



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

May 30, 2019

Ms. Charmaine Backens  
Director  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

OR2019-14284

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# 768083 (PIR No. 19-46204).

The Texas Commission on Environmental Quality (the "commission") received a request for specified compliance and deviation reports, correspondence related to a specified permit application, documents related to a specified enforcement case, and documents related to specified administrative orders.<sup>1</sup> You state the commission has released some of the requested information. The commission states it will redact e-mail addresses under section 552.137 of the Government Code in accordance with Open Records Decision No. 684

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<sup>1</sup>We note the commission 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). In addition, you inform us the commission sent the requestor an estimate of charges pursuant to section 552.2615 of the Government Code. *See id.* § 552.2615.

(2009).<sup>2</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. You also state release of this information may implicate the proprietary interests of Valero Refining - Texas, L.P. (“Valero”). Accordingly, you state, and provide documentation showing, you notified Valero 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 in certain circumstances). We have received comments from Valero. We have also received and considered comments from the requestor. *See* Gov’t Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>3</sup>

Initially, Valero argues Part 5 of the submitted information is not responsive to the request for information. A governmental body must make a good faith effort to relate a request to information that is within its possession or control. *See* Open Records Decision No. 561 at 8 (1990). The commission has reviewed its records and determined the documents it has submitted are responsive to the request. Therefore, we find the commission has made a good-faith effort to relate the instant request to information within its possession or control. Accordingly, we will determine whether the commission must release the submitted information under the Act.

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.

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<sup>2</sup>Open Records Decision No. 684 serves as a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. *See* ORD 684.

<sup>3</sup>We 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.

(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 asserts Part 2 of the submitted information is subject to pending litigation. The commission informs us the commission's enforcement division issued a Notice of Enforcement against Valero to initiate formal enforcement proceedings. The commission further states that the matter has been referred to the Office of the Attorney General (the "OAG") "for development into civil enforcement litigation." Based on these representations and our review, we find litigation was pending on the date the commission received the request for information. Further, you inform us the information at issue is related to the subject matter of the pending litigation. Therefore, the commission may generally withhold Part 2 pursuant to section 552.103 of the Government Code.

We note, however, Valero 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 Valero, which we have marked, under section 552.103. Therefore, with the exception of the information we have marked, the commission may withhold Part 2 under section 552.103 of the Government Code.<sup>4</sup> 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).

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<sup>4</sup>As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “to facilitate the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). 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.*, meaning it was “not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state Parts 3 and 4 of the submitted information consist of communications among commission attorneys, commission employees, and attorneys from the OAG involved with the commission’s enforcement action against Valero. You state the information at issue was communicated for the purpose of facilitating the rendition of professional legal services to the commission, was intended for internal distribution only, and has remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the commission may generally withhold Parts 3 and 4 under section 552.107(1) of the Government Code. We note, however, some of the e-mail strings in Parts 3 and 4 include e-mails received from and sent to parties with whom you have not demonstrated the commission shares a privileged relationship. Furthermore, if the e-mails received from and sent to non-privileged parties are removed from the e-mail string and stand alone, they are

responsive to the request for information. Therefore, if the non-privileged e-mails, which we have marked, are maintained by the commission separate and apart from the otherwise privileged e-mail strings in which they appear, then the commission may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code.

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.

Upon review, we find you have failed to establish any of the remaining information in Part 2 consists of material prepared, mental impressions developed, or a communication made in anticipation of litigation or for trial by or for the commission 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 stated 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 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*, 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).

You assert Part 1 and the remaining information in Part 2 consist of advice, recommendations, and opinions of the commission’s staff regarding policymaking decisions. Upon review, we find the information at issue consists of general administrative information that does not relate to policymaking or is purely factual in nature. Thus, we find you have failed to demonstrate how the information at issue consists of internal communications containing advice, opinions, or recommendations on the policymaking matters of the commission. Accordingly, no portion of the remaining information may be withheld under section 552.111 of the Government Code.

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). A private third party may invoke this exception. *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). 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.” *Id.* at 841. Valero states it has competitors. In addition, Valero states release of some of its information in Part 5 would “significantly damage Valero’s competitive position in relation to its competitors and would devalue significant investment in capital assets and intellectual property developed internal to the company.” After review of the information at issue and consideration of the arguments, we find Valero has established the release of the information at issue would give an advantage to a competitor or bidder. Thus, we conclude the commission may generally withhold the information we marked in Part 5 under section 552.104(a) of the Government Code. We note, however, under the federal Clean Air Act emission data must be made available to the public, even if the data otherwise qualifies as trade secret information. *See* 42 U.S.C. § 7414(c). Similarly, we find emission data must be made available even if the data is otherwise excepted under section 552.104 of the Government Code. *See English v. Gen. Elec. Co.*, 469 U.S. 72, 79 (1990) (noting state law is preempted to extent it actually conflicts with federal law). Emission data is only subject to the release provision in section 7414(c) of title 42 of the United States Code if it was collected pursuant to subsection (a) of that section. *See* 42 U.S.C. § 7414(c). Thus, to the extent any of the information in Part 5 constitutes emission data for the purposes of section 7414(c) of title 42 of the United States Code, the commission must release such information in accordance with federal law, notwithstanding any of the remaining arguments.<sup>5</sup>

In summary, with the exception of the information we have marked, the commission may withhold Part 2 under section 552.103 of the Government Code. The commission may generally withhold Parts 3 and 4 under section 552.107(1) of the Government Code; however, the commission may not withhold the marked non-privileged e-mails if they are maintained by the commission separate and apart from the otherwise privileged e-mail strings in which they appear. The commission may generally withhold the information we marked in Part 5 under section 552.104(a) of the Government Code; however, to the extent any of the information in Part 5 constitutes emission data for the purposes of section 7414(c) of title 42 of the United States Code, the commission must release it in accordance with federal law. 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.

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<sup>5</sup>As we are able to make this determination, we need not address the remaining argument against disclosure of this information.

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](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,



Deborah Southerland  
Attorney  
Open Records Division

DS/mo

Ref: ID# 768083

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Third Party  
(w/o enclosures)