



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 13, 2011

Mr. Les Trobman
General Counsel
Mr. Robert Martinez
Environmental Law Division
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

OR2011-05145

Dear Mr. Trobman and Mr. Martinez:

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# 414416 (PIR No. 11.01.24.05).

The Texas Commission on Environmental Quality ("TCEQ") received a request for information relating to environmental testing performed in or around Dish, Texas. You state some of the requested information has been released. The Office of the General Counsel (the "OGC") claims section 552.137 of the Government Code for some of the information the OGC has submitted. The Environmental Law Division (the "ELD") claims sections 552.101, 552.103, 552.107, 552.111, and 552.137 of the Government Code for most of the information the ELD has submitted. We have considered the exceptions you claim and reviewed the submitted information.¹

We first note some of the information submitted by the ELD as Attachment 3 is subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for required

¹This letter ruling assumes the submitted representative samples of information are truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the commission to withhold any information that is substantially different from the submitted information. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). The information in Attachment 3 includes completed reports prepared for TCEQ. The ELD seeks to withhold information in Attachment 3 under section 552.101 of the Government Code in conjunction with the common-law informer's privilege, which is other law that makes information confidential for purposes of section 552.022.² *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001); *Tex. Comm'n on Envtl. Quality v. Abbott*, No. GN-204227 (126th Dist. Ct., Travis County, Tex.). Therefore, we will consider the ELD's assertion of the informer's privilege for the information in Exhibit 3, including the information encompassed by section 552.022(a)(1).

Texas courts have long recognized the common-law informer's privilege. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). 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, provided that the subject of the information does not already know the informer's identity. *See* Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The 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." *See* Open Records Decision No. 279 at 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 4-5 (1988). The privilege excepts the informer's statement only to the extent necessary to protect the informer's identity. *See* Open Records Decision No. 549 at 5 (1990).

The ELD states Attachment 3 identifies complainants who reported potential violations of environmental laws TCEQ enforces, including section 101.4 of chapter 30 of the Texas Administrative Code. We understand TCEQ is authorized to enforce section 101.4, as well as section 26.121 of the Water Code and the Texas Clean Air Act, under section 26.127 of the Water Code and chapter 382 of the Health and Safety Code. We also understand violations of these laws are punishable by administrative and civil penalties. *See* Water Code §§ 7.052, .102. Therefore, having reviewed the information at issue, we conclude TCEQ may withhold the names of complainants we have marked in Attachment 3 under section 552.101 of the Government Code in conjunction with the common-law informer's privilege. We find the ELD has not demonstrated any of the remaining information in Attachment 3 falls within the scope of the informer's privilege. We therefore conclude

²Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101.

TCEQ may not withhold any of the remaining information on that basis under section 552.101.

The ELD also claims section 552.103 of the Government Code, which provides in 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). A governmental body that claims section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information it seeks to withhold. To meet this burden, the governmental body must demonstrate that (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 the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *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).

The question of 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 that 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."³ *Id.* The ELD claims section 552.103 for the information in Attachment 4. The ELD contends that, "given the number of complaints and the amount of interest in environmental testing in [and around the town of Dish], it is reasonable to conclude from the totality of the

³Among other examples, this office has concluded litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), *see* Open Records Decision No. 336 (1982); (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

circumstances that there is a substantial chance that litigation will ensue.” Having considered the ELD’s arguments, we find the ELD has not provided concrete evidence that TCEQ reasonably anticipated any litigation on the date of its receipt of this request for information. *See* Gov’t Code § 552.103(c); ORD 452 at 4; *see also* Open Records Decision No. 331 at 1-2 (1982) (mere chance of litigation not sufficient to trigger statutory predecessor to Gov’t Code § 552.103). We therefore conclude TCEQ may not withhold any of the submitted information under section 552.103 of the Government Code.

Next, we address the ELD’s claims under sections 552.107 and 552.111 of the Government Code. Section 552.107(1) protects information that comes within the attorney-client privilege. 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* 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 “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. *See* 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. *See 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 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. *See* TEX. R. EVID. 503(b)(1)(A)-(E). 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.* 503(b)(1), meaning it was “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). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). 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 ELD claims section 552.107(1) for information in Attachments 4, 5, and 7. The ELD states these attachments contain communications between attorneys for TCEQ and their

clients that were made for the purpose of facilitating the rendition of professional legal services. The ELD has identified some of the parties to the communications. The ELD states the communications were not intended to be disclosed to non-privileged parties. The ELD also states it is not aware of any disclosure of the communications to such parties. Based on the ELD's representations and our review of the information at issue, we have marked the information TCEQ may withhold under section 552.107(1) of the Government Code. We find the ELD has not demonstrated any of the remaining information at issue is protected by the attorney-client privilege. We therefore conclude TCEQ may not withhold any of the remaining information under section 552.107(1).

Section 552.111 of the Government Code excepts from disclosure "an 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 this privilege is to protect advice, opinion, and recommendation in the decisional process and 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, and opinions reflecting a governmental body's policymaking processes. *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. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (Gov't Code § 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). Moreover, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *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 also has 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 will also 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.

The ELD claims the deliberative process privilege under section 552.111 for information in Attachments 4, 5, 6, and 7. The ELD states the information at issue contains advice, opinions, or recommendations relating to policymaking and drafts of policy-related documents. Based on the ELD's representations and our review of the information at issue, we have marked the information TCEQ may withhold on the basis of the deliberative process privilege under section 552.111 of the Government Code. We find the ELD has not demonstrated any of the remaining information at issue consists of advice, opinions, recommendations, or draft documents related to TCEQ's policymaking processes. We therefore conclude TCEQ may not withhold any of the remaining information on the basis of the deliberative process privilege under section 552.111.

Section 552.111 of the Government Code also encompasses the attorney work product privilege, as found at rule 192.5 of the Texas Rules of Civil Procedure. *See* TEX. R. CIV. P. 192.5; *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 attorney work product as consisting of

(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 that seeks to withhold information on the basis of the attorney work product privilege under section 552.111 bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *See id.*; ORD 677 at 6-8. In order for this office to conclude that information was created 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.

The ELD claims the attorney work product privilege for information in Attachments 4, 5, and 7. The ELD contends the information at issue was prepared by attorneys in anticipation of civil litigation and consists of or tends to reveal an attorney's mental processes, conclusions, and legal theories. Having considered the ELD's arguments and reviewed the information at issue, we find the ELD has not demonstrated either that there was any substantial chance of ensuing litigation or that any of the information at issue was created or obtained for the purpose of preparing for such litigation. *See Nat'l Tank Co. v. Brotherton*, 851 S.W.2d at 207. We therefore conclude TCEQ may not withhold any of the remaining information in Attachments 4, 5, or 7 on the basis of the attorney work product privilege under section 552.111 of the Government Code.

Lastly, section 552.137 of the Government Code states that "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its public disclosure or the e-mail address falls within the scope of section 552.137(c). Gov't Code § 552.137(a)-(c). We note section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. The OGC has marked the e-mail addresses it seeks to withhold under section 552.137. The ELD claims this exception for e-mail addresses in Attachment 8. We note one of the e-mail addresses the OGC has marked is maintained by a governmental entity for one of its officials or employees and may not be withheld under section 552.137. We also note other information the OGC has marked does not fall within the scope of section 552.137 and may not be withheld under this exception. We have marked the information that may not be withheld under section 552.137 of the Government Code and must be released. We find the remaining e-mail addresses the OGC has marked, as well as the e-mail addresses we have marked in the OGC's information and the ELD's Attachment 8, do not appear to fall within the scope of section 552.137(c). We therefore conclude TCEQ must withhold the remaining e-mail addresses the OGC has marked and the additional e-mail addresses we have marked under section 552.137 of the Government Code, unless the owner of an e-mail address has consented to its public disclosure.⁴

In summary, TCEQ (1) may withhold the information we have marked under section 552.101 of the Government Code in conjunction with the common-law informer's privilege; (2) may

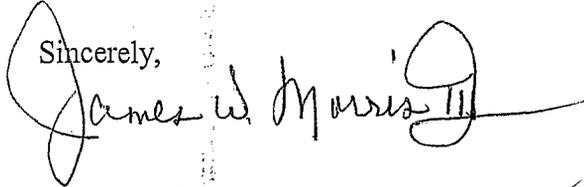
⁴We note this office issued Open Records Decision No. 684 (2009), a previous determination authorizing all governmental bodies to withhold ten categories of information without the necessity of requesting an attorney general decision, including an e-mail address of a member of the public under section 552.137 of the Government Code.

withhold the information we have marked under sections 552.107(1) and 552.111 of the Government Code; and (3) except for the e-mail address we have marked for release, must withhold the e-mail addresses the OGC has marked and the additional e-mail addresses we have marked under section 552.137 of the Government Code, unless the owner of an e-mail address has consented to its disclosure. TCEQ must release the rest of the submitted 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 http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in cursive script that reads "James W. Morris, III". The signature is written in black ink and is positioned to the right of the word "Sincerely,".

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/em

Ref: ID# 414416

Enc: Submitted documents

c: Requestor
(w/o enclosures)