



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 18, 2013

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OR2013-10311

Dear Ms. Ligarde and Mr. Trobman:

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# 490570 (TCEQ PIR# 13-11677).

The Texas Commission on Environmental Quality (the "commission") received a request for information created since October 9, 2012, regarding a specified permit number, and information created since January 30, 2013 regarding a specified agreed order number. You inform us you have made some of the requested information available to the requestor. You claim the submitted information is excepted from disclosure under sections 552.103, 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. The commission's Office of General Counsel (the "general counsel") has also submitted responsive documents, which it claims are excepted from disclosure under section 552.107 of the Government Code. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note you have marked portions of the submitted information that are not responsive to the instant request. This ruling does not address the public availability of non-responsive information, and the commission is not required to release non-responsive information in response to this request.

Next, we note the submitted information contains completed reports that are subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body,” unless it is excepted by section 552.108 of the Government Code or made confidential under the Act or other law. Gov’t Code § 552.022(a)(1). We note you do not raise section 552.108. Thus, the commission may withhold the information at issue only to the extent it is made confidential under the Act or other law. Although you raise sections 552.103, 552.107, and 552.111 of the Government Code, these are discretionary exceptions and do not make information confidential under the Act. *See id.* § 552.007; *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 Record Decision Nos. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 473 (1987) (section 552.103 may be waived), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). Accordingly, the commission may not withhold any of the information subject to section 552.022 under those sections. However, the Texas Supreme Court has held the Texas Rules of Civil Procedure and Texas Rules of Evidence are other laws within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider whether the commission may withhold the information subject to section 552.022 under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. We will also consider your arguments against disclosure of the information not subject to section 552.022.

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 state the information at issue consists of confidential communications exchanged between attorneys for the commission and commission staff and employees. You state these communications were intended to be confidential and that the confidentiality has been maintained. Having considered your representations and reviewed the information at issue, we find you have established the reports subject to section 552.022 constitute privileged attorney-client communications. Accordingly, the commission may withhold the reports subject to section 552.022 of the Government Code under rule 503 of the Texas Rules of Evidence. We note, however, the reports are separately responsive to the request. Consequently, to the extent the reports we have marked also exist separate and apart from the privileged communication to which they are attached, the commission may not withhold them under rule 503. Accordingly, we will consider your argument under rule 192.5 of the Texas Rules of Civil Procedure for the reports at issue.

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 it implicates the core work product aspect of the work product

privilege. *See* ORD 677 at 9-10. 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 that 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 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 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 the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney's 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 state the reports subject to section 552.022 constitute privileged core work product. You inform us the commission's attorneys participated in the communications at issue and they have not been shared with outside parties. However, we find you have failed to demonstrate that any of the information at issue consists of mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative that were created for trial or in anticipation of litigation. Thus, the commission may not withhold any of the reports subject to section 552.022 as core work product under rule 192.5 of the Texas Rules of Civil Procedure. Therefore, as you raise no further exceptions to disclosure of this information, to the extent the reports subject to section 552.022(a)(1) exist separate and apart from the privileged communication to which they are attached, they must be released.

Next, we turn to your arguments against disclosure of the information not subject to section 552.022. Section 552.103 of the Government Code provides in part:

- (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.

Gov't Code § 552.103(a), (c). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

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. *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 that 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. *Open Records Decision No. 331 (1982).* Further, the fact a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. *Open Records Decision No. 361 (1983).*

You claim the responsive information in tabs 1, 2, 3, 4, 5, 6, and 7 is excepted from disclosure under section 552.103 of the Government Code. You state that, prior to receiving the instant request for information, the commission received a Notice of Intent to File Citizen Suit against Exide. You explain parties bringing citizen suits in these situations often also pursue claims against governmental bodies. You have not, however, informed us any

individual has taken any concrete steps toward the initiation of litigation in which the commission is a party. *See* ORDs 452, 555. Therefore, we find you have not established the commission reasonably anticipated litigation when it received the request for information. Consequently, the commission may not withhold any portion of the responsive information under section 552.103 of the Government Code.

The commission raises section 552.107(1) of the Government Code for the information in tabs 1, 2, 3, 4, 5, 6, and 7 and for the information submitted by the general counsel. Section 552.107(1) 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 v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state the e-mails and notes you have indicated in tabs 1, 2, 3, 4, 5, 6, and 7, and the information submitted by the general counsel, consist of confidential communications or document confidential communications exchanged between attorneys for the commission and commission staff and employees. You state these communications were intended to be confidential and that the confidentiality has been maintained. Based on these representations, and our review, we agree section 552.107 is applicable to the information at issue, and the commission may generally withhold this information, which you have indicated, under section 552.107(1) of the Government Code.<sup>1</sup> We note, however, some of these e-mail strings include e-mails received from or sent to non-privileged parties. Furthermore, if the e-mails received from or sent to non-privileged parties are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, if these non-privileged e-mails, which we have marked, are maintained by the commission separate and apart from the otherwise privileged e-mail strings in which they appear, then the commission may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code.

To the extent the non-privileged e-mails are maintained separate and apart from the otherwise privileged e-mail strings in which they appear, we address your argument under section 552.111 of the Government Code. Section 552.111 encompasses the attorney work product privilege. *See* Gov't Code § 552.111. Section 552.111, which 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," encompasses the attorney work product

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<sup>1</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

privilege in rule 192.5. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); ORD No. 677 at 4-8. Section 552.111 protects work product as defined in rule 192.5(a) 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). A governmental body seeking to withhold information under the work product aspect of section 552.111 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 to determine whether information was created or developed in anticipation of litigation is the same as that discussed above concerning rule 192.5.

You claim the attorney work product privilege of section 552.111 of the Government Code for the remaining information in tabs 2 and 7. However, as previously noted, the information at issue consists of information which was sent to or received from a third party that you have not demonstrated is privileged. Therefore, because a non-privileged party has had access to this information, the work product privilege under section 552.111 has been waived. Accordingly, the commission may not withhold any of the remaining information under the work product privilege of section 552.111 of the Government Code.

Section 552.111 of the Government Code also encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). 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. 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*, 22 S.W.3d 351 (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).

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 at 9.

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.

You assert the remaining information in tabs 2 and 7 and the information in tab 8 are protected by the deliberative process privilege under section 552.111. You explain tab 8 consists of draft documents containing advice, opinion, and recommendation regarding the commission's website content. You inform us the final version of this information has been published. Based on your representations and our review of the information, we conclude the commission may withhold the information in tab 8 under section 552.111 of the Government Code. However, as noted, the remaining information in tabs 2 and 7 consists of information which was sent to or received from a third party that you have not demonstrated is privileged. Therefore, we conclude you have failed to demonstrate how the deliberative process privilege applies to the remaining information, and the commission may not withhold this information pursuant to the deliberative process privilege under section 552.111.

To the extent the non-privileged e-mails we have marked are maintained by the commission separate and apart from the otherwise privileged e-mail strings in which they appear, some of the information contained in them is subject to section 552.137 of the Government Code.<sup>2</sup> 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 owner of the e-mail address consents to its release or the e-mail address falls within the scope of section 552.137(c). *See* Gov’t Code § 552.137(a)-(c). Section 552.137 is not applicable to the work e-mail address of an employee of a governmental body 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 commission must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.<sup>3</sup>

In summary, the commission may withhold the information subject to section 552.022(a)(1) under Texas Rule of Evidence 503. However, to the extent the reports subject to section 552.022(a)(1) also exist separate and part from the privileged communication to which they are attached, the commission may not withhold them under rule 503 and they must be released. The commission may withhold the information you have indicated in tabs 1, 2, 3, 4, 5, 6, and 7, and the information submitted by the general counsel, under section 552.107 of the Government Code, and the information in tab 8 under section 552.111 of the Government Code. If the non-privileged e-mails we have marked are maintained by the commission separate and apart from the otherwise privileged e-mail strings in which they appear, then the commission may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code. In that case, the commission must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless their owners affirmatively consent to their public disclosure. The remaining responsive 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.

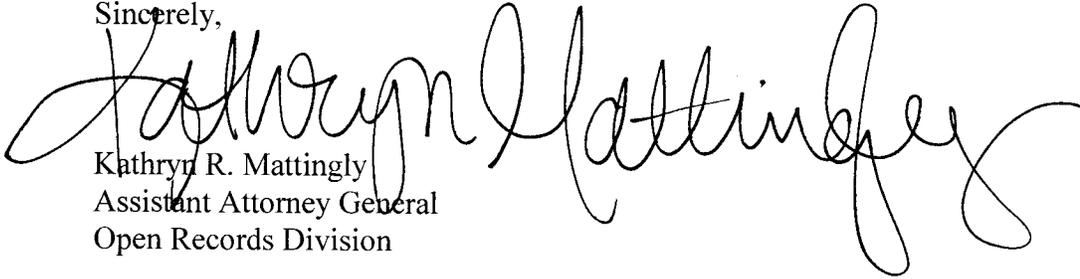
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<sup>2</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

<sup>3</sup>We note Open Records Decision No. 684 (2009) is 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 opinion.

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](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,

A large, stylized handwritten signature in black ink, which appears to read "Kathryn R. Mattingly". The signature is written in a cursive, flowing style with long, sweeping lines.

Kathryn R. Mattingly  
Assistant Attorney General  
Open Records Division

KRM/bhf

Ref: ID# 490570

Enc. Submitted documents

c: Requestor  
(w/o enclosures)