



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 30, 2011

Mr. Les Trobman
General Counsel
Office of the General Counsel

Mr. Robert Martinez
Environmental Law Division
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

OR2011-19227

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# 440622 (TCEQ PIR# 11.10.10.08).

The Texas Commission on Environmental Quality (the "commission") received a request for "all the information regarding Valero and other refineries" previously requested by a named senator in a letter to a named individual on a specified date. The commission states some of the requested information has been released. The Office of the General Counsel (the "OGC") and the Environmental Law Division (the "ELD") both claim sections 552.103, 552.107, and 552.111 of the Government Code for the information each has submitted. We have considered the claimed exceptions and reviewed the submitted representative samples of information.¹

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 that those records contain substantially different types of information than that submitted to this office.

Initially, the OGC informs us a portion of the submitted information in Attachment C is not responsive to the present request for information. This ruling does not address the public availability of non-responsive information, and the commission need not release non-responsive information in response to this request.

Next, the commission states it has previously provided the responsive information to a member of the state legislature under section 552.008 of the Government Code. Section 552.008 provides, in part, as follows:

(a) Th[e Act] does not grant authority to withhold information from individual members, agencies, or committees of the legislature to use for legislative purposes.

(b) A governmental body on request by an individual member, agency, or committee of the legislature shall provide public information, including confidential information, to the requesting member, agency, or committee for inspection or duplication in accordance with this chapter if the requesting member, agency, or committee states that the public information is requested under this chapter for legislative purposes. A governmental body, by providing public information under this section that is confidential or otherwise excepted from required disclosure under law, does not waive or affect the confidentiality of the information for purposes of state or federal law or waive the right to assert exceptions to required disclosure of the information in the future. The governmental body may require the requesting individual member of the legislature, the requesting legislative agency or committee, or the members or employees of the requesting entity who will view or handle information that is received under this section and that is confidential under law to sign a confidentiality agreement that covers the information and requires that:

- (1) the information not be disclosed outside the requesting entity, or within the requesting entity for purposes other than the purpose for which it was received;
- (2) the information be labeled as confidential;
- (3) the information be kept securely; or
- (4) the number of copies made of the information or the notes taken from the information that implicate the confidential nature of the information be controlled, with all copies or notes that are not destroyed or returned to the governmental body remaining confidential and subject to the confidentiality agreement.

Gov't Code § 552.008(a), (b). We note section 552.008 provides specific procedures relating to the confidential treatment of information provided to a legislative member for legislative purposes. *Id.* Accordingly, the fact that the responsive information was provided to the legislative member does not waive or affect the confidentiality of this information or the commission's right to assert exceptions to disclosure of the information. Accordingly, we will address the submitted arguments against disclosure.

The OGC raises section 552.107(1) of the Government Code for its Attachments C and D while the ELD raises section 552.107 for its Attachments E, F, and G. This section protects information that comes 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. *See Open Records Decision No. 676 at 6-7 (2002)*. First, a governmental body must demonstrate 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. *See 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. *See 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). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See 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. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain 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 ELD both explain that the information at issue consists of communications between or among commission attorneys, commission staff, and commission officials that were made for the purpose of rendering professional legal services. The OGC and ELD both state the communications have not been released to third parties, and the privilege has not been waived. Based on these representations and our review, we find the commission has

demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the commission may withhold the OGC's Attachments C and D and the ELD's Attachments E, F, and G under section 552.107(1) of the Government Code.²

Next, the OGC claims section 552.111 of the Government Code for its Attachment E. Section 552.111 excepts from disclosure "an interagency or intra-agency 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 ORD 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).

The OGC explains Attachment E consists of a policymaking document containing advice, opinion, and recommendation pertaining to policymaking matters of the commission. Further, the OGC claims protection of the information is necessary to encourage frank and open discussion within the commission in connection with its decision-making process.

²As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

Based on these representations and our review, we agree the information in Attachment E constitutes advice, opinions, recommendations, or other material reflecting the policymaking processes of the commission. Accordingly, the commission may withhold the OGC's Attachment E under section 552.111 of the Government Code.

In summary the commission may withhold the OGC's Attachments C and D and the ELD's Attachments E, F, and G under section 552.107(1) of the Government Code. The commission may withhold the OGC's Attachment E under section 552.111 of the Government Code.

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, 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,



Paige Lay
Assistant Attorney General
Open Records Division

PL/ag

Ref: ID# 440622

Enc. Submitted documents

cc: Requestor
(w/o enclosures)