ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 7, 2014

Ms. Tracey M. Smith
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OR2014-07733

Dear Ms. Smith:

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# 521596.

The Port of Corpus Christi Authority of Nueces County (the "authority"), which you represent, received three requests from the same requestor for specified documents pertaining to an agenda item from a specified period of time,[1] documents created pertaining to the requestor's original request, and any documents created between the authority and a specified law firm from a specified period of time. You state you have released some of the requested information to the requestor. You claim that 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 Evidence 503 and Texas Rule of Civil Procedure 192.5. We

[1]You state the authority sought and received clarification of the information requested pertaining to the first request. *See* Gov't Code § 552.222 (providing that 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 over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

have considered your arguments and reviewed the submitted representative sample of information.[2]

Initially, we note you marked portions of the submitted information as non-responsive to the requests for information because it does not pertain to the subject matter of the requestor's requests. Upon review, we agree this information is not responsive to the requests. This ruling does not address the public availability of any information that is not responsive to the requests, and the authority is not required to release such information in response to these requests.

Next, we note, and you acknowledge, portions of the submitted information are subject to section 552.022(a) of the Government Code, which provides in 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:
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> . . .
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> (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body; [and]
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> . . .
>
> (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)(3), (16). In this instance, the submitted information includes a signed purchase order relating to the expenditure of public funds by the authority, which is subject to section 552.022(a)(3) and information in attorney fee bills, which is subject to section 552.022(a)(16). Thus, the authority must release this information pursuant to subsections 552.022(a)(3) and 552.022(a)(16) unless the information is confidential under the Act or other law. *Id.* Although you seek to withhold the purchase order subject to section 552.022(a)(3) under section 552.111, this is section is a discretionary exception to disclosure and does not make information confidential under the Act. *See* Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under section 552.111 may

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[2]We assume that the "representative sample" of information 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 that those records contain substantially different types of information than that submitted to this office.

be waived), 470 at 7 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver), 665 at 2 n.5 (2000) (discretionary exceptions generally). However, the Texas Supreme Court has held the Texas Rules of Evidence and Texas Rules of Civil Procedure are "other law" that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Thus, we will consider your assertion of the attorney work product privilege under Texas Rule of Civil Procedure 192.5 for the information subject to section 552.022(a)(3). We will also consider your assertion of the attorney-client privilege and the attorney work product privilege under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, respectively, for the information subject to section 552.022(a)(16).

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:
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> > (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
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> > (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 should be withheld under rule 503. You assert the submitted fee bills include privileged attorney-client communications between counsel for the authority and authority representatives in their capacities as clients. You inform us the communications at issue were made for the purpose of the rendition of legal services to the authority. You indicate 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 authority has established the information we have marked constitutes attorney-client communications under rule 503. Thus, the authority may withhold the information we have marked within the submitted attorney fee bills pursuant to rule 503 of the Texas Rules of Evidence.[3] However, we find the remaining information you have marked either does not reveal communications for purposes of rule 503 or documents communication with individuals you have not identified as privileged. Accordingly, we find you have failed to demonstrate the applicability of the attorney-client privilege to the remaining information at issue, and the authority may not withhold it under rule 503.

Texas Rule of Civil Procedure 192.5 encompasses the attorney work product privilege. For purposes of section 552.022 of the Government Code, information is confidential under rule 192.5 only to the extent the information implicates the core work product aspect of the work product privilege. *See* Open Records Decision No. 677 at 9-10 (2002). Rule 192.5 defines core work product as the work product of an attorney or an attorney's representative, developed in anticipation of litigation or for trial, that contains the mental impressions, opinions, conclusions, or legal theories of the attorney or the attorney's representative. *See* TEX. R. CIV. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product from disclosure under rule 192.5, a governmental body must demonstrate the material was (1) created for trial or in anticipation of litigation and (2) consists of the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *Id.*

The first prong of the work product test, which requires a governmental body to show the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate (1) a reasonable person would have concluded from the totality of

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[3]As our ruling is dispositive for this information, we need not address your remaining argument against its disclosure.

the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and (2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See 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. The second part of the work product test requires the governmental body to show that the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *See* TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both parts of the work product test is confidential under rule 192.5, provided the information does not fall within the scope of the exceptions to the privilege enumerated in rule 192.5(c). *See Pittsburgh Corning Corp.*, 861 S.W.2d at 427.

You contend portions of the remaining information in the attorney fee bills and the signed purchase order contain attorney core work product that is protected by rule 192.5 of the Texas Rules of Civil Procedure. Upon review, we find you have not demonstrated any of the remaining information at issue consists of mental impressions, opinions, conclusion, or legal theories of an attorney or an attorney's representative that were created for trial or in anticipation of litigation. Accordingly, the authority may not withhold any of the remaining information at issue under rule 192.5.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. The elements of the privilege under section 552.107 are the same as those discussed above for rule 503. 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). 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 claim the information you have marked in Exhibit D, as well as Exhibits E and F, are protected by section 552.107(1) of the Government Code. You state the information at issue consists of communications between counsel for the authority and authority representatives in their capacities as clients. You state the communications were made in confidence for the purpose of facilitating the rendition of professional legal services to the authority and that these communications have remained confidential. We note some of the e-mails you have marked in Exhibit D and at issue in Exhibit E do not document privileged attorney-client communications for the purposes of section 552.107(1), and the authority may not withhold this information, which we have marked, on this basis. Based on your representations and our review, we find the remaining information at issue consists of privileged attorney-client communications the authority may generally withhold under section 552.107(1) of the

Government Code.[4] 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 authority separate and apart from the otherwise privileged e-mail strings in which they appear, then the authority 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 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

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[4]As our ruling for this information is dispositive, we need not address your remaining arguments against its release.

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 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 remaining information at issue consists of advice, opinions, and recommendations made by the authority and authority representatives and pertain to policymaking matters. You also indicate some of the information at issue consists of draft documents that were intended to be released in their final form. Based on your representations and our review, we find the information we have marked consists of advice, opinions, and recommendations pertaining to authority policymaking matters. Accordingly, the authority 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 general administrative and purely factual information or has been shared with individuals with whom the authority 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; ORD 677 at 4-8. 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
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> (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. The test for determining whether information was created or developed in anticipation of litigation is the same as that discussed above concerning rule 192.5. *See Nat'l Tank Co.*, 851 S.W.2d at 207. Upon review, we find you have failed to demonstrate how the remaining information at issue constitutes material prepared, impressions developed, or a communication made in anticipation of litigation by or for the authority. *See* TEX. R. CIV. P. 192.5(a), (b)(1). Accordingly, the authority may not withhold the remaining information at issue under section 552.111 of the Government Code on the basis of the work-product privilege.

We note some of the remaining information may be subject to section 552.117 of the Government Code.[5] 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 authority 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 numbers of authority employees. To the extent the employees

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[5]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).

timely elected to keep such information confidential under section 552.024 and no governmental body pays for the cellular telephone service, the authority must withhold the cellular telephone numbers at issue under section 552.117(a)(1) of the Government Code. If the employees did not make a timely election under section 552.024 or the cellular telephone service was paid by a governmental body, the authority may not withhold this information 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.[6] *See id.* § 552.137(b).

In summary, the authority may withhold the information we have marked under Texas Rule of Evidence 503. With the exception of the information we have marked for release, the authority may withhold the remaining information at issue under section 552.107(1) of the Government Code; however, if the non-privileged e-mails and attachments exist separate and apart from the otherwise privileged e-mail strings in which they appear, the authority may not withhold the non-privileged e-mails under section 552.107(1) of the Government Code. The authority may withhold the information we have marked under section 552.111 of the Government Code. The authority must withhold the cellular telephone numbers at issue under section 552.117(a)(1) of the Government Code if the employees whose cellular telephone numbers are at issue timely elected to keep these numbers confidential under section 552.024 of the Government Code and no governmental body pays for the cellular telephone service. The authority 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.

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[6]We note this office has issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of 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.

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,

Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/tch

Ref: ID# 521596

Enc. Submitted documents

c: Requestor
(w/o enclosures)