



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 20, 2019

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

OR2019-36126

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# 801818 (TCEQ PIR No. 20-49827).

The Texas Commission on Environmental Quality (the "commission") received a request for twelve categories of information pertaining to a specified incident. You state you released some information to the requestor. Additionally, you state you will redact information pursuant to Open Records Decision No. 684 (2009).¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code, as well as Texas Rule of Evidence 503. We have considered your arguments and reviewed the representative sample of submitted information.²

¹ Open Records Decision No. 684 serves as a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including e-mail addresses of members of the public subject to section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. *See* ORD 684.

² 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 those records contain substantially different types of information than that submitted to this office.

Initially, we note the submitted information includes a court-filed document. 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 it is “made confidential under [the Act] or other law[.]” Gov’t Code § 552.022(a)(17). You seek to withhold this information under sections 552.103 and 552.107 of the Government Code. However, sections 552.103 and 552.107 are discretionary exceptions to disclosure that protect a governmental body’s interests and do not make information confidential under the Act. *See id.* § 552.007; *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 section 552.103); *see also* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov’t Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the commission may not withhold the court-filed document 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 the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Thus, we will consider the applicability of the attorney-client privilege under Texas Rule of Evidence 503 for the information subject to section 552.022. We will also address your arguments against disclosure of the information not subject to section 552.022.

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

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

- (A) between the client or the client’s representative and the client’s lawyer or the lawyer’s representative;
- (B) between the client’s lawyer and the lawyer’s representative;
- (C) by the client, the client’s representative, the client’s lawyer, or the lawyer’s representative to a lawyer representing another party in a pending action or that lawyer’s representative, if the communications concern a matter of common interest in the pending action;
- (D) between the client’s representatives or between the client and the client’s representative; or
- (E) among lawyers and their representatives representing the same client. TEX. R. EVID. 503(b)(1). A communication is “confidential” if it is not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the

client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding).

You state the information subject to section 552.022 is attached to a privileged attorney-client communication between attorneys for the commission and commission representatives in their capacities as clients. You explain the information was communicated for the purpose of the rendition of legal services to the commission and that this communication has remained confidential. Upon review, we find the commission has demonstrated the attachment at issue is part of a privileged e-mail communication for purposes of rule 503 of the Texas Rules of Evidence. Thus, the commission may withhold the information subject to section 552.022(a)(17), which we marked, pursuant to rule 503 of the Texas Rules of Evidence.

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.

Gov't Code § 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 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). *See* ORD 551 at 4.

You state Attachments C, D, and F are protected by section 552.103 of the Government Code. You state litigation is currently pending against ExxonMobil in Travis County for multiple violations of state laws and commission rules. You inform us the commission referred the enforcement case pertaining to the incident at issue to the Office of the Attorney General (“OAG”) and the OAG filed the lawsuit prior to the commission’s receipt of the instant request. Based on your representations and our review, we find litigation involving the commission was pending when it received the request for information. Further, you state, and we agree, the information at issue is related to the subject matter of the pending litigation.

We note, however, the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* ORD 551 at 4-5. Thus, if the opposing party has seen or had access to information relating to the pending litigation through discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We further note the opposing party’s attorney has seen a portion of the information at issue. Therefore, this information is not protected by section 552.103 and may not be withheld on that basis. With the exception of the information we marked, the commission may withhold the information in Attachments C, D, and F that is not subject to section 552.022(a)(17) of the Government Code under section 552.103 of the Government Code.³ We also 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).

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* Gov’t Code § 552.107(1). 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. 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-

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

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 the remaining information in Attachment D consists of a communication involving attorneys for the commission or the OAG and employees in their capacities as clients. You also state these communications were made in furtherance of the rendition of professional legal services to the commission. You further state these communications were intended to be, and have remained, confidential. Based on these representations and our review, we find the commission has demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the commission may generally withhold the remaining information in Attachment D under section 552.107(1) of the Government Code. We note; however, this e-mail consists of an e-mail received from a non-privileged party. Furthermore, if the e-mail is removed from the otherwise privileged e-mail string in which it appears and stands alone, it is responsive to the request for information. Therefore, if this non-privileged e-mail, which we have marked, is maintained by the commission separate and apart from the otherwise privileged e-mail string in which it appears, then the commission may not withhold this non-privileged e-mail under section 552.107(1) of the Government Code.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. The commission raises section 552.101 in conjunction with the common-law informer’s privilege, which Texas courts have long recognized. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). The informer’s privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority. *See Open Records Decision No. 208* at 1-2 (1978). The informer’s privilege protects the identities of

individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to “administrative officials having a duty of inspection or of law enforcement within their particular spheres.” Open Records Decision No. 279 at 1-2 (1981) (citing 8 John H. Wigmore, *Evidence in Trials at Common Law*, 2374, at 767 (J. McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. See Open Records Decision Nos. 582 at 2 (1990), 515 at 4 (1988). The privilege excepts the informer’s statement only to the extent necessary to protect that informer’s identity. Open Records Decision No. 549 at 5 (1990). We note the informer’s privilege does not apply where the informant’s identity is known to the individual who is the subject of the complaint. See ORD 208 at 1-2.

You state portions of the information the commission marked in Attachment E consist of identifying information of complainants who reported possible violations of section 7.101 of the Water Code and section 101.4 of title 30 of the Texas Administration Code. You also explain the commission is charged with investigating potential violations of environmental laws in Texas, which includes the authority to regulate the quality of air and water in the state. See Health & Safety Code §§ 382.002, .017; Water Code §§ 5.013, 7.002. You further state there are administrative, civil, and criminal penalties for violations of the laws at issue. See Water Code §§ 7.052, .102, .187. Based upon your representations and our review, we conclude the commission has demonstrated the applicability of the common-law informer’s privilege to the information you marked in Attachment E. Therefore, the commission may withhold the information it marked under section 552.101 of the Government Code in conjunction with the common-law informer’s privilege.

In summary, the commission may withhold the court-filed document subject to section 552.022(a)(17) of the Government Code, which we marked, under rule 503 of the Texas Rule of Evidence. With the exception of the information we marked, the commission may withhold the information in Attachments C, D, and F that is not subject to section 552.022(a)(17) under section 552.103 of the Government Code. The commission may generally withhold the remaining e-mail in Attachment D under section 552.107(1) of the Government Code; however, if the non-privileged e-mail, is maintained by the commission separate and apart from the otherwise privileged e-mail string in which it appears, then the commission may not withhold this e-mail under section 552.107(1) of the Government Code and must release this information. The commission may withhold the information it marked under section 552.101 of the Government Code in conjunction with the common-law informer’s privilege. The remaining information must be released.

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 <https://www.texasattorneygeneral.gov/open->

government/members-public/what-expect-after-ruling-issued or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Pearlie Gault", with a long horizontal stroke extending to the right.

Pearlie Gault
Attorney
Open Records Division

PG/mo

Ref: ID# 801818

Enc. Submitted documents

c: Requestor
(w/o enclosures)