



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 19, 2013

Ms. Rebecca Hendricks Brewer  
Abernathy, Roeder, Boyd & Joplin, P.C.  
P.O. Box 1210  
McKinney, Texas 75070-1210

OR2013-14465

Dear Ms. Brewer:

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# 495232.

The City of Frisco (the "city"), which you represent, received two requests from the same requestor for (1) information created since June 1, 2012, pertaining to Exide's Voluntary Cleanup Program application or Exide's cleanup of J Parcel as defined by the June 2012 Master Settlement Agreement between Exide and the city and (2) information created since August 5, 2011, pertaining to the Old Stewart Creek Waste Water Treatment Plant. We understand the city will release some information to the requestor upon payment. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code and privileged under Texas Rule of Civil Procedure 192.3.<sup>1</sup> We have considered your arguments and reviewed the submitted information.

Initially, we note some information is not responsive to the instant request because it does not pertain to Exide or the Old Stewart Creek Waste Water Treatment Plant. This decision does not address the public availability of the non-responsive information, and that information need not be released in response to the present request.

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<sup>1</sup>Although you also raise rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure, we note sections 552.111 and 552.107 of the Government Code are the appropriate exceptions to raise for your attorney-client privilege claim and your attorney work product claim, respectively, for information not subject to section 552.022 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information protected by other statutes. You raise section 552.101 in conjunction with section 418.182 of the Government Code, which was added to chapter 418 of the Government Code as part of the Texas Homeland Security Act (the “HSA”). Section 418.182 provides in part:

(a) [I]nformation, including access codes and passwords, in the possession of a governmental entity that relates to the specifications, operating procedures, or location of a security system used to protect public or private property from an act of terrorism or related criminal activity is confidential.

*Id.* § 418.182(a). The fact that information may generally be related to a security system does not make the information *per se* confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the HSA must adequately explain how the responsive information falls within the scope of the provision. *See* Gov’t Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You raise section 418.182, which relates to information pertaining to the specifications, operating procedures, or location of a security system. The information at issue relates to the city’s reuse water plan, not a security system. You raise no other HSA provisions. Even if you had raised other HSA provisions, you merely recite statutory language and provide no arguments showing how the information at issue would be excepted under any HSA provision. *See id.* Consequently, none of the information you have marked may be withheld under section 552.101 of the Government Code in conjunction with section 418.182 of the Government Code.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *Id.* § 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 “for the purpose of facilitating 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 a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies to only

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 to only a confidential communication, *id.*, 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. *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 have marked constitutes communications between city staff, attorneys for the city, and representatives of the city and its attorneys that were made for the purpose of providing legal services to the city. You state the communications were intended to be confidential and we understand they have remained confidential. We note some of the e-mails you have marked do not constitute communications between or among privileged parties for the purposes of section 552.107(1), and the city may not withhold this information, which we have marked, on this basis. Based on your representations and our review, we find the remaining information you have marked consists of privileged attorney-client communications the city may generally withhold under section 552.107(1) of the Government Code.<sup>2</sup> We note, however, some of these otherwise privileged e-mail strings include e-mails and attachments received from or sent to non-privileged parties. Furthermore, if the e-mails and attachments 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 requests for information. Therefore, if these non-privileged e-mails and attachments, which we have marked, are maintained by the city separate and apart from the otherwise privileged e-mail strings in which they appear, then the city may not withhold these non-privileged e-mails and attachments under section 552.107(1) of the Government Code.

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

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<sup>2</sup>As our ruling for this information is dispositive, we need not address your remaining arguments against its release.

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 (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).

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 remaining information at issue consists of advice, opinions, and recommendations made by consultants for the city and pertain to policymaking matters. Upon review, however, we find the remaining information at issue was shared with individuals the city does not share a privity of interest or common deliberative process. Thus, we find you have failed to demonstrate how the remaining information is excepted under section 552.111 and the deliberative process privilege. Accordingly, the remaining information at issue may not be withheld 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. *City of Garland*, 22 S.W.3d at 360; 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). 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 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. Upon review, we find you have failed to demonstrate how the remaining information constitutes material prepared, impressions developed, or a communication made in anticipation of litigation by or for the city. See TEX. R. CIV. P. 192.5(a), (b)(1). Accordingly, the city may not withhold the information at issue under section 552.111 of the Government Code on the basis of the work-product privilege.

Rule 192.3 of the Texas Rules of Civil Procedure provides for the consulting expert privilege. A party to litigation is not required to disclose the identity, mental impressions, and opinions of consulting experts whose mental impressions or opinions have not been reviewed by a testifying expert. See *id.* 192.3(e). A "consulting expert" is defined as "an expert who has been consulted, retained, or specially employed by a party in anticipation of litigation or in preparation for trial, but who is not a testifying expert." *Id.* 192.7. Although we understand you to generally claim this privilege, we find you have not demonstrated its

applicability to the information at issue. Accordingly, the city may not withhold any of the remaining information at issue under rule 192.3 of the Texas Rules of Civil Procedure.

We note some of the remaining information may be subject to section 552.117 of the Government Code.<sup>3</sup> Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the city may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. We note section 552.117 also encompasses a personal cellular telephone or pager number, unless the cellular or pager service is paid for by a governmental body. *See* Open Records Decision No. 506 at 5-7 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). The remaining information contains the cellular telephone number of a city employee. To the extent the employee timely elected to keep such information confidential under section 552.024 and no governmental body pays for the cellular telephone service, the city must withhold the cellular telephone number we have marked under section 552.117(a)(1) of the Government Code. If the employee did not make a timely election under section 552.024 or the cellular telephone service was paid by a governmental body, the city may not withhold the information we have marked under section 552.117(a)(1) of the Government Code.

We note the remaining information includes e-mail addresses 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). *See* Gov't Code § 552.137(a)-(c). We note section 552.137 is not applicable to an e-mail address provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent. *See id.* § 552.137(c)(1). The e-mail addresses we have marked are not specifically excluded by section 552.137(c). As such, these e-mail addresses must be withheld under section 552.137 of the Government Code, unless their owners affirmatively consent to their release. *See id.* § 552.137(b).

In summary, with the exception of the information we have marked for release, the city may withhold the remaining information at issue under section 552.107(1) of the Government

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<sup>3</sup>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).

Code; however, if the non-privileged e-mails exist separate and apart from the otherwise privileged e-mail strings in which they appear, the city may not withhold the non-privileged e-mails under section 552.107(1) of the Government Code. The city must withhold the cellular telephone number we have marked under section 552.117(a)(1) of the Government Code if the employee whose cellular telephone number is at issue timely elected to keep this number confidential under section 552.024 of the Government Code and no governmental body pays for the cellular telephone service. The city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless their owners affirmatively consent to their release. The remaining information must be released.

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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Ana Carolina Vieira  
Assistant Attorney General  
Open Records Division

ACV/ag

Ref: ID# 495232

Enc. Submitted documents

c: Requestor  
(w/o enclosures)