



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 4, 2020

Mr. Jacob Laborde
Public Information Coordinator
Capital Metro Transportation Authority
2910 East Fifth Street
Austin, Texas 78702

OR2020-22401

Dear Mr. Laborde:

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# 842114 (PIR No. 2020-06-944).

The Capital Metro Transportation Authority (the "authority") received two requests from the same requestor for information pertaining to a specified contract during a certain time period. You state the authority has released some of the requested information. You claim the submitted information is excepted from disclosure under section 552.111 of the Government Code. You also state you notified MV Transportation, Inc. ("MV") 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 considered the exception you claim and reviewed the submitted representative sample of information.¹

Initially, we note some of the submitted information, which we marked, is not responsive to the instant request for information because it was created after the date of the instant request. This ruling does not address the public availability of any information that is not

¹ We 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.

responsive to the request and the authority is not required to release such information in response to this request.²

Next, we note some of the responsive information was the subject of a previous request for a ruling, as a result of which this office issued Open Records Letter No. 2020-16440 (2020). In that ruling, we determined the authority: (1) may withhold the information we marked under section 552.111 of the Government Code; (2) must withhold the cellular telephone numbers we marked to the extent the employees whose information is at issue timely requested confidentiality under section 552.024 of the Government Code and the cellular telephone services are not paid for by a governmental body under section 552.117(a)(1) of the Government Code; (3) must withhold all vehicle identification numbers (“VINs”) and license plate numbers under section 552.130 of the Government Code; (4) must release the remaining information. We understand the law, facts, and circumstances on which the prior ruling was based have not changed. Thus, the authority must continue to rely on Open Records Letter No. 2020-16440 as a previous determination and withhold or release the information at issue in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, we will consider your argument for the remaining responsive information not subject to the previous ruling.

Next, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body’s notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov’t Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from MV explaining why the remaining responsive information should not be released. Therefore, we have no basis to conclude MV has a protected proprietary interest in the remaining responsive information. *See, e.g., id.* § 552.110 (requiring the provision of specific factual evidence demonstrating the applicability of the exception). Accordingly, the authority may not withhold the remaining responsive information on the basis of any proprietary interest MV may have in the information.

In addition, we note a portion of the remaining responsive information is subject to section 552.022 of the Government Code. Section 552.022(a) 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:

...

² As we are able to make this determination, we need not address your argument against disclosure of this information.

(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). Some of the remaining responsive information consists of 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, unless it is made confidential under the Act or other law. *See id.* Although you raise section 552.111 of the Government Code for this information, this exception is discretionary in nature and does not make information confidential under the Act. *See* Open Records Decision Nos. 677 at 8-10 (2002) (governmental body may waive attorney work product privilege under section 552.111), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). Therefore, the authority may not withhold any of the information subject to section 552.022 under section 552.111. However, the Texas Supreme Court has held the Texas Rules of Civil Procedure are “other law” that make information expressly confidential for purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Thus, we will consider your assertion of the attorney work product privilege under Texas Rule of Civil Procedure 192.5 for the information subject to section 552.022 of the Government Code.

Rule 192.5 encompasses the attorney work product privilege. 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). A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party’s representative. *Id.* 192.5; ORD 677 at 6-8. In order for this office to conclude 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.

You claim the information subject to section 552.022 consists of attorney work product that is protected by rule 192.5 of the Texas Rules of Civil Procedure. Upon review, we find you have not demonstrated any of the information at issue contains the mental impressions, opinions, conclusions, or legal theories of an attorney or the attorney’s representative that were developed in anticipation of litigation or for trial. We therefore conclude the authority may not withhold the information subject to section 552.022 under Texas Rule of Civil Procedure 192.5.

Section 552.111 of the Government Code 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); ORD 677 at 4-8. Rule 192.5 defines work product as:

(1) [M]aterial 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). A governmental body seeking to withhold information under this exception bears the burden of demonstrating 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. The test to determine whether information was created or developed in anticipation of litigation is the same as that discussed above concerning rule 192.5.

As previously noted, you assert the remaining responsive information not subject to section 552.022 of the Government Code consists of attorney work product. Upon review, we find you have failed to establish the applicability of the attorney work product privilege to the information at issue. Therefore, the authority may not withhold any of the remaining responsive information as attorney work product under section 552.111 of the Government Code.

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, no writ); 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 (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. We note a governmental body does not share a privity of interest with a third party when the governmental body and the third party are involved in contract negotiations, as the parties' interests are adverse.

You state the remaining responsive information consists of draft modifications of a contract and internal communications, including advice, opinions, and recommendations, discussing

the draft modifications. You state some of the information at issue consists of draft documents that we understand will be released in their final forms. Upon review, we find the authority may withhold the information we marked under section 552.111 of the Government Code. However, we find some of the remaining communications pertain to contract negotiations between the authority and a third party; thus, their interests were adverse as to the negotiations and there is no privity of interest between the two parties. Further, we find the remaining responsive information at issue consists of information that is administrative or purely factual in nature. Thus, you have failed to demonstrate the remaining responsive information reveals advice, opinions, or recommendations that pertain to policymaking. Accordingly, the authority may not withhold any portion of the remaining responsive information under section 552.111 of the Government Code on the basis of the deliberative process privilege.

Section 552.117(a)(1) of the Government Code excepts from disclosure the current and former home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code.³ Gov't Code § 552.117(a)(1). Section 552.117(a)(1) also applies to the personal cellular telephone number of a current or former official or employee of a governmental body, provided the cellular telephone service is not paid by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988). 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). Therefore, a governmental body must withhold information under section 552.117(a)(1) on behalf of a current or former employee only if the individual made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Therefore, if the employees whose information is at issue timely requested confidentiality under section 552.024 of the Government Code and the cellular telephone services are not paid for by a governmental body, the authority must withhold the cellular telephone numbers we marked 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 authority must withhold all VINs and license plate numbers in the remaining responsive information under section 552.130 of the Government Code.

In summary, the authority must continue to rely on Open Records Letter No. 2020-16440 as a previous determination and withhold or release the information at issue in accordance with that ruling. The authority may withhold the information we marked under section 552.111 of the Government Code. To the extent the employees whose information is at

³ 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.

issue timely requested confidentiality under section 552.024 of the Government Code and the cellular telephone services are not paid for by a governmental body, the authority must withhold the cellular telephone numbers we marked under section 552.117(a)(1) of the Government Code. The authority must withhold all VINs and license plate numbers in the remaining responsive information under section 552.130 of the Government Code. The authority must release the remaining responsive 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.

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,

Deborah Southerland
Assistant Attorney General
Open Records Division

DS/jxd

Ref: ID# 842114

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

Third Party
(w/o enclosures)