



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 6, 2019

Mr. Justin S. Light
Counsel for the Tarrant Regional Water District
Pope, Hardwicke, Christie, Schell, Kelly & Taplett, L. L. P.
500 West 7th Street, Suite 600
Fort Worth, Texas 76102

OR2019-06257

Dear Mr. Light:

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# 753180 (TRWD PIR 18.158).

The Tarrant Regional Water District (the "district"), which you represent, received a request for e-mails sent to or received from two named individuals and e-mails sent to or received from a specified domain during a specified time period.¹ You state the district will release some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.104, 552.107, and 552.111 of the

¹You inform us the district sent the requestor a cost estimate pursuant to section 552.2615 of the Government Code. *See* Gov't Code § 552.2615. The cost estimate required the requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. *See id.* § 552.263(a). We understand the requestor modified his request in response to the cost estimate. *See id.* § 552.222(b) (governmental body may communicate with requestor for purposes of clarifying or narrowing request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when governmental entity, acting in good faith, requests clarification or narrowing of unclear or overbroad request for public information, ten-day period to request attorney general ruling is measured from date request is clarified or narrowed). You state the district sent a second cost estimate in response to the modified request. The second cost estimate also required the requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. *See* Gov't Code § 552.263(a). You also inform us the district received the required deposit on December 7, 2018. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date governmental body receives bond or deposit).

Government Code. You also state you notified the Department of the Army, Corps of Engineers, Fort Worth District (the "Corps") 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 § 552.304 (interested party may submit comments stating why information should or should not be released). We received comments from the Corps. We have considered the submitted arguments and reviewed the submitted representative samples of information.²

Initially, we note some of the submitted information is 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[.]

Id. § 552.022(a)(3). The submitted information includes contracts relating to the receipt or expenditure of funds by a governmental body that are subject to section 552.022(a)(3). The district 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 seek to withhold this information under section 552.107 of the Government Code, this section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* 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). Thus, the district may not withhold this information under section 552.107 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503 for this information. Further, we will address your arguments under section 552.107 of the Government Code for the information not subject to section 552.022 of the Government Code.

²We assume that the "representative samples" of records submitted to this office are 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

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. This exception encompasses information other statutes make confidential. A federal regulation enacted pursuant to statutory authority can provide statutory confidentiality for purposes of section 552.101 of the Government Code. *See* Open Records Decision No. 599 at 4 (1992). You raise section 552.101 in conjunction with part 24 of title 49 of the Code of Federal Regulations, which implements the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (the “Uniform Act”), and pertains to relocation assistance and real property acquisition for federal and federally-assisted programs. Section 4633 of title 42 of the United States Code authorizes the Secretary of Transportation to prescribe regulations necessary to carry out the Uniform Act. *See* 42 U.S.C. § 4633. Section 24.9 of title 49 of the Code of Federal Regulations states, in part:

(a) Records. The Agency shall maintain adequate records of its acquisition and displacement activities in sufficient detail to demonstrate compliance with this part. These records shall be retained for at least 3 years after each owner of a property and each person displaced from the property receives the final payment to which he or she is entitled under this part, or in accordance with the applicable regulations of the Federal funding Agency, whichever is later.

(b) Confidentiality of records. Records maintained by an Agency in accordance with this part are confidential regarding their use as public information, unless applicable law provides otherwise.

49 C.F.R. § 24.9(a)-(b). You assert the district is an “agency” as understood by this section. “Agency” means a federal agency, state, state agency, or a person that acquires real property or displaces a person from property. *See id.* § 24.2(a)(1). “State Agency” means any department, agency or instrumentality of a state or of a political subdivision of a state, and any person who has the authority to acquire property by eminent domain under state law. *See id.* § 24.2(a)(1)(iv). You state the information you indicated consists of acquisition and displacement records maintained by the district as part of the acquisition and relocation policy for the properties located in the Trinity River Vision project (the “TRV project”) area. You inform us the district is required to maintain this information in sufficient detail “to demonstrate compliance with part 24.” You further state the information is maintained by the district in accordance with part 24 of title 49 of the Code of Federal Regulations. Based upon these representations and our review of the information at issue, we agree the information you indicated is confidential under section 24.9(b) of title 49 of the Code of Federal Regulations. Thus, the district must withhold the information you indicated under section 552.101 of the Government Code in conjunction with section 4633 of title 42 of the United States Code and section 24.9(b) of title 49 of the Code of Federal Regulations.

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.

Gov't Code § 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).

You state, and provide documentation showing, a lawsuit styled *Tarrant County Regional Water District v. Featherngill*, cause number 2017-006467-3, was pending in the County Court at Law Number Three of Tarrant County, Texas, when the district received the instant request for information. You also state a lawsuit styled *Tarrant County Regional Water District v. Starrfoam Manufacturing, Inc.*, cause number 2014-001900-3, was pending in the County Court at Law Number Three of Tarrant County, Texas, when the district received the instant request. You further state a lawsuit styled *Valera v. Enverest Operating, LLC*, cause number 18-8351-431 was pending against the district in the 431st Judicial District Court of Denton County, Texas, when the district received the instant request. You state the information you indicated is related to the pending lawsuits. Based on your representations, the submitted documentation, and our review of the information at issue, we find litigation was pending when the district 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 district may withhold the information you indicated 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, 841 (Tex. 2015). You argue the district has specific marketplace interests in the information you indicated because the district competes with other entities for federal funding for public works projects. Further, you state release of the information you indicated would allow other entities to “use the information in an attempt to show the TRV project is not deserving of federal funds due to the status of certain design elements” or to “imitate the positives the TRV [p]roject is creating by its progress.” You thus argue release of the information at issue would “provide a clear threat of harm to the [d]istrict’s ability to obtain federal funding on the TRV [p]roject and the TRV [p]roject’s ability to effectively compete with other federally funded projects for funding.” After review of the information at issue and consideration of the arguments, we find you established the release of the information at issue would give an advantage to a competitor or bidder. Thus, we conclude the district may withhold the information you indicated under section 552.104(a) of the Government Code.³

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:

(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;

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

(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 consists of attachments between attorneys for the district, district employees and officials, and other privileged parties that were made for the purpose of facilitating the rendition of professional legal services to the district. You state these communications were intended to be and have remained confidential. Upon review, we find you established the attachments at issue are part of privileged e-mail communications for the purposes of rule 503. Thus, the district may withhold the information subject to section 552.022 of the Government Code under Texas Rule of Evidence 503.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). The elements of the privilege under section 552.107(1) are the same as those discussed above for rule 503. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. ORD 676 at 6-7. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie*, 922 S.W.2d at 923.

You state the information you indicated consists of communications between attorneys for the district, district employees and officials, and other privileged parties that were made for the purpose of providing legal services to the district. You state the communications were intended to be and have remained confidential. Based on your representations and our review, we find the information at issue consists of privileged attorney-client communications. Thus, the district may withhold the information you indicated that is not subject to section 552.022 under section 552.107(1) of the Government Code.

Section 552.111 of the Government Code excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]” Gov’t Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref’d n.r.e.); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body’s policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body’s policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body’s policy mission. *See* Open Records Decision No. 631 at 3 (1995).

Further, section 552.111 does not protect facts and written observations of facts and events 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 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.

You state the information you indicated consists of advice, opinions, and recommendations of district employees and officials regarding policymaking matters. You further state part of the information at issue consists of a draft document that was released in its final form. Upon review, we find the district may withhold the information you indicated under section 552.111 of the Government Code.⁴

In summary, the district must withhold the information you indicated under section 552.101 of the Government Code in conjunction with section 4633 of title 42 of the United States Code and section 24.9(b) of title 49 of the Code of Federal Regulations. The district may withhold the information you indicated under section 552.103 of the Government Code. The district may withhold the information you indicated under section 552.104 of the Government Code. The district may withhold the information subject to section 552.022 of the Government Code under Texas Rule of Evidence 503. The district may withhold the remaining information you indicated under section 552.107 of the Government Code. The district may withhold the information you indicated under section 552.111 of the Government Code.

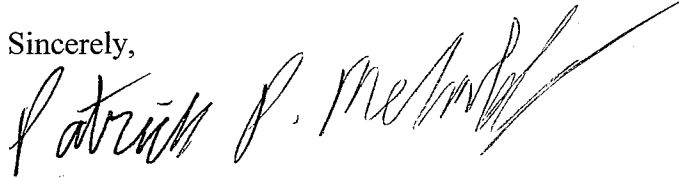
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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/>

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

[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,



Patrick P. Mehaffy
Assistant Attorney General
Open Records Division

PPM/jxd

Ref: ID# 753180

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)