



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 23, 2010

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Mr. Robert Martinez  
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OR2010-09258

Dear Mr. Trobman and Mr. Martinez:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 383898 (TCEQ PIR# 10.04.05.14).

The Texas Commission on Environmental Quality ("TCEQ") received a request for the calendars, telephone logs, and meeting schedules for four commissioners and two employees during specified time periods, and for e-mails sent to or received by three of the commissioners and the two employees for a different time period. TCEQ's Office of the General Counsel (the "OGC") and its Environmental Law Division (the "division") have submitted separate briefs as well as separate documents that each seeks to withhold. The OGC and the division state that they have provided some of the requested information to the

requestor. The division states that the TCEQ does not maintain telephone logs.<sup>1</sup> The OGC claims that the information it has submitted is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, 552.136, and 552.137 of the Government Code. The division claims that the information it has submitted is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, 552.117 and 552.137. We have considered the claimed exceptions and reviewed the submitted representative sample of information.<sup>2</sup>

The OGC and the division state that the requestor clarified his request to exclude “purely personal” information not subject to the Act, private e-mail addresses, and personal information of staff members. Therefore, this information is not responsive to the request. This decision does not address the public availability of the non-responsive information, and that information need not be released.<sup>3</sup>

The OGC and the division each claim that some of the submitted information is excepted from disclosure under section 552.107(1) of the Government Code. Section 552.107(1) protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. 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 capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel,

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<sup>1</sup>The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

<sup>2</sup>We assume that 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 that those records contain substantially different types of information than that submitted to this office.

<sup>3</sup>Accordingly, we do not address your claims under sections 552.117 and 552.137 of the Government Code for this information.

such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, lawyer representatives, and lawyers representing another party in a pending action concerning a matter of common interest therein. TEX. R. EVID. 503(b)(1)(A)-(E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

The OGC and the division state that the information each has marked consists of confidential communications between and among TCEQ attorneys, attorneys representing the TCEQ from the Office of the Attorney General, and TCEQ staff that were made for the purpose of rendering professional legal services and advice. The OGC and the division further state that all of these communications were made in confidence, and that confidentiality has been maintained. The attorneys and employees at issue have been identified. Based on these representations and our review of the information at issue, we find that the OGC and the division have demonstrated the applicability of the attorney-client privilege to the marked information. Accordingly, the TCEQ may withhold the OGC’s Exhibits B, C, and D, and the information the division has marked in Attachments C, D, E, F, G, H, and I, as attorney-client privileged communications under section 552.107 of the Government Code.<sup>4</sup>

The division asserts that some of the remaining information is excepted from disclosure under section 552.103 of the Government Code, which provides 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

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<sup>4</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show that 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 of the governmental body's receipt of the request, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *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 under section 552.103(a). For purposes of section 552.103(a), this office considers a contested case under the Texas Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code, to constitute "litigation." See Open Records Decision No. 588 (1991).

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). When the governmental body is the prospective plaintiff in litigation, the evidence of anticipated litigation must at least reflect that litigation involving a specific matter is "realistically contemplated." See Open Records Decision No. 518 at 5 (1989); see also Attorney General Opinion MW-575 (1982) (investigatory file may be withheld if governmental body's attorney determines that it should be withheld pursuant to Gov't Code § 552.103 and that litigation is "reasonably likely to result").

The division states that the information at issue pertains to pending or anticipated litigation and enforcement actions. Based on this representation and our review, we determine that litigation was pending or reasonably anticipated on the date the TCEQ received the request for information. Furthermore, we find that the information at issue is related to pending or anticipated litigation for purposes of section 552.103(a). Accordingly, the TCEQ may withhold the information the division has marked in the remaining records in Attachments C, E, and G pursuant to section 552.103 of the Government Code.<sup>5</sup>

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<sup>5</sup>As our ruling is dispositive, we do not address the division's remaining arguments against disclosure of this information.

The OGC and the division argue that portions of the remaining information are excepted from disclosure under section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code § 552.111. This exception encompasses the deliberative process privilege. See Open Records Decision No. 615 at 2 (1993). The purpose of 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 that 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. 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 that 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.

Upon review, we agree that some of the information at issue, which we have marked, consists of the advice, opinions, or recommendations of TCEQ employees or officials regarding policymaking matters. However, you have failed to establish that the remaining

information, which is comprised of general factual and administrative information, consists of advice, opinions, or recommendations for purposes of section 552.111. Therefore, the deliberative process privilege found in section 552.111 is not applicable to the remaining information at issue. Accordingly, the TCEQ may only withhold the information we have marked in the OGC's Exhibit E and the division's Attachments D, E, G, H, and I under the deliberative process privilege of section 552.111 of the Government Code.<sup>6</sup>

The division asserts that portions of the remaining information are excepted from public disclosure based on the attorney work product privilege. Section 552.111 of the Government Code encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines 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 governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. TEX. R. CIV. P. 192.5; ORD 677 at 6-8. In order for this office to conclude that 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.

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<sup>6</sup>As our ruling is dispositive, we do not address the remaining arguments against disclosure of this information.

Upon review, however, we find the division has failed to demonstrate that any of the information at issue consists of material prepared or mental impressions developed in anticipation of litigation or for trial by a party or a representative of a party. Accordingly, the TCEQ may not withhold any of the information at issue under the work product privilege of section 552.111.

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 exception encompasses information that other statutes make confidential. The OGC and the division raise section 552.101 of the Government Code in conjunction with sections 418.176, 418.177, and 418.180 of the Texas Homeland Security Act (the "HSA"), chapter 418 of the Government Code.<sup>7</sup> Section 418.176 provides in part:

(a) Information is confidential if the information is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity and:

- (1) relates to the staffing requirements of an emergency response provider, including a law enforcement agency, a fire-fighting agency, or an emergency services agency;
- (2) relates to a tactical plan of the provider; or
- (3) consists of a list or compilation of pager or telephone numbers, including mobile and cellular telephone numbers, of the provider.

*Id.* § 418.176(a). Section 418.177 provides that information is confidential if it:

- (1) is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity; and
- (2) relates to an assessment by or for a governmental entity, or an assessment that is maintained by a governmental entity, of the risk or vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity.

*Id.* § 418.177. Section 418.180 provides:

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<sup>7</sup>While the division also raises section 418.183, this section is not a confidentiality provision, but instead, provides for release of otherwise confidential information under certain circumstances.

Information, other than financial information, in the possession of a governmental entity is confidential if the information:

- (1) is part of a report to an agency of the United States;
- (2) relates to an act of terrorism or related criminal activity; and
- (3) is specifically required to be kept confidential:
  - (A) under Section 552.101 because of a federal statute or regulation;
  - (B) to participate in a state-federal information sharing agreement; or
  - (C) to obtain federal funding.

*Id.* § 418.180. The fact that information may be related to a governmental body's emergency response preparedness or security concerns does not make such 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). Furthermore, the mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the HSA must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

The division states that the marked e-mails in Attachment G consist of "warnings from the [FBI] and other credible sources of information regarding vulnerable sites, targeted personnel, and bomb threats." The division asserts that this information is confidential under the HSA.

The OGC states that the e-mails in Exhibit F "contain law enforcement sensitive information." The OGC explains that the documents labeled F1 and F2 "involve warnings from the [FBI] relating to specific threats to state and federal officials," while the document labeled F3 is a report of a collision between a train and a pickup truck that resulted in a fatality. The OGC claims that this information is confidential under section 418.177 because it is information "collected and maintained" by governmental entities "for the purpose of detecting and preventing the criminal act threatened." The OGC further asserts that documents F1 and F2 relate "to an assessment of the risk or vulnerability of TCEQ officials to an act of terrorism or related criminal activity[.]" while the information in document F3 "is being used to assess and analyze risks and/or vulnerability[.]"

Based on these representations and our review, we find that the FBI homeland security alert bulletins we have marked consists of an assessment by a governmental entity of the risk or vulnerability of persons to an act of terrorism or related criminal activity. We therefore conclude that the FBI homeland security alert bulletins we have marked in Attachment G, Exhibit F1, and Exhibit F2 must be withheld under section 552.101 in conjunction with section 418.177 of the Government Code. However, we find that the OGC and the division have not adequately demonstrated that any of the remaining information at issue assesses the risk or vulnerability of persons or property to an act of terrorism or related criminal activity for the purposes of section 418.177. We therefore conclude that the TCEQ may not withhold Exhibit F3 or any of the remaining information at issue in Attachment G under section 552.101 on the basis of section 418.177.

Further, we find that the remaining information at issue in Attachment G does not reveal specific staffing requirements or tactical methods related to the prevention, detection, response, or investigation of an act of terrorism or related criminal activity, nor does it consist of a list or compilation of pager or telephone numbers of an emergency response provider. Accordingly, the TCEQ may not withhold any of the remaining information in Attachment G under section 552.101 of the Government Code in conjunction with section 418.176 of the Government Code.

The division also states that the remaining information in Attachment G must be withheld under section 418.180 of the Texas Homeland Security Act. However, upon review, we find that the division has failed to adequately explain how the remaining information in Attachment G falls within the scope of section 418.180. We therefore determine that the TCEQ may not withhold any of the submitted information under section 552.101 in conjunction with section 418.180 of the Government Code.

The OGC next claims the user ID and password that it has marked in Exhibit G are confidential under section 552.136(b) of the Government Code, which states that “[n]otwithstanding 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.” *Id.* § 552.136. An access device number is one that 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, and includes an account number. *Id.* § 552.136(a). The OGC states that the information at issue is used to access a TCEQ subscription to a particular environmental news updates service. Upon review of the OGC’s arguments and the information at issue, we find that the OGC has demonstrated this information constitutes access device numbers used to obtain money, goods, services, or another thing of value. We therefore conclude the TCEQ must withhold the information the OGC has marked in Exhibit G under section 552.136 of the Government Code.

In summary, the TCEQ may withhold (1) the OGC’s Exhibits B, C, and D, and the information the division has marked in Attachments C, D, E, F, G, H, and I as attorney-client

privileged communications under section 552.107 of the Government Code; (2) the information the division has marked in the remaining records in Attachments C, E, and G pursuant to section 552.103 of the Government Code; and (3) the information we have marked in the OGC's Exhibit E and the division's Attachments D, E, G, H, and I under the deliberative process privilege of section 552.111 of the Government Code. The FBI homeland security alert bulletins we have marked in Attachment G, Exhibit F1, and Exhibit F2 must be withheld under section 552.101 in conjunction with section 418.177 of the Government Code. The TCEQ must withhold the information the OGC has marked in Exhibit G under section 552.136 of the Government Code. The remaining responsive information must be released to the requestor.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/dls

Ref: ID# 383898

Enc. Submitted documents

c: Requestor  
(w/o enclosures)