



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 23, 2018

Ms. Charmaine K. Backens
Director
Litigation Division
Texas Commission on Environmental Equality
P.O. Box 13087
Austin, Texas 78711-3087

OR2018-04314

Dear Ms. Backens:

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# 696845 (PIR No. 18-37237).

The Texas Commission on Environmental Quality (the "commission") received a request for specified information pertaining to Arkema, Inc. ("Arkema").¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.111, 552.117, and 552.136 of the Government Code. Additionally, the commission states release of the submitted information may implicate the proprietary interests of Arkema and Pollution Control Services ("Pollution Control"). Accordingly, the commission states, and provides documentation showing, it notified each third party of the request for information and of its right to submit arguments to this office as to why the submitted information 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

¹We note the commission 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 when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

in certain circumstances). Further, the commission provides documentation showing it notified the Environmental Protection Agency and the United States Department of Health and Human Services of their right to submit comments to this office why some of the submitted information should not be released.² *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have received comments from Arkema. We have considered the submitted arguments and reviewed the submitted representative sample of information.³

Initially, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) of the Government Code to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Pollution Control explaining why the submitted information should not be released. Therefore, we have no basis to conclude Pollution has a protected proprietary interests in the submitted information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the commission may not withhold any portion of the submitted information related to Pollution Control on the basis of any proprietary interest it may have in the information.

We note most of the information at issue was the subject of a previous request for a ruling, as a result of which this office issued Open Records Letter No. 2017-26401 (2017). In that ruling, we determined the commission: must withhold certain information under section 552.101 of the Government Code in conjunction with section 418.178 of the Government Code; may withhold certain information under section 552.108(a)(1) of the Government Code; may withhold certain information under section 552.103 of the Government Code; must withhold certain information under section 552.136 of the Government Code; and, to the extent the personal e-mail addresses in the remaining responsive information are not the personal e-mail addresses of government officials or employees and subsection (c) does not apply, must withhold certain information under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release. We also determined the commission must release the remaining responsive information. We have

²As of the date of this letter, this office has not received comments from either of these third parties explaining why any of the submitted information should not be released.

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.

no indication the law, facts, or circumstances on which the prior ruling was based have changed. Thus, the commission must continue to rely on Open Records Letter No. 2017-26401 as a previous determination and withhold or release the information at issue in accordance with that ruling. *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). As we are able to make this determination, we need not address your submitted arguments for this information. However, we will consider the exceptions you raise for the information we indicated, which is not subject to Open Records Letter No. 2017-26401.

We note Attachment K.3 contains court-filed documents. Section 552.022(a)(17) of the Government Code provides for required public disclosure of “information that is also contained in a public court record,” unless the information is made confidential under the Act or other law. Gov’t Code § 552.022(a)(17). Although the commission seeks to withhold this information under sections 552.103 and 552.107 of the Government Code, these sections are discretionary exceptions 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); Open Records Decision No. 676 at 6 (2002) (attorney-client privilege under section 552.107 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.103 and 552.107 do not make information confidential for the purposes of section 552.022. Accordingly, the commission may not withhold the court-filed documents in Attachment K.3 under section 552.103 or section 552.107. However, the Texas Supreme Court has held the Texas Rules of Evidence are “other law” that make information expressly confidential for purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Thus, we will consider the commission’s assertion of the attorney-client privilege under Texas Rule of Evidence 503 for the information subject to section 552.022(a)(17). Further, we will address your claims under sections 552.103 and 552.107 for the submitted information not subject to section 552.022(a)(17) of the Government Code.

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. The commission contends some of the remaining information is confidential under section 552.101 in conjunction with sections 418.177, 418.178, and 418.181 of the Government Code. These sections were added to chapter 418 of the Government Code as part of the Texas Homeland Security Act (“HSA”). Section 418.177 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. Section 418.178 provides:

(a) In this section, “explosive weapon” has the meaning assigned by Section 46.01, Penal Code.

(b) Information is confidential if it is information collected, assembled, or maintained by or for a governmental entity and:

(1) is more than likely to assist in the construction or assembly of an explosive weapon or a chemical, biological, radiological, or nuclear weapon of mass destruction; or

(2) indicates the specific location of:

(A) a chemical, biological agent, toxin, or radioactive material that is more than likely to be used in the construction or assembly of such a weapon; or

(B) unpublished information relating to a potential vaccine or to a device that detects biological agents or toxins.

Id. § 418.178. Section 418.181 provides:

Those documents or portions of documents in the possession of a governmental entity are confidential if they identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism.

Id. § 418.181. The fact that information may be related to a governmental body’s security concerns, biological toxins, or emergency preparedness does not make such information *per se* confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). As with any confidentiality statute, a governmental body asserting one of the confidentiality provisions of the HSA must adequately explain how the responsive records fall within the scope of that provision. *See*

Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

The commission argues some of the remaining information is confidential under section 418.178(b) because it reveals information regarding a specific facility that stores hazardous chemicals that are more than likely to assist in the construction or assembly of an explosive weapon. Upon review, we find the information we indicated is confidential under section 418.178 of the Government Code. Therefore, the commission must withhold the information at issue under section 552.101 of the Government Code in conjunction with section 418.178 of the Government Code.⁴

However, we conclude the remaining information at issue does not indicate the specific locations of chemicals that are more than likely to assist in the construction or assembly of an explosive weapon. Further, the commission has not explained how section 418.178(b)(1) or section 418.178(b)(2)(B) encompass any of the remaining information at issue. We also find the commission has not demonstrated the remaining information at issue is confidential under section 418.177 or section 418.181 of the Government Code. Accordingly, the commission may not withhold any of the remaining information at issue under section 552.101 of the Government Code in conjunction with section 418.177, section 418.178, or section 418.181 of the Government Code.

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.

Id. § 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

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

anticipated on the date the governmental body received the request for 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 commission indicates a lawsuit styled *Harris County v. Arkema, Inc.*, Cause No. 2017-76961, was pending in the 157th Judicial District Court of Harris County, Texas, when it received the instant request for information. The commission informs us it was named a necessary and indispensable party to the suit pursuant to section 7.353 of the Texas Water Code. *See* Water Code § 7.353. You state the information we indicated in Attachments F.1, F.6, G.1, and G.4 is related to the pending lawsuit. Based on your representations and our review of the submitted information, we find litigation was pending when the commission received this request for information, and the information at issue is related to the pending litigation for the purposes of section 552.103. Therefore, the commission may generally withhold the information we indicated in Attachments F.1, F.6, G.1, and G.4 under section 552.103(a) of the Government Code.

We note, however, the opposing party has seen or had access to some of the information at issue. 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 the opposing party in pending litigation has seen or had access to information that is related to the litigation, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Accordingly, the commission may not withhold the information seen by the opposing party in Attachment G.1, which we indicated, under section 552.103. However, the commission may withhold the remaining information at issue under section 552.103 of the Government Code.⁵ We note the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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

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:

⁵As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

- (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 state the information subject to section 552.022(a)(17) in Attachment K.3 consists of communications between and among attorneys for the commission that were made for the purpose of facilitating the rendition of professional legal services to the commission. You state these communications were intended to be confidential and have remained confidential. Upon review, we find you have established the information at issue constitutes privileged attorney-client communications under rule 503. Thus, the commission may withhold the information subject to section 552.022(a)(17) of the Government Code in Attachment K.3 under Texas Rule of Evidence 503.

Section 552.108(a)(1) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). The commission states the information we indicated in Attachment Q.2 relates to an ongoing criminal investigation by the commission’s Environmental Crimes Unit, and release of the information would interfere with the investigation of the alleged criminal conduct. This office has previously determined that the Environmental Crimes Unit of the commission is a law enforcement agency for purposes of section 552.108. Based on the commission’s representation and our review, we find release of the information at issue would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Accordingly, the commission may withhold the information we indicated in Attachment Q.2 under section 552.108(a)(1) of the Government Code.⁶

Section 552.111 of the Government Code excepts from disclosure “an 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) 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 governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party’s representative. *Id.*;

⁶As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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 U.S. v. Nobles*, 422 U.S. 225, 236 (1975). Upon review, we find you have failed to establish any of the information in Attachment G.1 consists of material prepared, mental impressions developed, or a communication made in anticipation of litigation or for trial by or for the department or representatives of the commission. Therefore, the commission may not withhold any of the information at issue as attorney work product under section 552.111 of the Government Code.

As state 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. 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*, 22 S.W.3d at 351 (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).

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.

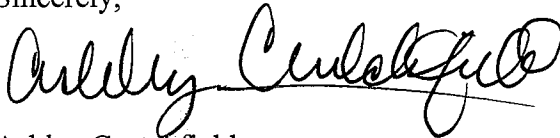
The commission states some of the information in Attachment G.1 “consists of interagency communications and documents containing advice, opinion, or recommendations on policymaking matters[.]” Upon review, however, we find the information at issue was received from or sent to an individual with whom you have not demonstrated the commission shares a privity of interest or common deliberative process. Thus, we find the commission has failed to show the information at issue consists of internal communications containing advice, opinions, or recommendations on the policymaking matters of the commission. Accordingly, the commission may not withhold the information at issue in Attachment G.1 under section 552.111 of the Government Code.

In summary, the commission must continue to rely on Open Records Letter No. 2017-26401 as a previous determination and withhold or release the information at issue in accordance with that ruling. The commission must withhold the information we indicated under section 552.101 of the Government Code in conjunction with section 418.178 of the Government Code. The commission may withhold the information we indicated in Attachments F.1, F.6, G.1, and G.4 under section 552.103 of the Government Code. The commission may withhold the information subject to section 552.022(a)(17) in Attachment K.3 pursuant to Texas Rule of Evidence 503. The commission may withhold the information we indicated in Attachment Q.2 under section 552.108(a)(1) of the Government Code. 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,



Ashley Crutchfield
Assistant Attorney General
Open Records Division

AC/sb

Ref: ID# 696845

Enc. Submitted documents

c: Requestor
(w/o enclosures)

4 Third Parties
(w/o enclosures)