



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 6, 2019

Mr. Dane C. Brunn
Counsel for the Port of Corpus Christi Authority of Nueces County
Welder Leshin LLP
800 North Shoreline Boulevard, Suite 300 North
Corpus Christi, Texas 78401

OR2019-03487

Dear Mr. Brunn:

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# 749042.

The Port of Corpus Christi Authority of Nueces County (the "authority"), which you represent, received eighteen requests from the same requestor for (1) information pertaining to the authority's involvement with a named individual, (2) information pertaining to the termination of a named former authority official, and (3) information pertaining to a specified authority project. You state the authority released some of the requested information to the requestor. You state the authority does not have information responsive to one of the requests.¹ You claim the submitted information is excepted from disclosure under sections 552.103, 552.104, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information, some of which is a representative sample.²

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

²We assume that 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.

Initially, we note parts of Exhibit F are subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part, the following:

(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:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). Exhibit F includes information in an account, voucher, or contract relating to the receipt or expenditure of funds by a governmental body that is subject to section 552.022(a)(3). The authority must release this information pursuant to section 552.022(a)(3), unless it is made confidential under the Act or other law. *See id.* Although you raise section 552.103 of the Government Code for this information, section 552.103 is discretionary in nature and does not make information confidential under the Act. *See Dallas Area Rapid Transit*, 4 S.W.3d at 475-76 (governmental body may waive section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1990) (waiver of discretionary exceptions). Therefore, the authority may not withhold any of the information subject to section 552.022(a)(3) under section 552.103. However, you also argue section 552.104 of the Government Code for Exhibit F. Section 552.104(b) provides information encompassed by section 552.022 may be withheld under section 552.104(a). *See* Gov't Code § 552.104(b) (information protected by section 552.104 not subject to required disclosure under section 552.022(a)). Thus, we will address your argument under section 552.104 of the Government Code for this information. Further, we will address your argument under section 552.103 of the Government Code against disclosure of the remaining information not subject to section 552.022 of the Government Code.

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. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate 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 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. *See 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 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 Exhibit D consists of communications between attorneys for the authority, representatives of the authority’s attorneys, and authority representatives made for the purpose of providing legal services to the authority. You indicate the communications were intended to be and have remained confidential. Based on your representations and our review, we find Exhibit D consists of privileged attorney-client communications the authority may generally withhold under section 552.107(1) of the Government Code. We note, however, some of these otherwise privileged e-mail strings include e-mails received from or sent to non-privileged parties. Furthermore, if the e-mails received from or sent to non-privileged parties are removed from the otherwise privileged e-mail strings in which they appear and stand alone, they are responsive to the request for information. Therefore, if these non-privileged e-mails, which we marked, are maintained by the authority separate and apart from the otherwise privileged e-mail strings in which they appear, then the authority may not withhold these non-privileged e-mails under section 552.107(1). In that event, we address your remaining arguments against disclosure of the non-privileged e-mails.

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.*; 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 failed to establish the non-privileged e-mails consist of material prepared, mental impressions developed, or a communication made in anticipation of litigation or for trial by or for the authority or representatives of the authority. Therefore, if the e-mails received from or sent to non-privileged parties in Exhibit D are removed from the otherwise privileged e-mail strings in which they appear and stand alone, the authority may not withhold any of the non-privileged e-mails as attorney work product under section 552.111 of the Government Code in conjunction with the attorney-client privilege.

Section 552.111 of the Government Code also encompasses the deliberative process privilege. *See Open Records Decision No. 615 at 2* (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630

S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. 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 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.

You assert section 552.111 of the Government Code in conjunction with the deliberative process for Exhibit D. Upon review, we find the non-privileged e-mails were shared with third parties with whom you have not demonstrated shared a privity of interest with the authority. Therefore, we find you failed to demonstrate the non-privileged e-mails constitute internal communications containing advice, recommendations, or opinions reflecting the policymaking processes of the authority. Accordingly, if the e-mails received from or sent to non-privileged parties in Exhibit D are removed from the otherwise privileged e-mail strings in which they appear and stand alone, the authority may not withhold any of the non-

privileged e-mails under section 552.111 of the Government Code in conjunction with the deliberative process privilege.

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).³ Gov’t Code § 552.137(a)-(c). The e-mail addresses at issue are not of a type specifically excluded by section 552.137(c) of the Government Code. Accordingly, if the e-mails received from or sent to non-privileged parties in Exhibit D are removed from the otherwise privileged e-mail strings in which they appear and stand alone, the authority must withhold the e-mail addresses we marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their disclosure.

Section 552.103 of the Government Code provides 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). A 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 (1) litigation was pending or reasonably 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

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

You state, and provide documentation showing, a lawsuit styled *In re Port of Corpus Christi*, Cause No. 2018DCV-4898-C, was pending against the authority in the 94th Judicial District Court of Nueces County, Texas, when it received the instant request for information. You state Exhibits E and F are related to the pending lawsuit. Based on your representations, the submitted documentation, and our review of the information at issue, we find litigation was pending when the authority received this request for information, and Exhibits E and F are related to the pending litigation for the purposes of section 552.103. Therefore, the authority may withhold Exhibit E and the parts of Exhibit F not subject to section 552.022 of the Government Code under section 552.103(a) 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. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing parties in the pending litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

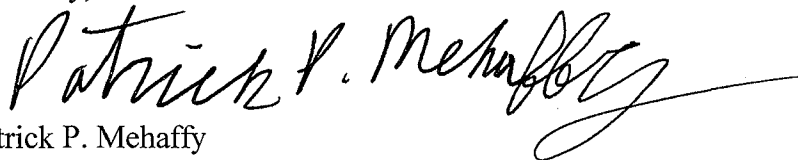
Section 552.104(a) of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). The “test under section 552.104 is whether knowing another bidder’s [or competitor’s information] would be an advantage, not whether it would be a decisive advantage.” *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). You state the authority has specific marketplace interests in Exhibit F because the authority is competing with local competitors in the marine port and dredging industries. In addition, you state release of Exhibit F would provide the authority’s competitors information that could be used to “undercut [the authority]’s commercial terms[.]” After review of the information at issue and consideration of the arguments, we find the authority established the release of Exhibit F would give advantage to a competitor or bidder. Thus, we conclude the authority may withhold the parts of Exhibit F subject to section 552.022 of the Government Code under section 552.104(a) of the Government Code.

In summary, the authority may generally withhold Exhibit D under section 552.107(1) of the Government Code; however, the authority may not withhold the marked non-privileged e-mails if they are maintained separate and apart from the otherwise privileged e-mail strings in which they appear. In that instance, the authority must withhold the e-mail addresses we marked under section 552.137 of the Government Code and release the remaining portions of the non-privileged e-mails. The authority may withhold Exhibit E and the portions of Exhibit F not subject to section 552.022 of the Government Code under section 552.103 of the Government Code. The authority may withhold the portions of Exhibit F subject to section 552.022 of the Government Code under section 552.104(a) of the Government Code.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, reading "Patrick P. Mehaffy". The signature is written in a cursive style with a long, sweeping underline that extends to the right.

Patrick P. Mehaffy
Assistant Attorney General
Open Records Division

PPM/gw

Ref: ID# 749042

Enc. Submitted documents

c: Requestor
(w/o enclosures)