



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 3, 2017

Mr. Robert Martinez
Director
Environmental Law Division
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

OR2017-25241

Dear Mr. Martinez:

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# 683095 (PIR no. 17-35340).

The Texas Commission on Environmental Quality (the "commission") received a request for records pertaining to the water systems of three specified cities. You state you have released some information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.110, 552.111, 552.117, 552.136, 552.137, and 552.139 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence. You also state release of this information may implicate the proprietary interests of Ingevity Corporation ("Ingevity"). Accordingly, you state, and provide documentation supporting, you notified Ingevity of the request for information and of its right to submit arguments to this office as to why the information at issue should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from Ingevity. We have reviewed the submitted representative samples of information and considered the submitted arguments.¹

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.

Initially, you state Attachments I, J, K, K-1, L, M, ECU-2, and ECU-3 were the subject of a previous request for a ruling, as a result of which this office issued Open Records Letter No. 2017-11182 (2017). In that ruling, we determined (1) the commission may withhold information it marked under section 552.103 of the Government Code, (2) the commission may withhold information it marked under section 552.101 of the Government Code in conjunction with the common-law informer's privilege, (3) the commission may withhold information it marked under section 552.108(a)(1) of the Government Code, (4) the commission must withhold the personal information of employees who timely requested confidentiality under section 552.024 of the Government Code under section 552.117 of the Government Code, (5) the commission must withhold conference call telephone numbers and access codes under section 552.136 of the Government Code, (6) the commission must withhold the personal e-mail addresses we marked under section 552.137 of the Government Code, and (7) the commission must withhold the computer network security information it marked under section 552.139 of the Government Code. You state the law, facts, or circumstances on which the prior ruling was based have not changed. Thus, the commission must continue to rely on Open Records Letter No. 2017-11182 as a previous determination and withhold or release the information in Attachments I, J, K, K-1, L, M, ECU-2, and ECU-3 in accordance with that ruling.² *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Section 552.103 of the Government Code provides in relevant part as follows:

(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.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for

²As we are able to make this determination, we need not address the submitted arguments against disclosure of this information.

information and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate litigation is reasonably anticipated, the governmental body must furnish “concrete evidence showing that the claim litigation may ensue is more than mere conjecture.” *Id.* In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the concrete evidence must at least reflect litigation is “realistically contemplated.” *See* Open Records Decision No. 518 at 5 (1989); *see also* Attorney General Opinion MW-575 (1982) (finding investigatory file may be withheld if governmental body attorney determines it should be withheld pursuant to section 552.103 and litigation is “reasonably likely to result”).

You argue Attachments D, F, H, N, N-1, O, and T are protected by section 552.103 of the Government Code. You state the commission regulates public water systems in the State of Texas. You state Attachment D relates to the commission’s pending investigation of a “backflow” incident involving the City of Corpus Christi’s drinking water. You inform us if the investigation concludes environmental violations occurred, the violations may be referred to the commission’s Enforcement Division to formally pursue enforcement action. Based on these representations and our review, we find the commission reasonable anticipated litigation involving the City of Corpus Christi’s drinking water when it received the request. You also explain that, prior to the receipt of the instant request, alleged drinking water violations by the City of Dilley were reviewed and referred to the commission’s Enforcement Division. Further, you inform us the commission has sent a proposed agreed order to the City of Dilley regarding the violations at issue. We understand you to assert that if the settlement negotiations fail, litigation between the commission and the City of Dilley will result. Based on your representations and our review, we find the commission reasonably anticipated litigation involving the City of Dilley when it received the instant request. Lastly, you inform us docket no. 2015-1478-PWS-E has been referred to the commission’s ligation division and a petition has been filed. Thus, we find litigation was pending for docket no. 2015-1478-PWS-E on the date the commission received the request. Further, you inform us the information at issue is related to the subject matters of the pending and the anticipated litigation. Therefore, we conclude the commission may generally withhold Attachments D, F, H, N, N-1, O, and T under section 552.103 of the Government Code.³

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

We note, however, it appears one of the opposing parties at issue has seen or had access to some of the information at issue, which we have marked, and it may not be withheld under section 552.103. The purpose of section 552.103 of the Government Code is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. *See* ORD 551 at 4-5. Thus, 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. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, information that has either been obtained from or provided to all parties to the litigation may not be withheld under section 552.103(a). However, the commission may withhold the remaining information at issue under section 552.103. Further, the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

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. You raise section 552.101 in conjunction with the common-law informer’s privilege, which Texas courts have long recognized. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). The informer’s privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority. *See* Open Records Decision No. 208 at 1-2 (1978). The informer’s privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to “administrative officials having a duty of inspection or of law enforcement within their particular spheres.” Open Records Decision No. 279 at 1-2 (1981) (citing 8 John H. Wigmore, *Evidence in Trials at Common Law*, § 2374, at 767 (J. McNaughton Rev. Ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4 (1988). However, witnesses who provide information in the course of an investigation but do not make a report of the violation are not informants for the purposes of claiming the informer’s privilege. The privilege excepts the informer’s statement only to the extent necessary to protect that informer’s identity. Open Records Decision No. 549 at 5 (1990). We note the informer’s privilege does not apply where the informant’s identity is known to the individual who is the subject of the complaint. *See* ORD 208 at 1-2.

You state the information you have marked reveals the identity of complainants who reported possible violations of the Texas Health and Safety Code and Texas Water Code to the commission. We understand the commission has the authority to enforce the relevant code provisions. You also state violations of the relevant code provisions carry civil penalties and are punishable by fines. Based on your representations and our review, we find the commission may withhold the information you marked and the additional information we have marked under section 552.101 of the Government Code in conjunction with the common-law informer’s privilege.

Section 552.107(1) of the Government Code protects information coming 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. Open Records Decision No. 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 “to facilitate the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. 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: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. 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).

You state some of the remaining information consists of privileged attorney-client communications. We note, however, the information at issue was sent to or received by individuals you have not demonstrated are privileged parties. Therefore, you have failed to establish any of the remaining information constitutes privileged attorney-client communications for the purposes of section 552.107(1). Accordingly, the commission may not withhold the information at issue 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, orig. proceeding); 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, orig. proceeding). 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).

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 Nos. 631 at 2 (section 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) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body's consultants). 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.

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 some of the remaining information consists of advice, opinions, and recommendations of commission employees and legal counsel relating to the commission's policy. In this instance, we find the information we marked consists of advice, opinions, and recommendations pertaining to the policymaking matters of the commission. However, we find the remaining information at issue either consists of factual information, consists of internal administrative matters that do not rise to the level of policymaking, or was communicated with parties you have not identified as sharing a privity of interest or common deliberative process with the commission. Therefore, we conclude you have failed to demonstrate the remaining information at issue constitutes internal communications containing advice, recommendations, or opinions reflecting the policymaking processes of the commission. Consequently, the commission may not withhold any of the remaining information under section 552.111 of the Government Code.

Section 552.111 of the Government Code also 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) 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). 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. TEX. R. CIV. P. 192.5; ORD 677 at 6-8. In order for this office to conclude 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 commission asserts some of the remaining information consists of attorney work product under section 552.111 of the Government Code. Upon review, we find the commission has failed to establish the information at issue was created in anticipation of litigation or for trial by or for the commission or representatives of the commission. *See Nat'l Tank*, 851 S.W.2d at 206 (information created in ordinary course of business constitutes work product if agency demonstrates primary motivating purpose for preparation of information was in anticipation of litigation); *see also* ORD 677 at 7. Further, the commission has failed to demonstrate all of the individuals in the communications at issue are privileged. Therefore, the commission may not withhold any portion of the information at issue as attorney work product under section 552.111 of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). Section 552.117(a)(1) also applies to the personal cellular telephone number of a current or former official or employee of a governmental body, provided the cellular telephone service is not paid by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. Therefore, to the extent the employees whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the commission must withhold the information you marked and we marked under section 552.117(a)(1) of the Government Code; however, the commission may only withhold the marked cellular telephone numbers if the cellular telephone service is not paid for by a governmental body. Conversely, to the extent the employees whose information is at issue did not timely request confidentiality under section 552.024, the commission may not withhold the marked information under section 552.117(a)(1).

Section 552.136(b) of the Government Code provides, “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). Upon review, we agree the commission must withhold the conference call telephone numbers and access codes you have marked under section 552.136 of the Government Code.

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). *Id.* § 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). In *Austin Bulldog v. Leffingwell*, 490 S.W.3d 240 (Tex. App.—Austin 2016, no pet.), the court concluded section 552.137 does not except from disclosure the private e-mail addresses of government officials who use their private e-mail addresses to conduct official government business. *See Austin Bulldog*, 490 S.W.2d at 491. Thus, the personal e-mail addresses of commission officials and employees in the remaining information are not subject to section 552.137, and the commission may not withhold them on that basis. However, to the extent the e-mail addresses within the remaining information are not the personal e-mail addresses of commission officials or employees and subsection (c) does not apply, this information is subject to section 552.137 and the commission must withhold such e-mail addresses under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release.

Section 552.139(a) of the Government Code provides:

(a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

Gov’t Code § 552.139(a). You explain the information you have marked relates to a secure, non-public site, as well as the security information used to access the site. Based on your representations, we find the information you have marked is related to computer network security and the design, operation, or defense of a computer network. Thus, the commission must withhold the information you have marked under section 552.139(a).

In summary, the commission must continue to rely on Open Records Letter No. 2017-11182 as a previous determination and withhold or release the information in Attachments I, J, K, K-1, L, M, ECU-2, and ECU-3 in accordance with that ruling. With the exception of the information we have marked for release, the commission may withhold Attachments D, F, H, N, N-1, O, and T under section 552.103 of the Government Code. The commission may withhold the information you marked and the additional information we have marked under section 552.101 of the Government Code in conjunction with the common-law informer’s privilege. The commission may withhold the information we marked under section 552.111 of the Government Code. To the extent the employees whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the commission must withhold the information you marked and we marked under section 552.117(a)(1) of

the Government Code; however, the commission may only withhold the marked cellular telephone numbers if the cellular telephone service is not paid for by a governmental body. The commission must withhold the conference call telephone numbers and access codes you have marked under section 552.136 of the Government Code. To the extent the e-mail addresses within the remaining information are not the personal e-mail addresses of commission officials or employees and subsection (c) does not apply, this information is subject to section 552.137 and the commission must withhold such e-mail addresses under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release. The commission must withhold the information you have marked under section 552.139(a). The commission 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,



Paige Lay
Assistant Attorney General
Open Records Division

PL/gw

Ref: ID# 683095

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

cc: Third Party
(w/o enclosures)