



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 30, 2014

Ms. Laura Russell
Attorney
Texas Parks and Wildlife Department
4200 Smith School Road
Austin, Texas 78744-3291

OR2014-07210

Dear Ms. Russell:

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# 521224 (TPWD No. 2014-02-R12).

The Texas Parks and Wildlife Department (the "department") received a request for information related to the Surface Use Agreement between the department and Talisman Energy USA, Inc. ("Talisman") during a specified period of time. You claim the submitted information is excepted from disclosure under sections 552.101, 552.104, 552.107, and 552.111 of the Government Code and privileged under Texas Rule of Evidence 503. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹ We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

The requestor asserts some of the requested information has been released to members of the public. We note section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may

¹We 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.

not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See id.* § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the department may not now withhold any previously released information unless its release is expressly prohibited by law or the information is confidential under law. Although you raise sections 552.104, 552.107, and 552.111 of the Government Code, these sections do not prohibit the release of information or make information confidential. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 663 at 5 (1999) (governmental body may waive section 552.111), 665 at 2 n.5 (2000) (discretionary exceptions generally), 592 (1991) (governmental body may waive statutory predecessor to section 552.104). Thus, to the extent any portion of the submitted information was previously released to the public, the department may not now withhold such information under section 552.104, section 552.107, or section 552.111. However, to the extent the information was not previously released, we will address your arguments under these exceptions for the information at issue. Further, because sections 552.101 and 552.117 of the Government Code can make information confidential, we will address the applicability of these sections to the submitted information.²

We note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(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:

...

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code § 552.022(a)(16). The information submitted as Exhibit D consists of attorney fee bills subject to section 552.022(a)(16). Thus, the information in Exhibit D must be released unless it is confidential under the Act or other law. *See id.* The Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will address your attorney-client privilege claim for the submitted fee bills

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

in Exhibit D under rule 503 of the Texas Rules of Evidence. You also claim the fee bills are excepted from disclosure under section 552.104 of the Government Code. Section 552.104(b) states section 552.022 does not apply to information that is excepted from disclosure under section 552.104. Gov't Code § 552.104(b). Thus, we will also consider the applicability of section 552.104 to the fee bills.

Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." *Id.* § 552.104(a). The protections of section 552.104 serve two purposes. One purpose is to protect the interests of a governmental body by preventing one competitor or bidder from gaining an unfair advantage over others in the context of a pending competitive bidding process. *See* Open Records Decision No. 541 (1990). The other purpose is to protect the legitimate marketplace interests of a governmental body when acting as a competitor in the marketplace. *See* Open Records Decision No. 593 (1991). In both instances, the governmental body must demonstrate actual or potential harm to its interests in a particular competitive situation. *See* Open Records Decision Nos. 593 at 2, 463 (1987), 453 at 3 (1986). A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104. *See* ORD 593 at 2. Furthermore, section 552.104 generally is not applicable once a competitive bidding situation has concluded and a contract has been executed. *See* ORD 541.

The department generally contends the information you have marked would provide an advantage to a competitor or bidder if released. The department also generally argues the release of the submitted information would cause harm to its marketplace interests. Upon review, we find the department has failed to demonstrate how release of the information at issue would cause potential harm to the department's interests in a particular competitive situation. Therefore, we find the department has failed to demonstrate the applicability of section 552.104 of the Government Code to the information you have marked, and it may not be withheld on that basis.

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a

lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is “confidential” if it is 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).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You assert the portions of the submitted fee bills you have marked in Exhibit D should be withheld under rule 503. You assert the submitted fee bills include privileged attorney-client communications between the department’s outside legal counsel and department employees and officers in their capacities as clients. You state the communications at issue were made for the purpose of the rendition of legal services to the department. You state the communications at issue have not been, and were not intended to be, disclosed to third parties. Based on your representations and our review of the information at issue, we find the department has established the information you have marked constitutes attorney-client communications under rule 503. Thus, the department may withhold the information you have marked in Exhibit D within the submitted attorney fee bills pursuant to rule 503 of the Texas Rules of Evidence.

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 section 191.004 of the Natural Resources Code, which provides:

(a) Information specifying the location of any site or item declared to be a state archeological landmark under Subchapter D of this chapter is not public information.

(b) Information specifying the location or nature of an activity covered by a permit or an application for a permit under this chapter is not public information.

(c) Information specifying details of a survey to locate state archeological landmarks under this chapter is not public information.

Nat. Res. Code § 191.004 (footnote omitted). You inform us the Chaparral Wildlife Management Area is under the management and control of the department, and the department has conducted archaeological investigations at this location under archaeological permits issued by the Texas State Historical Commission. You state the information you have marked in Exhibit H contains references to archaeological sites, descriptions, and maps that would allow an individual to determine the location of the archaeological sites. Based on your representations and our review, we agree the information at issue is within the scope of section 191.004. Therefore, we conclude the department must withhold the information you have marked in Exhibit H under section 552.101 of the Government Code in conjunction with section 191.004 of the Natural Resources Code.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. *See* Gov't Code § 552.107(1). The elements of the privilege under section 552.107(1) are the same as those discussed for rule 503 above. 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* ORD 676 at 6-7. 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*, 922 S.W.2d at 923.

You state the information you have marked in Exhibit C consists of communications involving department attorneys, outside legal counsel, and employees and officers in their capacities as clients. You state these communications were made for the purpose of facilitating legal counsel to the department. You also state these communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information you have marked in Exhibit C. Accordingly, the department may withhold the information you have marked in Exhibit C 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 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 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 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).

This office has also concluded a preliminary draft of a document that is 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.

You state the information in Exhibit E consists of communications involving the department's outside legal counsel related to the negotiation of a surface user agreement with Talisman. You explain the information you have marked in Exhibit E is reflective of the deliberative process by which the department's Technical Evaluation Committee (the "committee") arrives at the final rankings. You also inform us Exhibit E includes draft documents that have been or will be released to the public in their final form. Thus, you state the information at issue consists of advice, opinions, and recommendations of the department pertaining to the policymaking functions of the department. Based on your representations and our review of the information at issue, we find the department has demonstrated the information at issue consists of advice, opinions, or recommendations on the policymaking matters of the department. Thus, the department may withhold the information you have marked in Exhibit E under section 552.111 of the Government Code.

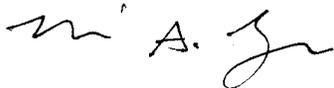
Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. Therefore, if the individual whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, then the department must withhold the information we have marked under section 552.117(a)(1) of the Government Code; however, the marked cellular telephone number may be withheld only if a governmental body does not pay for the cellular telephone service. Conversely, if the individual at issue did not timely request confidentiality under section 552.024 or a governmental body pays for the cellular telephone service, then the department may not withhold the marked information under section 552.117(a)(1).

In summary, the department may withhold the information you have marked in Exhibit D under rule 503 of the Texas Rules of Evidence and the information you have marked in Exhibits C and E under sections 552.107 and 552.111 of the Government Code, respectively. The department must withhold (1) the information you have marked under section 552.101 of the Government Code in conjunction with section 191.004 of the Natural Resources Code in Exhibit H and the information we have marked under section 552.117(a)(1) of the Government Code, if the individual at issue timely requested confidentiality under section 552.024 of the Government Code and a governmental body does not pay for the cellular telephone service. The department 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 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,



Nicholas A. Ybarra
Assistant Attorney General
Open Records Division

NAY/bhf

Ref: ID# 521224

Enc. Submitted documents

c: Requestor
(w/o enclosures)