



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 10, 2018

Ms. Lisa Calem-Lindström
Public Information Coordinator
Texas Facilities Commission
P.O. Box 13047
Austin, Texas 78711-3047

OR2018-00715

Dear Ms. Calem-Lindstrom:

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# 689221.

The Texas Facilities Commission (the "commission") received a request for recordings of commission meetings; specified job postings; with specified exceptions, all communications to or from commissioners; records relating to hiring specified positions; and communications to or from specified agencies related to board governance or oversight, during specified time periods.¹ The commission states it has released some of the requested information. The commission claims the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, 552.116, and 552.139 of the Government Code. Additionally, we have received comments from the Office of the Governor (the "governor's office"). See Gov't Code § 552.304 (interested party may submit comments

¹The commission states it sought and received clarification of the information requested. See Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); 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).

stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted representative sample of information.²

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:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(15) information regarded as open to the public under an agency's policies; [and]

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

Id. § 552.022(a)(1), (15), (17). The information submitted as Exhibits C, D, and F includes completed reports and investigations that are subject to section 552.022(a)(1). The commission must release the completed reports and investigations pursuant to section 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or are made confidential under the Act or other law. *See id.* § 552.022(a)(1). The submitted information also contains job descriptions that are subject to section 552.022(a)(15) if the commission considers these items to be open to the public under its policies and contains court-filed documents that are 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.* § 552.022(a)(15), (17). The commission seeks to withhold the information subject to section 552.022 under sections 552.103, 552.107, and 552.116 of the Government Code. However, sections 552.103, 552.107, and 552.116 are discretionary in nature and do not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); *see also* 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

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

generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the commission may not withhold the information subject to section 552.022 within Exhibits C and F, which we marked, under section 552.103 or section 552.116 of the Government Code. Further, the commission may not withhold the information subject to section 552.022 within Exhibit D under the attorney-client privilege of section 552.107 of the Government Code. However, 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 the commission’s assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence for the information at issue in Exhibit D. Further, we will consider the commission’s remaining arguments against disclosure of the submitted information not subject to section 552.022 of the Government Code. In addition, because sections 552.117 and 552.137 of the Government Code make information confidential under the Act, we will consider the applicability of these exceptions to the submitted information.³

Texas Rule of Evidence 503(b)(1) provides as follows:

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 it is not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the

³The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must (1) show 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 the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding).

The commission asserts the information within Exhibit D subject to section 552.022 consists of privileged attorney-client communications between the commission's attorneys and outside counsel and commission officials and staff in their capacities as clients. The commission states the communications at issue were made for the purpose of the rendition of legal services to the commission. The commission states the communications at issue have not been, and were not intended to be, disclosed to third parties. Based on these representations and our review of the information at issue, we find the commission has established the information at issue constitutes attorney-client communications under rule 503. Thus, the commission may withhold the information within Exhibit D that is subject to section 552.022 of the Government Code pursuant to rule 503 of the Texas Rules of Evidence.

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. The commission raises section 552.101 in conjunction with a provision of the Texas Homeland Security Act (the "HSA"), chapter 418 of the Government Code. Section 418.177 was added to chapter 418 as part of the HSA and provides that information is confidential if it:

- (1) is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity; and
- (2) relates to an assessment by or for a governmental entity, or an assessment that is maintained by a governmental entity, of the risk or vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity.

Id. § 418.177. The fact that information may relate to a governmental body's security measures does not make the information *per se* confidential under the HSA. *See* Open Records Decision No. 649 (1996). Furthermore, the mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the HSA must adequately explain how the responsive records fall within the scope of the claimed provision. *See id.* § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

The commission states the information submitted as Exhibits A-1, A-2, and A-3 consists of audits of the commission's information technology division and the commission's building automation program and systems. The commission explains the information concerns the assessment, operation, and risks of its information systems, building access and security, and building automation systems. The commission informs us it maintains and controls a number of state buildings and asserts its computer and building automation systems have vital information about buildings and security systems that control fire alarm and suppression systems, ventilation, electricity, water and utilities, and elevators. Upon review, we agree the state buildings at issue are critical infrastructure for purposes of section 418.177. Thus, we find the commission has demonstrated the information at issue consists of assessments of the risk or vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity that must be withheld under section 552.101 of the Government Code in conjunction with section 418.177 of the Government Code.⁴

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). However, this office has concluded the public has a legitimate interest in information that relates to public employees and their conduct in the workplace. *See, e.g.*, Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs but in fact touches on matters of legitimate public concern), 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of government employees), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal

⁴As our ruling is dispositive for this information, we need not address the remaining argument against its disclosure.

public interest). Upon review, we find some of the information submitted as Exhibit B, which we have marked, satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, the commission must withhold the information we marked within Exhibit B under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find the commission has not demonstrated any of the remaining information at issue is highly intimate or embarrassing and not of legitimate public concern. Thus, the commission may not withhold any portion of the remaining information under section 552.101 in conjunction with common-law privacy.

Section 552.103 of the Government Code provides, in relevant part:

(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 claiming section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information, and (2) the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

The commission states, and provides documentation showing, prior to its receipt of the instant request, a lawsuit styled *Charles D. Williams v. Texas Facilities Commission*, Cause No.1:17-CV-00689-LY, was filed and is currently pending against the commission in the United States District Court for the Western District of Texas. Therefore, we agree litigation was pending on the date the commission received the present request for information. The commission also states the remaining information in Exhibit C relates to the lawsuit. Based on these representations and our review, we find the information at issue is related to the

pending litigation. Therefore, we conclude the commission may withhold the information not subject to section 552.022 of the Government Code within Exhibit C under section 552.103 of the Government Code.

Generally, however, 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). Thus, information that has either been obtained from or provided to all parties to the pending or anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

The commission claims section 552.107 of the Government Code for portions of the information in Exhibit D not subject to section 552.022. Section 552.107(1) protects information that comes within the attorney-client privilege. The elements of the privilege under section 552.107 are the same as those discussed 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. *See* 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 v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

As noted above, the commission informs us some of the remaining information in Exhibit D consists of communications between the commission's attorneys and outside counsel and commission officials and staff in their capacities as clients, made for the purpose of the rendition of legal services to the commission. The commission states the communications were intended to be confidential. However, we note the commission also states some of the information at issue, which it marked, was shared with an outside party. The commission does not list or identify this outside party as a privileged party. Thus, we understand the commission does not seek to withhold the information it marked under section 552.107(a). Based on the commission's representations and our review, we find the commission has demonstrated the applicability of the attorney-client privilege to the remaining information at issue in Exhibit D. Accordingly, with the exception of the information the commission marked, the commission may withhold the remaining information in Exhibit D under section 552.107(1) of the Government Code.

Section 552.116 of the Government Code provides,

- (a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district,

a hospital district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from [required public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public disclosure] by this section.

(b) In this section:

(1) “Audit” means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, the bylaws adopted by or other action of the governing board of a hospital district, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) “Audit working paper” includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov’t Code § 552.116. The commission asserts the remaining information submitted as Exhibit F consists of audit working papers pertaining to audits conducted by the commission’s internal auditor and the commission’s outside contractor pursuant to section 2102.007 of the Government Code. *See id.* §§ 552.116(b)(1), 2102.007(a)(5), (6). Based on these representations and our review, we agree the information at issue constitutes audit working papers. Therefore, the commission may withhold the information not subject to section 552.022 of the Government Code within Exhibit F under section 552.116 of the Government Code.⁵

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[.]” *Id.* § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111

⁵As our ruling is dispositive for this information, we need not address the governor’s office’s argument against its disclosure.

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.

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* ORD 561.

The governor's office argues portions of the information the commission marked within Exhibit D are protected by section 552.111 of the Government Code. The governor's office states the information consists of communications between the commission and the governor's office in their official policy-making capacities. The governor's office argues as the chief executive office of the State of Texas, it shares a privity of interest and common deliberative process with the commission with regard to specific policy-making issues of broad scope. The governor's office states the information at issue, which it marked, consists of advice and recommendations of the governor's office and includes opinions and advice from the commission on the recommendations of the governor's office. Based on these representations and our review of the information at issue, we find the governor's office has demonstrated the information it marked consists of advice, opinions, or recommendations relating to policymaking matters. Thus, the commission may withhold the information the governor's office marked under section 552.111 of the Government Code.

The commission "asserts that the documents submitted as Exhibit E may be withheld under [s]ection 552.111 as drafts." However, the commission does not inform us, and we are unable to determine, whether the documents at issue will be made available to the public in their final forms. Upon review, therefore, we find if the draft documents within Exhibit E, which we have marked, will be released to the public in their final forms, then the commission may withhold the draft documents we marked under section 552.111 of the Government Code. However, if the marked draft documents will not be released to the public in their final forms, then the commission may not withhold them under section 552.111. Further, the remaining information in Exhibit E does not consist of draft documents. Moreover, the commission has not otherwise demonstrated the remaining information in Exhibit E consists of advice, opinions, or recommendations on the policymaking matters of the commission. Accordingly, the commission may not withhold any portion of the remaining information at issue 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). We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). 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, if the individuals whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the commission must withhold the information we have marked under section 552.117(a)(1) of the Government Code; however, the marked cellular telephone number may be withheld only if a governmental body does not pay for the cellular telephone service. Conversely, if the individuals 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 552.137 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). *See* Gov't Code § 552.137(a)-(c). The e-mail address at issue is not excluded by subsection (c). Therefore, the commission must withhold the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure.

In summary, the commission may withhold the information subject to section 552.022 of the Government Code within Exhibit D pursuant to rule 503 of the Texas Rules of Evidence. The commission must withhold Exhibits A-1, A-2, and A-3 under section 552.101 of the Government Code in conjunction with section 418.177 of the Government Code. The commission must withhold the information we marked in Exhibit B under section 552.101 of the Government Code in conjunction with common-law privacy. The commission may withhold the information not subject to section 552.022 within Exhibit C under section 552.103 of the Government Code. With the exception of the information the commission marked, the commission may withhold the remaining information in Exhibit D under section 552.107(1) of the Government Code. The commission may withhold the information not subject to section 552.022 of the Government Code within Exhibit F under section 552.116 of the Government Code. The commission may withhold the information the governor's office marked within Exhibit D under section 552.111 of the Government Code. If the draft documents within Exhibit E, which we marked, will be released to the public in their final forms, then the commission may withhold the draft documents we marked under section 552.111 of the Government Code. If the individuals whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the commission must withhold the information we marked under section 552.117(a)(1) of the Government Code; however, the marked cellular telephone number may be withheld only if a governmental body does not pay for the cellular telephone

service. The commission must withhold the personal e-mail address we marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure. 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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/som

Ref: ID# 689221

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)