



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 25, 2017

Mr. David Duncan
General Counsel
Texas Department of Motor Vehicles
4000 Jackson Avenue
Austin, Texas 78731

OR2017-08772

Dear Mr. Duncan:

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# 654669 (TxDMV ID# 17-02-036).

The Texas Department of Motor Vehicles (the "department") received a request for correspondence, documents, and records containing specified terms during a specified time period. You state the department will release some information to the requestor upon the payment of costs. 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.¹

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:

¹We 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 those records contain substantially different types of information than that submitted to this office.

...

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

Gov't Code § 552.022(a)(17). The submitted information contains court-filed documents that are subject to section 552.022(a)(17), which must be released unless they are made confidential under the Act or other law. *See id.* Although the department raises sections 552.107 and 552.111 of the Government Code for this information, these exceptions are discretionary in nature and do not make information confidential under the Act. *See* Open Records Decision Nos. 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), 470 at 7 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver). Accordingly, the department may not withhold any of the information subject to section 552.022(a)(17), which we marked, under section 552.107 or section 552.111. 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 and section 552.111 against disclosure of the remaining information.

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 communications involving attorneys for the department and department staff in their capacities as clients. You state these communications were made in furtherance of the rendition of professional legal services to the department. However, we note the court-filed documents have been seen by non-privileged parties, and these documents are separately responsive to the request. Accordingly, to the extent these non-privileged court-filed documents, which we have marked, exist separate and apart from the privileged e-mail communications to which they are attached, the department may not withhold them under rule 503 of the Texas Rules of Evidence. If the marked court-filed documents do not exist separate and apart from the privileged communications, the department 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 you marked that is not subject to section 552.022(a)(17) includes communications involving attorneys for the department and department staff in their capacities as clients. You state these communications were made in furtherance of the rendition of professional legal services to the department. You state these communications were intended to be, and have remained, confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information you have marked. Accordingly, the department may generally withhold the information you marked that is not subject to section 552.022(a)(17) under section 552.107(1) of the Government Code. We note, however, some of these e-mail strings include e-mails and attachments received from or sent to non-privileged parties. Furthermore, if the e-mails received from or sent to non-privileged parties are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, if these non-privileged e-mails and attachments, which we have marked, are maintained by the department separate and apart from the otherwise privileged e-mail strings in which they appear, then the department may not withhold these non-privileged e-mails and attachments under section 552.107(1) of the Government Code.

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. This exception 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. *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 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).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *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).

This office has also concluded 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* 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.

You state the remaining information consists of drafts and communications among department staff that are reflective of the deliberative process by which the department contemplates and deliberates policymaking matters. We understand the drafts will be released in their final forms. Thus, you state the information at issue consists of advice, opinions, and recommendations of the department pertaining to the policymaking functions of the department. Based on your representations and our review of the information at issue, we find the department has demonstrated portions of the information at issue, which we have marked, consist of advice, opinions, or recommendations on the policymaking matters of the department. Therefore, the department may withhold the information we marked under section 552.111 of the Government Code. Upon review, however, we find the remaining information at issue is general administrative and purely factual information or does not pertain to policymaking. Further, some of the remaining information was received from an individual with whom you have not demonstrated the department shares a privity of interest or common deliberative process. Thus, we find you have failed to show the remaining information at issue consists of internal communications containing advice, opinions, or recommendations on the policymaking matters of the department. Accordingly, the department may not withhold the remaining information at issue under section 552.111 of the Government Code.

In summary, the department may withhold the information subject to subsection 552.022(a)(17) of the Government Code we have marked pursuant to rule 503 of the Texas Rules of Evidence, if the marked information does not exist separate and apart from the otherwise privileged communications to which it is attached. The department may generally withhold the information you marked that is not subject to section 552.022(a)(17) under section 552.107(1) of the Government Code. However, to the extent the non-privileged e-mails and attachments we have marked are maintained by the department separate and apart from the otherwise privileged e-mail strings in which they appear, the department must release these non-privileged e-mails and attachments. The department may withhold the

information we marked under section 552.111 of the Government Code. The department must release the remaining 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,



Ian Lancaster
Assistant Attorney General
Open Records Division

IML/sb

Ref: ID# 654669

Enc. Submitted documents

c: Requestor
(w/o enclosures)