Division
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711

OR2017-02764

Dear Ms. Decker:

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# 644811 (PIR No. 17-30315).

The Texas Commission on Environmental Quality (the "commission") received a request for all information pertaining to a specified company during a certain time period.¹ You state the commission has released some information. You claim the submitted information is exempted from disclosure under sections 552.101, 552.107, and 552.111 of the Government

¹You state, and provide documentation showing, the commission sought and received clarification of the request for information. *See* Gov't Code § 552.222(b) (stating governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

Code, as well as privileged under rule 503 of the Texas Rules of Evidence.² We have considered your arguments and reviewed the submitted representative sample of information.³

Initially, 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; [and]

(18) a settlement agreement to which a governmental body is a party.

Gov't Code § 552.022(a)(17)-(18). The submitted information contains court-filed documents that are subject to section 552.022(a)(17). The submitted information also includes a settlement agreement, to which the commission is a party, that is subject to section 552.022(a)(18) of the Government Code. This information must be released unless it is made confidential under the Act or other law. *See id.* § 552.022. You seek to withhold the information subject to section 552.022(a)(17) under section 552.107 of the Government Code. However, section 552.107 is discretionary in nature and does not make information confidential under the Act. *See Open Records Decision Nos. 676 at 10-11 (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 court-filed documents may not be withheld under section 552.107 of the Government Code. However, we note the Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider your assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence for the information subject to section 552.022(a)(17). We will also consider your arguments under section 552.107 against disclosure of the information not subject to section 552.022. Additionally, as you raise section 552.101 of the Government Code, which protects information made confidential under law, for the information subject to

²Although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, this office has concluded section 552.101 does not encompass discovery privileges. *See Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).*

³We 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.

section 552.022(a)(18) of the Government Code, we will consider the applicability of that section to the information at issue.

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. This exception encompasses information that other statutes make confidential, such as section 154.073 of the Civil Practice and Remedies Code, which provides, in relevant part:

(a) Except as provided by Subsections (c), (d), (e), and (f), a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.

...

(d) A final written agreement to which a governmental body . . . is a signatory that is reached as a result of a dispute resolution procedure conducted under this chapter is subject to or excepted from required disclosure in accordance with [the Act].

Civ. Prac. & Rem. Code § 154.073(a), (d). In Open Records Decision No. 658 (1998), this office found that communications during the formal settlement process were intended to be confidential. *See* ORD 658 at 4. You state the commission and other parties to a specified lawsuit engaged in an alternative dispute resolution procedure in the form of formal mediation. You state Attachment G consists of communications made by the parties to that dispute and the communications directly relate to settlement negotiations made pursuant to their participation in alternative dispute resolution procedures. Based on your representations and our review, we agree most of the information at issue consists of communications relating to the subject matter of a dispute made by a participant in an alternative dispute resolution procedure. Therefore, except for the information we have marked, the commission must withhold Attachment G under section 552.101 of the Government Code in conjunction with section 154.073 of the Civil Practice and Remedies Code. However, we note some of the information at issue constitutes a final settlement agreement. Section 154.073 of the Civil Practice and Remedies Code does not except from required public disclosure a governmental body’s mediated final settlement agreement. *See* Civ. Prac. & Rem. Code § 154.073(d). Thus, the submitted settlement agreement is not confidential under section 154.073 of the Civil Practice and Remedies Code. Accordingly, the commission may not withhold the submitted final settlement agreement, which we have marked for release, under section 552.101 of the Government Code in conjunction with section 154.073 of the Civil Practice and Remedies Code.

Texas Rule of Evidence 503(b)(1) 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).

You assert the information subject to section 552.022(a)(17) consists of attachments to an e-mail communication between attorneys for the commission and commission employees,

as well as attorneys for the Office of the Attorney General (the "OAG"). You state the OAG has been providing legal services to the commission. You also state the communications were made for the purpose of facilitating the rendition of professional legal services to the commission and these communications were intended to be confidential. However, we note these attachments were shared with a non-privileged party. Further, if the attachments are removed from the e-mail and stand alone, they are responsive to the request for information. Therefore, if these non-privileged attachments, which we have marked, are maintained by the commission separate and apart from the otherwise privileged e-mails to which they are attached, then the commission may not withhold the attachments under rule 503 of the Texas Rules of Evidence. If the attachments subject to section 552.022(a)(17) we have marked do not exist separate and apart from the e-mails to which they are attached, the commission may withhold them under rule 503 of the Texas Rules of Evidence.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. 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 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.

You state the information not subject to section 552.022(a)(17) within Attachment D consists of communications between commission staff, commission attorneys, and attorneys from the OAG, who have been providing legal services to the commission. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the commission. You further state the communications were intended to be confidential and have remained confidential. Upon review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Therefore, the commission may generally withhold the information within Attachment D not subject to section 552.022(a)(17) under section 552.107(1) of the Government Code. However, we note some of the otherwise privileged e-mail strings include e-mails from non-privileged parties. Furthermore, if these e-mails are removed from the e-mail strings and stand alone, they are responsive to the instant request. Therefore, if the commission maintains these non-privileged e-mails, which we have marked, separate and apart from the otherwise privileged e-mail strings in which they appear, then the commission may not withhold the non-privileged e-mails under section 552.107(1).

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); 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.

The work product doctrine under section 552.111 of the Government Code is applicable to litigation files in criminal and civil litigation. *Curry v. Walker*, 873 S.W.2d 379, 381 (Tex. 1994); *see also United States v. Nobles*, 422 U.S. 225, 236 (1975). In *Curry*, the Texas Supreme Court determined a request for a district attorney's "entire file" was "too broad" and, citing *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458, 460 (Tex. 1993), held "the decision as to what to include in [the file] necessarily reveals the attorney's thought processes concerning the prosecution or defense of the case." *Curry*, 873 S.W.2d at 380. Accordingly, if a requestor seeks an attorney's entire litigation file, and a governmental body demonstrates the file was created in anticipation of litigation, we will presume the entire file is excepted from disclosure under the attorney work product aspect of section 552.111. Open Records Decision No. 647 at 5 (1996) (organization of attorney's litigation file necessarily reflects attorney's thought processes (citing *Nat'l Union*, 863 S.W.2d at 461)). However, we note the court in *National Union* also concluded a specific document is not automatically

considered to be privileged simply because it is part of an attorney's file. 863 S.W.2d at 461. The court held an opposing party may request specific documents or categories of documents that are relevant to the case without implicating the attorney work product privilege. *Id.*; ORD 647 at 5.

You assert the information in Attachment E pertains to litigation the commission was anticipating against the specified company for a civil enforcement and the present request for information encompasses the commission's entire litigation file. However, the requestor has requested information pertaining to a specific company, rather than requesting a specified litigation file. Such a request does not constitute a request for the "entire" litigation file. Thus, we conclude *Curry* is inapplicable. You explain the information in Attachment E was created by an attorney or the attorney's representatives in anticipation of litigation. You also state the information at issue contains the attorney's mental impressions, conclusions, and legal theories. Based on your representations and our review, we conclude, except for the information we have marked for release, the commission may withhold Attachment E as attorney work product under section 552.111 of the Government Code. However, the remaining information was sent to or received from non-privileged parties. Therefore, because non-privileged parties have had access to this information, the work product privilege under section 552.111 has been waived. Accordingly, the commission may not withhold the information we have marked for release as attorney work product under section 552.111 of the Government Code.

As stated above, 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[.]" Gov't Code § 552.111. Section 552.111 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 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, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. ORD 615 at 5; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). 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). However, 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. ORD 615 at 5-6; *see also Dallas Morning News*, 22 S.W.3d at 364 (section 552.111 not applicable to personnel-related communications that did not involve policymaking).

Further, section 552.111 does not generally except from disclosure facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 157; 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). When determining if an interagency memorandum is excepted from disclosure under section 552.111, we must consider whether the agencies between which the memorandum is passed share a privity of interest or common deliberative process with regard to the policy matter at issue. *See* Open Records Decision No. 561 at 9 (1990).

This office also has concluded a preliminary draft of a document that has been or 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* Open Records Decision No. 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 policymaking document that will be released to the public in its final form. *See id.* at 2.

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 No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). 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 id.* We note a governmental body does not have a privity of interest or common deliberative process with a private party with which the governmental body is engaged in contract negotiations. *See id.* (section 552.111 not applicable to communication with entity with which governmental body has no privity of interest or common deliberative process).

You state Attachment F consists of advice, opinions, and recommendations relating to policymaking of the commission. You also state the information at issue contains a draft policymaking document that will be released to the public in its final form. You inform us some of the information at issue was communicated with the OAG, which shares a privity

of interest with the commission with regard to the information at issue. Upon review, we find the commission may withhold the information we have marked and the draft document at issue in its entirety under section 552.111 of the Government Code and the deliberative process privilege. However, we find the remaining information consists of either general administrative information that does not relate to policymaking, information that is purely factual in nature, or communications with individuals with whom you have not demonstrated the commission shares a privity of interest or common deliberative process. Thus, you have failed to demonstrate this information is excepted under section 552.111 of the Government Code, and none of the remaining information may be withheld on this basis.

We note the remaining information contains e-mail addresses of members of the public that are subject to section 552.137 of the Government Code.⁴ 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). Gov’t Code § 552.137(a)-(c). The e-mail addresses we have marked are not of the types specifically excluded by section 552.137(c). *See id.* § 552.137(c). Accordingly, the commission must withhold the e-mail addresses we have marked under section 552.137 of the Government Code unless the owners of the addresses affirmatively consent to their release.

In summary, except for the information we have marked for release, the commission must withhold Attachment G under section 552.101 of the Government Code in conjunction with section 154.073 of the Civil Practice and Remedies Code. If the attachments subject to section 552.022(a)(17) of the Government Code we have marked do not exist separate and apart from the e-mails to which they are attached, the commission may withhold them under rule 503 of the Texas Rules of Evidence. The commission may generally withhold the information within Attachment D not subject to section 552.022(a)(17) under section 552.107(1) of the Government Code. However, if the commission maintains the non-privileged e-mails, which we have marked, separate and apart from the otherwise privileged e-mail strings in which they appear, then the commission may not withhold the non-privileged e-mails under section 552.107(1) of the Government Code. Except for the information we have marked for release, the commission may withhold the information you have marked as attorney work product under section 552.111 of the Government Code. The commission may withhold the information we have marked under section 552.111 of the Government Code and the deliberative process privilege. The commission must withhold the e-mail addresses we have marked under section 552.137 of the Government Code unless the owners of the addresses affirmatively consent to their release. The remaining information must be released.

⁴The Office of the Attorney General 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).

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,

A handwritten signature in black ink that reads "Cole Hutchison". The signature is written in a cursive style with a large, sweeping initial "C".

Cole Hutchison
Assistant Attorney General
Open Records Division

CH/sb

Ref: ID# 644811

Enc. Submitted documents

c: Requestor
(w/o enclosures)