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ATTORNEY GENERAL OF TEXAS

March 6, 2020

Mr. ML Calcote
Assistant General Counsel
Texas Dept of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR2020-07245

Dear Mr. Calcote:

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# 815493 (PIR # 19-5090).

The Department of Public Safety (the "department") received fifteen requests for communications sent to or received by named individuals related to the requestor.¹ You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code and privileged under Texas Rule of Evidence 503. We have considered your arguments and reviewed the submitted information.

Initially, we note portions of the submitted information are subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(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:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

¹ You state the department sought and received clarification of the request for information. See Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (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).

Gov't Code § 552.022(a)(1). The submitted information includes completed reports and an evaluation that are subject to section 552.022(a)(1). The department must release the information subject to section 552.022(a)(1), which we have marked, pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or is made confidential under the Act or other law. *See id.* You seek to withhold the information at issue under sections 552.107 and 552.111 of the Government Code. However, sections 552.107 and 552.111 are discretionary in nature and do not make information confidential under the Act. *See Open Records Decision Nos. 677 (2002) (governmental body may waive attorney work product privilege under section 552.111), 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 information at issue may not be withheld under section 552.107 or section 552.111 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *See 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. We will also address your arguments for the information not subject to 552.022.

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

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 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 at 6-7. 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 at issue was attached to communications between department attorneys and department employees that were made for the purpose of providing legal services to the department. You state the communications were intended to be confidential and have 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. Therefore, the department may withhold the information at issue, which we have marked, under rule 503 of the Texas Rules of Evidence.

Next, we address your argument under section 552.107 of the Government Code for the information not subject to section 552.022. Section 552.107(1) protects information coming within the attorney-client privilege. 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. *See* 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 that is not subject to section 552.022 consists of communications between department attorneys and department employees that were intended to be, and have remained, confidential. Upon review, we find you have demonstrated the applicability of the attorney-client privilege to most of the information at issue. Thus, the department may generally withhold the remaining information you indicated under section 552.107(1) of the Government Code. However, we note the information we have marked for release was sent to or received from individuals whom you have not demonstrated to be privileged parties. Therefore, you have failed to establish how this information constitutes privileged attorney-client communications for the purposes of section 552.107(1). Accordingly, the department may not withhold this information under section 552.107(1) of the Government Code. Additionally, we note some of the otherwise privileged e-mail strings include e-mails received from or sent to parties you have not demonstrated to be privileged. Furthermore, if these 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 have marked, are maintained by the department separate and apart from the otherwise privileged e-mail strings in which they appear, then the department may not withhold these non-privileged e-mails under section 552.107(1) 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.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show section 552.103(a) is applicable in a particular situation. The test for meeting this burden is a showing that (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. *See 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). *See* ORD 551.

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* This office has stated a pending complaint with the Equal Employment Opportunity Commission (the "EEOC") indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

You state, and provide documentation showing, prior to the department's receipt of the instant requests for information, the requestor filed a discrimination claim against the department with the EEOC. Based on your representations and our review of the information at issue, we find the department reasonably anticipated litigation on the date these requests were received and the information at issue is related to the reasonably anticipated litigation. Therefore, to the extent it exists separate and apart from the privileged e-mail string in which it is found, the department may withhold the information we have marked under section 552.103 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 anticipated 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 552.111 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 employees of the department regarding policymaking matters. You further state some of the information you indicated consists of draft documents that were released in their final forms. Upon review, we find the department may withhold the information we have marked under section 552.111 of the Government Code. However, we find the remaining information at issue pertains to administrative and personnel matters, is purely factual in nature, or does not pertain to policymaking. Thus, you have failed to demonstrate the remaining information reveals advice, opinions, or recommendations that pertain to policymaking. Accordingly, the department may not withhold any portion of the remaining information at issue under section 552.111 of the Government Code on the basis of the deliberative process privilege.

Section 552.117(a)(2) of the Government Code excepts from disclosure the home address, home telephone number, personal pager and cellular telephone numbers, emergency contact information, social security number, and family member information of a peace officer, regardless of whether the peace officer complies with sections 552.024 or 552.1175 of the Government Code.² Gov't Code § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Section 552.117(a)(2) also applies to personal cellular telephone numbers, provided the cellular telephone service is not paid by a governmental body. *See* ORD 506 at 5-6. In this instance, however, it is unclear whether the individuals whose information is at issue are currently licensed peace officers as defined by article 2.12. If the individuals at issue are currently licensed peace officers as defined by article 2.12, then the department must withhold the information we have marked, under section 552.117(a)(2) of the Government Code; however, the department may only withhold the marked cellular telephone numbers if the cellular telephone services are not paid for by a governmental body. Conversely, if the individuals at issue are not currently licensed police officers as defined by article 2.12, the information at issue may not be withheld under section 552.117(a)(2) of the Government Code.

If the individuals at issue are not currently licensed peace officers, then their personal information may be subject to section 552.117(a)(1) of the Government Code, which excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024. Gov't Code § 552.117(a)(1). Section 552.117(a)(1) also applies to personal cellular telephone numbers, provided the cellular telephone service is not paid by a governmental body. *See* ORD 506 at 5-6. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The department may only withhold the information at issue under section 552.117(a)(1) if the individuals at issue elected

² The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

confidentiality under section 552.024 prior to the date on which the request for this information was made. If the individuals at issue made timely elections under section 552.024, the department must withhold the information we have marked under section 552.117(a)(1) of the Government Code; however, the department may only withhold the marked cellular telephone numbers if the cellular telephone services are not paid for by a governmental body. Conversely, if the individuals at issue did not make timely elections under section 552.024, their information may not be withheld under section 552.117(a)(1) of the Government Code.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release. *See* Gov't Code § 552.130. Accordingly, the department must withhold the motor vehicle record information we have indicated under section 552.130 of the Government Code.

To the extent the information we have marked is maintained separate and apart from the otherwise privileged e-mail string in which it appears, the e-mail includes information subject to section 552.137 of the Government Code. Section 552.137 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). *Id.* § 552.137(a)-(c). The e-mail address we have marked is not a type specifically excluded by section 552.137(c) of the Government Code. Accordingly, the department must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner of the e-mail address affirmatively consents to its disclosure.

In summary, the department may withhold the information we have marked under rule 503 of the Texas Rules of Evidence. With the exception of the information we have marked for release, the department may generally withhold the information you indicated under section 552.107(1) of the Government Code; however, if the non-privileged e-mails, which we have marked, are maintained by the department separate and apart from the otherwise privileged e-mail strings in which they appear, then the department may not withhold the non-privileged e-mails under section 552.107(1) of the Government Code. The department may withhold the information we have marked under section 552.111 of the Government Code. If the individuals at issue are currently licensed peace officers as defined by article 2.12, then the department must withhold the information we have marked under section 552.117(a)(2) of the Government Code; however, the department may only withhold the marked cellular telephone numbers if the cellular telephone services are not paid for by a governmental body. If the individuals at issue are not currently licensed peace officers, to the extent the individuals at issue made timely elections under section 552.024, the department must withhold the information we have marked under section 552.117(a)(1) of the Government Code; however, the department may only withhold the marked cellular telephone numbers if the cellular telephone services are not paid for by a governmental body. The department must withhold the motor vehicle record information we have indicated under section 552.130 of the Government Code. To the extent the e-mails we have marked exist separate and apart from the privileged e-mail strings in which they are found, the department (1) may withhold the information we have marked under section

552.103 of the Government Code, and (2) must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner of the e-mail address affirmatively consents to its disclosure. In either instance, the department must release the remaining information.³

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,



Erin Groff
Assistant Attorney General
Open Records Division

EMG/gw

Ref: ID# 815493

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³ We note the information being released contains an e-mail address to which the requestor has a right of access under section 552.137(b) of the Government Code. *See* Gov't Code § 552.137(b). However, Open Records Decision No. 684 (2009) is a previous determination authorizing all governmental bodies to withhold specific categories of information without the necessity of requesting an attorney general decision, including e-mail addresses of members of the public under section 552.137 of the Government Code. Thus, if the department receives another request for this same information from a person who does not have a right of access to it, Open Records Decision No. 684 authorizes the department to redact the requestor's e-mail address without the necessity of requesting an attorney general decision.