



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 13, 2014

Mr. Michael A. Gershon
Counsel for Aqua Water Supply Corporation
Lloyd, Gosselink, Rochelle & Townsend, PC
816 Congress Avenue, Suite 1900
Austin, Texas 78701

OR2014-10215

Dear Mr. Gershon:

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# 525945.

The Aqua Water Supply Corporation (the "corporation"), which you represent, received a request for information pertaining to current permits with the Lost Pines Groundwater Conservation District (the "district"), current customer use, current actual groundwater production, projections of customer growth, projections of groundwater production demand, certain analysis of the current permitted production authorization for that growth and demand, changes to the corporation's service area since 2000, and pending applications for groundwater permits. The corporation claims the requested information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. We have considered the claimed exceptions and reviewed the submitted representative sample of information.¹ We have also considered comments submitted by the requestor. *See Gov't Code § 552.304* (interested party may submit comments stating why information should or should not be released).

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.

Initially, 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, the following:

(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:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108; [and]

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1), (3). Although the corporation asserts the information subject to section 552.022, which we have marked, is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code, these sections are discretionary and do not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived), 470 at 7 (1987) (governmental body may waive statutory predecessor to section 552.111 deliberative process); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the corporation may not withhold the information subject to section 552.022 under section 552.103, 552.107, or 552.111. However, the Texas Supreme Court has held the Texas Rules of Evidence 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). In addition, section 552.136 of the Government Code makes information confidential under the Act.² Accordingly, we will consider the corporation’s assertion of the attorney-client privilege under rule 503 and the applicability of section 552.136 to the information subject to section 552.022.

Texas Rule of Evidence 503(b)(1) provides the following:

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:

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987).

(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 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).

Accordingly, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must do the following: (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. *See* ORD 676. Upon a demonstration of all three factors, the entire communication is confidential under rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

The corporation asserts the information at issue constitutes a confidential communication among a corporation attorney, consultant, and employee that was made in furtherance of the rendition of professional legal services. It also asserts the communication was intended to be confidential and its confidentiality has been maintained. Upon review, we find the corporation has established this information constitutes a privileged attorney-client communication. Therefore, the corporation may withhold this information, which we have marked, under Texas Rule Evidence 503.

Section 552.136 of the Government Code provides in part the following:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136(a)-(b). The corporation must withhold the information we have marked under section 552.136 of the Government Code.

The corporation asserts the remaining information is excepted from disclosure under section 552.103 of the Government Code, which provides in part as follows:

(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.

Id. § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

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 demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.³ Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

For purposes of section 552.103, "litigation" includes contested cases conducted in a quasi-judicial forum. Open Records Decision Nos. 588 at 2 (1991), 474 at 6 (1987) (disciplinary action before Texas State Board of Pharmacy), 368 at 2 (1983) (administrative hearing before Commissioner of Insurance), 301 at 1-2 (1982). Likewise, "contested cases" conducted under the Texas Administrative Procedure Act, chapter 2001 of the Government Code, constitute "litigation" for purposes of section 552.103. *See, e.g.*, ORDs 588 at 7 (State Board of Insurance proceeding), 301 at 2 (hearing before Public Utilities Commission). Factors this office considers in determining whether an administrative proceeding is conducted in a quasi-judicial forum include whether the administrative proceeding provides for discovery, evidence to be heard, factual questions to be resolved, the making of a record, and whether the proceeding is an adjudicative forum of first jurisdiction with appellate review of the resulting decision without a re-adjudication of fact questions. *See* ORD 588 at 3-4.

The corporation states it has filed an application with the district to drill a well, and that application is still pending. The corporation argues it reasonably anticipates the requestor, Forestar (U.S.A.) Real Estate Group, Inc. ("Forestar"), will contest that application, which will result in a contested case hearing. The corporation explains the contested case hearing will be conducted by the State Office of Administrative Hearings pursuant to rule 14.4.B of the district's rules, or by a quorum of the district's board of directors or a hearings examiner appointed by the board, pursuant to rule 14.4.C of the district's rules. *See* Water Code ch. 36, subchapter M (discussing permits, notice, and hearing process for applications to groundwater conservation district). The corporation asserts such contested case hearings constitute litigation for purposes of section 552.103. Thus, the corporation argues (1) it reasonably expects Forestar to request a contested case hearing for the application at issue

³In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); 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 threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

and (2) the contested case hearing constitutes litigation for purposes of section 552.103. However, without determining whether the type of contested case hearing at issue constitutes litigation for purposes of section 552.103, we find the corporation has not demonstrated Forestar had taken any concrete steps toward contesting the corporation's pending application when the corporation received the request for information. Thus, we conclude the corporation has failed to demonstrate it reasonably anticipated litigation when it received the request for information. Therefore, the corporation may not withhold the remaining information under section 552.103(a) of the Government Code.

The corporation asserts some of the remaining information is excepted from disclosure under section 552.107(1) of the Government Code, which also protects information that comes within the attorney-client privilege. The elements of the privilege under section 552.107(1) are the same as those discussed 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* 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.

The corporation explains the remaining information it has marked under section 552.107 consists of confidential communications between attorneys, consultants, and employees of the corporation that were made in furtherance of the rendition of professional legal services. The corporation also asserts the communications were intended to be confidential and their confidentiality has been maintained. We note this information includes communications between the corporation and the district. The corporation has not provided arguments explaining how the district is a privileged party with the corporation. Therefore, the corporation has failed to establish this information reflects a confidential communication between privileged parties in furtherance of the rendition of legal services. Accordingly, the corporation may not withhold this information under section 552.107. However, we conclude the corporation has demonstrated the applicability of the attorney-client privilege to the remaining information at issue. Thus, the corporation may withhold this information, which we have marked, under section 552.107(1) of the Government Code.⁴

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).

⁴As our ruling is dispositive, we do not address your other argument to withhold this information.

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 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. 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 *id.* at 9.

The corporation asserts the remaining information it has marked under section 552.111, including communications with the district and the Texas Commission on Environmental Quality ("commission"), represents "a collaborative process among the [corporation] and its

consultants . . . to edit, draft, and finalize documents, permits, maps, etc., by providing either review, comments, information, advice or revision, or seeking the same.” You also explain this information represents deliberative communications, opinions, and recommendations regarding the corporation’s policymaking and decisions that pertain to the regional water supply system operated by the corporation. Upon review, we find the corporation has established the deliberative process privilege is applicable to some of the remaining information. Therefore, the corporation may withhold this information, which we have marked, under section 552.111 of the Government Code. However, we find you have not demonstrated the corporation shares a privity of interest or common deliberative process with the district or the commission. Further, the district and the commission appear to be acting in a regulatory capacity. Thus, the corporation may not withhold the communications with the district and the commission under section 552.111. We also find the corporation has not established the remaining information it seeks to withhold consists of advice, opinion, or recommendations, or it is purely factual in nature. Accordingly, the corporation may not withhold any of the remaining information under section 552.111 and the deliberative process privilege.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator’s license, driver’s license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release. *See* Gov’t Code § 552.130. The corporation must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

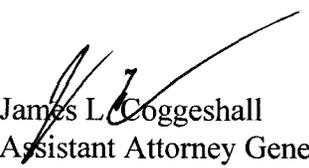
The remaining information contains e-mail addresses of members of the public. Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the 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). Section 552.137 does not apply to a government employee’s work e-mail address because such an address is not that of the employee as a “member of the public,” but is instead the address of the individual as a government employee. The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). You do not inform us a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, the corporation must withhold the e-mail addresses we have marked under section 552.137 of the Government Code.

To conclude, the corporation may withhold the information we have marked under sections 552.107 and 552.111 of the Government Code and Texas Rule of Evidence 503. The corporation must withhold the information we have marked under sections 552.130, 552.136, and 552.137 of the Government Code. The corporation 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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/tch

Ref: ID# 525945

Enc. Submitted documents

c: Requestor
(w/o enclosures)