



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 9, 2014

Ms. Danielle R. Folsom
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2014-09863

Dear Ms. Folsom:

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# 525289 (GC No. 21275).

The City of Houston (the "city") received two requests from the same requestor for information pertaining to the progress of three specified loans. You state the city will release some information to the requestor. You claim portions of the submitted information are excepted from disclosure under sections 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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:

(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:

...

(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)(3). The information we marked is subject to section 552.022(a)(3) and must be released unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(3). You seek to withhold this information under sections 552.107 and 552.111 of the Government Code. However, sections 552.107 and 552.111 are discretionary exceptions to disclosure and do not make information confidential under the Act. *See* Open Records Decision Nos. 677 (2002) (governmental body may waive attorney work product privilege under section 552.111), 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). Therefore, the city may not withhold the information subject to section 552.022(a)(3) under section 552.107 or section 552.111 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence and the Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will address your claim of the attorney-client privilege under rule 503 of the Texas Rules of Evidence and the attorney work product privilege under rule 192.5 of the Texas Rules of Civil Procedure for the submitted information that is subject to section 552.022(a)(3). Additionally, we will address your arguments under sections 552.107 and 552.111 of the Government Code for the information not subject to section 552.022(a)(3).

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 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).

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. 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. *Id.* Upon a demonstration of all three factors, the entire communication 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 Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *see also In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege extends to entire communication, including factual information).

You assert the information subject to section 552.022(a)(3) of the Government Code was communicated between attorneys for the city and city employees. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the city and these communications were intended to be confidential. Based on your representations, we find a portion of the information at issue consists of privileged attorney-client communications. Accordingly, you may withhold the information we marked under rule 503 of the Texas Rules of Evidence. However, the remaining information at issue was shared with non-privileged parties. Thus, we find you have failed to demonstrate the remaining information at issue constitutes privileged communications for purposes of rule 503. Therefore, the city may not withhold any of the remaining information at issue under Texas Rule of Evidence 503.

Rule 192.5 of the Texas Rules of Civil Procedure 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* 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. 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 the circumstances surrounding the investigation there was a substantial chance litigation would ensue and (2) the party resisting discovery believed in good faith there was a substantial chance 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 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 privileged 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. v. Caldwell*, 861 S.W.2d 423, 425 (Tex. App.—Houston [14th Dist.] 1993, no writ).

Furthermore, if a requestor seeks a governmental body's entire litigation file, the governmental body may assert the file is excepted from disclosure in its entirety because such a request implicates the core work product aspect of the privilege. *See* ORD 677 at 5-6. In *Curry*, the Texas Supreme Court determined a request for a district attorney's "entire file" was "too broad" and, citing *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458, 460 (Tex. 1993), held "the decision as to what to include in [the file] necessarily reveals the attorney's thought processes concerning the prosecution or defense of the case." *Curry v. Walker*, 873 S.W.2d 379, 380 (Tex. 1994). Accordingly, if a requestor seeks an attorney's entire litigation file, and a governmental body demonstrates the file was created in anticipation of litigation, we will presume the entire file is excepted from disclosure under the attorney work product privilege. *See* Open Records Decision No. 647 at 5. However, we note the court in *National Union* also concluded a specific document is not automatically considered to be privileged simply because it is part of an attorney's file. 863 S.W.2d at 461. The court held an opposing party may request specific documents or categories of documents that are relevant to the case without implicating the attorney work product privilege. *Id.*; ORD 647 at 5.

The city asserts the information at issue in Exhibit 3 pertains to litigation the city was anticipating against a loan recipient for defaulting on a loan. The city contends the present request for information encompasses the entire litigation file of the city's general litigation and real estate sections. We disagree. Rather, the requestor has requested information pertaining to the progress of specified loans. Such a request does not constitute a request for

the “entire” litigation file. Thus, we conclude the request for information is not a request for the entire litigation file, and *Curry* is inapplicable. The city also claims the information at issue includes items prepared by city attorneys or their representatives in anticipation of or in the course of preparing for litigation, or reflects the mental impressions or legal reasoning of attorneys for the city. We note the information at issue consists of an Assignment of Lien. Upon review, we find you have failed to demonstrate 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. Accordingly, the city may not withhold the Assignment of Lien under Texas Rule of Civil Procedure 192.5.

Next, we address your argument for the information not subject to section 552.022 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[.]” *See* Gov’t Code § 552.111. This section 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).

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 consisting 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). Additionally, section 552.111 does not generally except from disclosure purely factual information severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5. 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).

You argue the deliberative process privilege is applicable to Exhibit 2. You state the information in Exhibit 2 consists of a communication between city employees containing

advice, opinions, and recommendations about the city's policymaking process. Upon review, we find the city may withhold the information we marked under section 552.111 of the Government Code. However, we find the remaining information at issue consists of routine administrative information or purely factual information. You have failed to establish that any portion of the remaining information at issue constitutes advice, opinions, recommendations, or other material reflecting the policymaking processes of the commission. Accordingly, you may not withhold any portion of the remaining information at issue under section 552.111 of the Government Code.

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 v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); ORD 677 at 4-8. Rule 192.5 defines work product as:

- (1) [M]aterial 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 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 to determine whether information was created or developed in anticipation of litigation is the same as that discussed above concerning rule 192.5.

The work product doctrine under section 552.111 of the Government Code is applicable to litigation files in criminal and civil litigation. *Curry*, 873 S.W.2d at 381; *see U.S. v. Nobles*, 422 U.S. 225, 236 (1975). As stated above, the Texas Supreme Court determined a request for a district attorney's "entire file" was "too broad" and held "the decision as to what to include in [the file] necessarily reveals the attorney's thought processes concerning the prosecution or defense of the case." *Id.* at 380. Accordingly, if a requestor seeks an attorney's entire litigation file, and a governmental body demonstrates the file was created in anticipation of litigation, we will presume the entire file is excepted from disclosure under the attorney work product aspect of section 552.111. Open Records Decision No. 647 at 5; *see Nat'l Union*, 863 S.W.2d at 461 (organization of attorney's litigation file necessarily reflects attorney's thought processes). Additionally, as stated above, the court in *National Union* also concluded a specific document is not automatically considered to be privileged simply because it is part of an attorney's file. 863 S.W.2d at 461. The court held an

opposing party may request specific documents or categories of documents that are relevant to the case without implicating the attorney work product privilege. *Id.*; ORD 647 at 5.

As previously noted, the city asserts the information at issue in Exhibit 3 pertains to litigation the city was anticipating against a loan recipient for defaulting on a loan and the present request for information encompasses the entire litigation file of the city's general litigation and real estate sections. However, the requestor has requested information pertaining to the progress of specified loans. Such a request does not constitute a request for the "entire" litigation file. Thus, we conclude *Curry* is inapplicable. The city also claims the information at issue includes items prepared by city attorneys or their representatives in anticipation of or in the course of preparing for litigation, or reflects the mental impressions or legal reasoning of attorneys for the city. Upon review, we find section 552.111 is applicable to most of the information at issue. However, some of the information at issue consists of information that was sent to or received from third parties you have not demonstrated are privileged. Therefore, because non-privileged parties have had access to this information, the work product privilege under section 552.111 has been waived for this information. With the exception of the information we marked as communicated with non-privileged parties, the city may withhold Exhibit 3 under section 552.111 of the Government Code as attorney work product.¹

You contend the information that was communicated with non-privileged parties in Exhibit 3 consists of confidential attorney-client privileged communications. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). The elements of the privilege under section 552.107(1) 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. 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.

You state the information at issue is contained in communications between attorneys for the city and city employees. You state these communications were made for the purpose of facilitating the rendition of professional legal services to the city and were intended to be confidential. Upon review, we find some of the information at issue is contained within privileged e-mail strings. However, the information at issue consists of e-mails shared with non-privileged parties. Furthermore, if the e-mails are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, if the non-privileged e-mails, which we have marked, are maintained by the city separate and apart from the otherwise privileged e-mail strings in which they appear, then the city may not

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

withhold the non-privileged e-mails under section 552.107(1) of the Government Code. However, if the non-privileged e-mails are not maintained separate and apart from the otherwise privileged e-mail strings, the city may withhold the marked e-mails under section 552.107(1) of the Government Code. Furthermore, we find the remaining information at issue was shared with individuals you have not demonstrated are privileged parties. Accordingly, this information may not be withheld under section 552.107(1) of the Government Code.

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).² See Gov’t Code § 552.137(a)-(c). The e-mail addresses at issue are not excluded by subsection (c). Therefore, the city must withhold the personal e-mail addresses we marked under section 552.137 of the Government Code, including the personal e-mail addresses we marked in the non-privilege e-mails if they are maintained by the city separate and apart from the otherwise privileged e-mail strings in which they appear, unless the owners affirmatively consent to their public disclosure.

In summary, the city may withhold the information we marked under rule 503 of the Texas Rules of Evidence. With the exception of the information we marked as communicated with non-privileged parties, the city may withhold Exhibit 3 under section 552.111 of the Government Code as attorney work product. The city may withhold the information we marked under section 552.111 of the Government Code on the basis of the deliberative process privilege. If the non-privileged e-mails we marked are not maintained separate and apart from the otherwise privileged e-mail strings, the city may withhold the marked e-mails under section 552.107(1) of the Government Code. The city must withhold the personal e-mail addresses we marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. The remaining information must be released, including the information we marked pursuant to section 552.022(a)(3) 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.texasattorneygeneral.gov/open/>

²The 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).

[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,



Paige Thompson
Assistant Attorney General
Open Records Division

PT/dls

Ref: ID# 525289

Enc. Submitted documents

c: Requestor
(w/o enclosures)