



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

March 15, 2022

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

OR2022-07674

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# 935870 (TCEQ PIR No. 22-67610).

The Texas Commission on Environmental Quality (the "commission") received a request for information pertaining to a specified incident and two named entities.<sup>1</sup> The commission states it will redact certain information pursuant to section 552.136(c) of the Government Code and e-mail addresses of members of the public under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).<sup>2</sup> We understand the commission will release some of the requested information upon payment of costs. The commission claims some of the submitted information is excepted from disclosure under sections 552.103, 552.107, 552.108, and 552.111 of the Government Code. Additionally, the commission states release of some of the submitted information may implicate the proprietary interests of Intercontinental Terminals Company, L.L.C. ("ITC"). Accordingly, the commission states, and provides documentation showing, it notified ITC of the request

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<sup>1</sup> The commission states it sought and 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); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

<sup>2</sup> Section 552.136(c) of the Government Code allows a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from the attorney general. *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). Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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 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 the commission claims and reviewed the submitted representative sample of information.<sup>3</sup>

Initially, the commission indicates some of the submitted information, which it redacted, is not responsive to the present request for information. This ruling does not address the public availability of any information that is not responsive to the request and the commission is not required to release such information in response to the present request.

Next, the commission informs us some of the responsive information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2019-17577 (2019). In that ruling, we determined the commission: (1) must release certain information pursuant to section 552.007 of the Government Code; and (2) may withhold the remaining information under section 552.103 of the Government Code. We have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, the commission may continue to rely on Open Records Letter No. 2019-17577 as a previous determination and withhold or release the responsive information in accordance with that ruling.<sup>4</sup> *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 prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the responsive information is not encompassed by the previous ruling, we will address the arguments against its disclosure.

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 ITC explaining why the information at issue should not be released. Therefore, we have no basis to conclude ITC 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 commission may not withhold the remaining responsive information on the basis of any proprietary interest ITC may have in the information.

Next, we note some of the remaining responsive information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

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

<sup>4</sup> As we are able to make this determination, we need not address the commission's remaining arguments against disclosure of this information.

[T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

(15) information regarded as open to the public under an agency's policies[.]

*Id.* § 552.022(a)(15). The responsive information includes information that the commission posts on its website. Thus, we find the commission considers this information to be open to the public under the commission's policies, and therefore, is subject to section 552.022(a)(15). The information subject to section 552.022(a)(15), which we have marked, must be released unless it is made confidential under the Act or other law. *See id.* The commission seeks to withhold the information subject to section 552.022(a)(15) under section 552.111 of the Government Code. However, section 552.111 is discretionary in nature and does not make information confidential under the Act. *See Open Records Decision Nos. 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 commission may not withhold the information subject to section 552.022, which we have marked, under section 552.111 of the Government Code. However, we will consider the commission's argument under section 552.111 of the Government Code for the information not subject to section 552.022 of the Government Code.

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).

The commission states the information it marked consists of communications involving attorneys for the commission, commission employees, and other privileged parties that were made in furtherance of the rendition of professional legal services to the commission. The commission states 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 withhold the information it marked under section 552.107(1) of the Government Code.<sup>5</sup>

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.

...

(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).*

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<sup>5</sup> As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

The commission states, and provides documentation showing, prior to the commission's receipt of the instant request for information, a lawsuit styled *State of Texas v. Intercontinental Terminals Company, LLC*, Cause No. D-1-GN-19-001593, was filed and is currently pending in the 261st Judicial District Court of Travis County, Texas. The commission states the information at issue is related to the subject matter of the current litigation. Based upon these representations, the submitted documentation, and our review of the information at issue, we find litigation was pending when the commission received the instant request, and we find the information at issue is related to the pending litigation for purposes of section 552.103. Accordingly, the commission may withhold the information it marked under section 552.103(a) of the Government Code.<sup>6</sup>

Generally, however, once information has been obtained by all parties to the litigation though discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to the pending litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that did not result in conviction or deferred adjudication. *See* Gov't Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). The commission states the information it marked relates to a criminal investigation by the commission's Environmental Crimes Unit into possible violations of state and federal criminal statutes. This office has previously determined that the Environmental Crimes Unit of the commission is a law enforcement agency for purposes of section 552.108. The commission states the information at issue concerns a closed criminal investigation that did not result in conviction or deferred adjudication. Based on this representation and our review, we conclude section 552.108(a)(2) is applicable to the information at issue.

However, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. *Id.* § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). *See also* Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Thus, with the exception of the basic information, which must be released, the commission may withhold the information it marked under section 552.108(a)(2) of the Government Code.

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<sup>6</sup> As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

Section 552.111 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. Section 552.111 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 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 the information was made or developed in anticipation of litigation, we must be satisfied

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.

The commission claims some of the remaining responsive information consists of attorney work product under section 552.111 of the Government Code. The commission states the information at issue was created in support of pending and anticipated litigation. The commission further state the information at issue reflects the mental impressions, conclusions, and legal theories of attorneys for the commission. Based upon these representations and our review, we find the commission has demonstrated the applicability of the attorney work product privilege to some of the information at issue. Accordingly, the commission may withhold the information we have marked under the attorney work product privilege of section 552.111 of the Government Code. However, we find the commission has failed to demonstrate the remaining information at issue contains the mental impressions, opinions, conclusions, or legal theories of an attorney or the attorney’s representative that was developed in anticipation of litigation or for trial. Accordingly, the commission may not withhold any portion 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, 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 Dallas Morning News*, 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).

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.

The commission seeks to withhold some of the remaining information at issue under section 552.111 of the Government Code. The commission states the information at issue consists of advice, opinions, and recommendations that were communicated between commission employees and officials third parties with whom the commission shares a privity of interest regarding the policymaking functions at issue. Based on these representations and our review of the information at issue, we find the commission may withhold the information we have marked under section 552.111 of the Government Code. However, we find the remaining information at issue consists of information that is administrative or purely factual in nature. Thus, the commission has failed to demonstrate

the remaining information at issue reveals advice, opinions, or recommendations that pertain to policymaking. Accordingly, the commission may not withhold any portion of the remaining responsive information under section 552.111 of the Government Code on the basis of the deliberate process privilege.

In summary, the commission may continue to rely on Open Records Letter No. 2019-17577 as a previous determination and withhold or release the responsive information in accordance with that ruling. The commission may withhold the information it marked under section 552.107(1) of the Government Code. The commission may withhold the information it marked under section 552.103(a) of the Government Code. With the exception of the basic information, which must be released, the commission may withhold the information it marked under section 552.108(a)(2) of the Government Code. The commission may withhold the information we have marked under the attorney work product privilege of section 552.111 of the Government Code. The commission may withhold the information we have marked under section 552.111 of the Government Code. The commission 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,

Alexandra C. Burks  
Assistant Attorney General  
Open Records Division

ACB/be

Ref: ID# 935870

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

1 Third Party  
(w/o enclosures)