



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 10, 2020

Ms. Kasey Feldman-Thomason
General Counsel
Public Utility Commission of Texas
P.O. Box 13326
Austin, Texas 78711-3326

OR2020-22809

Dear Ms. Feldman-Thomason:

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# 842952 (PUC ID No. 2020-06-019).

The Public Utility Commission of Texas (the "commission") received a request for nine categories of information pertaining to a specified type of incident. You state the commission has released some information with redactions allowed by law, including personal e-mail addresses under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).¹ We understand the commission has redacted certain information pursuant to section 552.136(c) of the Government Code.² You claim some of the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. Additionally, you state release of some of the submitted information may implicate the proprietary interests of Oncor Electrical Delivery Company ("Oncor"). Accordingly, you state, and provide documentation demonstrating, the commission notified Oncor of the request for information and of the 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

¹ 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.

² Section 552.136 of the Government Code permits a governmental body to withhold the information described in section 552.136(b) without the necessity of seeking a decision from this office. *See* Gov't Code § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e).

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 exceptions you claim and reviewed the submitted information.

Initially, we note in a letter dated August 3, 2020, you state the commission wishes to withdraw its request for an open records decision with regard to some of the information at issue because Oncor does not object to the release of its information. This ruling does not address the public availability of this information.

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. 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 the information you marked consists of communications involving commission attorneys and employees that were made in furtherance of the rendition of professional legal services to the commission. You also 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 most of the information at issue. Accordingly, with the exception of the information we indicated

for release, the commission may generally withhold the information you marked under section 552.107(1) of the Government Code.³ However, we note some of these privileged e-mail strings include e-mails and attachments sent to or received from non-privileged parties. Furthermore, if these e-mails and attachments are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, to the extent the commission maintains these non-privileged e-mails and attachments, which we indicated, separate and apart from the otherwise privileged e-mail strings in which they appear, the commission may not withhold these non-privileged e-mails or attachments under section 552.107(1) of the Government Code. Further, upon review, we find the information we indicated for release has been sent to or received from individuals the commission has not demonstrated are privileged parties. Therefore, we conclude the commission has failed to demonstrate this information consists of privileged attorney-client communications. Accordingly, the commission may not withhold the information we indicated for release under section 552.107.

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 section 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 information 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 2002, no pet.); *see* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendations 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).

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

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 understand you to assert the remaining you marked consists of advice, opinions, and recommendations of commission employees and officials. However, the information at issue was sent to or received from third parties you have not demonstrated share a privity of interest or common deliberative process with the commission. Therefore, we find you failed to demonstrate the information at issue is excepted under the deliberative process privilege. Accordingly, the commission may not withhold any portion of the remaining information under section 552.111 of the Government Code on that basis.

Section 552.111 of the Government Code also encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. Open Records Decision No. 677 (2002) at 4-8; *see City of Garland*, 22 S.W.3d at 377. 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 a party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents.

TEX. R. CIV. P. 192.5(a)(1)-(2). 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 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 . . . 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't 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 remaining information at issue consists of attorney-work product. Although you state the information at issue consists of communications involving attorneys for the state that are related to pending litigation, as previously noted, the information at issue was sent to or received from third parties you have not demonstrated are privileged. Therefore, the commission may not withhold any of the remaining information at issue as attorney work product under section 552.111 of the Government Code.

We note some of the non-privileged e-mails contain an e-mail address that is subject to section 552.137 of the Government Code.⁴ 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). Gov’t Code § 552.137(a)-(c). The e-mail address at issue is not excluded by subsection (c). Accordingly, the commission must withhold the personal e-mail address we indicated under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure.

In summary, with the exception of the information we indicated for release, the commission may generally withhold the information you marked under section 552.107(1) of the Government Code. However, if the non-privileged e-mails and attachments, which we indicated, 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 and attachments under section 552.107(1) of the Government Code. The commission must withhold the personal e-mail address we indicated under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure. 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.

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.

⁴ 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).

Sincerely,

Matthew Taylor
Assistant Attorney General
Open Records Division

MT/jm

Ref: ID# 842952

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)