



OFFICE of the ATTORNEY GENERAL  
GREG ABBOTT

January 7, 2003

Ms. Melissa L. Barloco  
Assistant County Attorney  
Harris County  
1019 Congress, 15<sup>th</sup> Floor  
Houston, Texas 77002-1700

OR2003-0122

Dear Ms. Barloco:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 174626.

The Harris County Attorney (the "county attorney") received a request for information relating to the Katy Freeway expansion project. You claim that the requested information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You argue that the submitted information is excepted from disclosure under section 552.103 of the Government Code. Section 552.103 was intended to prevent the use of the Public Information Act as a method of avoiding the rules of discovery in litigation. *See* Attorney General Opinion JM-1048 at 4 (1989). The purpose of section 552.103 is to protect a governmental body's position in litigation by forcing parties to obtain information relating to the litigation through the discovery process. *See* Open Records Decision No. 551 (1990). Further, section 552.103 only applies where the litigation involves or is expected to involve the governmental body which is claiming the exception. *See* Open Records Decision No. 392 (1983) (finding predecessor to section 552.103 only applicable to governmental body who has the litigation interest). Section 552.103 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 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.

The county attorney 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 that the governmental body receives the request, 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, 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 county attorney must meet both prongs of this test for information to be excepted under 552.103(a).

You state that the submitted information relates to a pending lawsuit in which Harris County has intervened as a defendant. You have submitted the district judge's signed order granting Harris County's motion to intervene as evidence of Harris County's intervention in the pending lawsuit. However, we note that the signed order on the motion is dated November 26, 2002, well after the county attorney received the request for information. Therefore, we find that the county attorney has not established that the submitted information relates to pending litigation to which Harris County was a party on the date the county attorney received the request for information. Further, you do not assert that the submitted information relates to litigation Harris County reasonably anticipated on the date the county attorney received the information request. Accordingly, we find that you may not withhold the information on the basis of section 552.103(a).

You next argue that the preliminary drafts of an agreement between Harris County and the Federal Highway Administration are excepted from disclosure under section 552.111. Section 552.111 excepts "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 § 522.111. In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 at 5-6 (1993). Furthermore, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5.

In addition, a preliminary draft of a policymaking document that has been released or is intended for release in final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document. *See* Open Records Decision No. 559 at 2 (1990). Based on our review of your arguments and the information, we conclude that the documents we have marked constitute draft communications among agency staff that consist of advice, opinions, and recommendations reflecting the policymaking processes of Harris County. You may withhold these documents from disclosure under section 552.111 of the Government Code.

In summary, the county attorney may withhold the marked drafts of the agreement based on section 552.111. The remaining information must be released to the requestor.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



V.G. Schimmel  
Assistant Attorney General  
Open Records Division

VGS/sdk

Ref: ID# 174626

Enc: Submitted documents

c: Mr. James B. Blackburn, Jr.  
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(w/o enclosures)