



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

July 1, 2003

Ms. Julie Joe
Assistant County Attorney
Travis County
P. O. Box 1748
Austin, Texas 78767

OR2003-4483

Dear Ms. Joe:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 183602.

The Travis County Transportation and Natural Resources Department (the "department") received a request for information relating to "any and all versions of proposed State Highway 45 South between Loop 1 (MoPac) and FM 1626 and/or I-35, including right-of-way purchases and maps thereof made by the county for the proposed roadway," and all correspondence between Travis County and certain agencies regarding the proposed highway. You state that you are relying on Open Records Letter Nos. 2001-6052 (2001) and 99-2910 (1999) as previous determinations for withholding certain information pursuant to sections 552.107 and 552.111 of the Government Code. *See* Open Records Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). You claim that the requested information not previously ruled upon is excepted from disclosure under sections 552.101, 552.107, 552.111, 552.136,

and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

We note that a portion of the submitted materials includes information made public by section 552.022 of the Government Code. This section provides several categories of information that are not excepted from required disclosure unless they “are expressly confidential under other law.” In pertinent part this section reads

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate[.]

Gov’t Code § 552.022(a)(5). The information that we have marked constitutes working papers used to estimate the need for or expenditure of public funds by the department. Thus, this information must be released to the requestor under section 552.022(a)(5), unless it is confidential under other law.

Sections 552.107 and 552.111 of the Government Code are discretionary exceptions to disclosure that protect a governmental body’s interests and are therefore not other law that makes information expressly confidential for purposes of section 552.022(a). *See* Open Records Decision Nos. 663 (1999) (governmental body may waive section 552.111), 630 at 4-5 (1994) (governmental body may waive statutory predecessor to section 552.107), 522 at 4 (1989) (discretionary exceptions in general), 473 (1987) (governmental body may waive predecessor to section 552.111). The information that is subject to the purview of section 552.022 may therefore not be withheld on the basis of section 552.107 or 552.111.

However, the attorney-client privilege is also found in Rule 503 of the Texas Rules of Evidence. The Texas Supreme Court held that “[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are other law within the meaning of section 552.022.” *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Thus, we will determine whether any of the information at issue is excepted under Texas Rule of Evidence 503.

¹We 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.

Rule 503(b)(1) provides:

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 layer 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.

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. Tex. R. Evid. 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must 1) show that 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 that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. See Open Records Decision No. 676 (2002). Upon a demonstration of all three factors, the entire communication is confidential under Rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.-Houston [14th Dist.] 1998, no pet.) (privilege attaches to complete communication, including factual information).

Upon reviewing your arguments and the submitted records, we conclude that you have demonstrated that some of the information you have marked constitutes confidential communications made for the purpose of facilitating the rendition of professional legal services to the client. We have marked the submitted information that the department may withhold under rule 503 of the Texas Rules of Evidence.

We will now address your argument under section 552.107 of the Government Code for the remaining information you have marked as privileged. 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 Texas 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, 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, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (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 one that 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 writ). 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).

We note that some of the submitted documents have been shared with Hays County. You claim that all of these documents are excepted under section 552.107(1). Generally, when a governmental body shares privileged information with a third party, the governmental body

is deemed to have waived the attorney-client privilege. *See* Tex. R. Evid. 511; Open Records Decision No. 630 at 4 (1994). However, you contend that the privilege is not waived where, as here, the privileged information is shared with an associate government agency under the authority of an interlocal cooperation agreement between the two agencies. We agree.

Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct provides that an attorney may not reveal the confidential information of a client, including privileged information, to:

- (1) a person the client has instructed is not to receive the information; or
- (2) anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm.

TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.05(b)(1). However, Rule 1.05 also provides that "[a] lawyer may reveal confidential information . . . [w]hen the lawyer has been expressly authorized to do so in order to carry out the representation." *Id.* R. 1.05(c)(1). Thus, the rules of professional conduct allow a government attorney to reveal privileged information when expressly authorized to do so by his or her governmental body while still restricting the attorney from revealing the information to unauthorized third parties. *Id.* R. 1.05(a)-(c).

The Restatement of the Law Governing Lawyers specifically addresses the circumstance in which an attorney for one government agency exchanges privileged information with another government agency. Comment c to section 74 of the Restatement states that "[c]ommunications between a lawyer representing one governmental agency and another governmental agency are privileged only if the lawyer represents both agencies . . . or if the communication is pursuant to a common interest arrangement." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 74 cmt.c (2000). With respect to common interest arrangements, the Restatement provides:

- (1) If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such information that otherwise qualifies as privileged under §§ 68-72 that relates to the matter is privileged as against third persons. Any such client may invoke the privilege, unless it has been waived by the client who made the communication.

Id. § 76. This section is designed to "permit[] persons who have common interests to coordinate their positions without destroying the privileged status of their communications with their lawyers." *Id.* cmt.b. Thus, "[c]lients . . . can elect separate representation while maintaining the privilege in cooperating on common elements of interest." *Id.* Furthermore, comment c to section 76 provides that "[e]xchanging communications may be predicated on

an express agreement, but formality is not required. It may pertain to litigation or to other matters.” *Id.* cmt.c. Therefore, under the Restatement, the attorney-client privilege is not waived when an attorney for one government agency exchanges privileged information with another government agency pursuant to a formal or informal agreement concerning a matter of interest common to both agencies. *See id.* §§ 74, 76; *see also In re Auclair*, 961 F.2d 65, 69 (5th Cir. 1992) (citing *Hodges, Grant & Kaufmann v. United States Government*, 768 F.2d 719, 721 (5th Cir. 1985) (“The privilege is not . . . waived if a privileged communication is shared with a third person who has a common legal interest with respect to the subject matter of the communication.”)).

Here, the requested information relates to a proposed Texas Department of Transportation State Highway Project located within both Travis County and Hays County. The interlocal cooperation agreement provides for coordination between both counties. Because this information was shared by agreement between the department and the county in cooperation on a matter of common interest, we find that the department has not waived its section 552.107 argument with respect to these shared documents. *See* Gov’t Code § 552.107(1); TEX. DISCIPLINARY RULES OF PROF’L CONDUCT R. 1.05(a)-(c); *see also In re Auclair*, 961 F.2d 65, 69 (5th Cir. 1992); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 74, 76 (2000); *cf.* Tex. R. Evid. 503(b)(1)(C).

Based on our review of your arguments and the submitted information, we agree that some of the information you have marked under section 552.107 reflects confidential communications made in furtherance of the rendition of legal services to the client. Accordingly, we conclude that the department may withhold the documents we have marked pursuant to section 552.107(1) of the Government Code under that exception.

Section 552.111 of the Government Code 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.” 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. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *see also Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.--Austin, 2001, no pet.). The purpose of section 552.111 is “to protect from public disclosure advice and opinions on policy matters and to encourage frank and open discussion within the agency in connection with its decision-making processes.” *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref’d n.r.e.). An agency’s policymaking functions 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. *See* Open Records Decision No. 615 at 5-6 (1993). 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).

We note, however, that section 552.111 will not apply unless the parties between whom the information is passed are shown to share a privity of interest or common deliberative process with regard to the policy matter at issue. Open Records Decision No. 561 at 9 (1990). You state that some of the requested information consists of intraagency or interagency memoranda that consist of advice, recommendation, or opinion regarding a policy matter of the department, and that the memoranda exchanged with the Hays County Commissioners Court or their agents and representatives are also protected from disclosure pursuant to section 552.111 because Travis County and Hays County shared a privity of interest or common deliberative process with respect to the acquisition and development of rights-of-way and easements for proposed State Highway 45. You have also attached an interlocal cooperation agreement documenting this privity of interest.

After reviewing the remaining submitted information, we agree that some of the information you have marked pursuant to section 552.111 consists of advice, recommendation, or opinion regarding a policy matter of the department. Thus, the department may withhold this information under section 552.111. However, other information which you have marked under section 552.111 is purely factual. We have marked the information that the department may withhold under section 552.111.

You argue that the various business tax identification numbers and corresponding vendor numbers are confidential under federal law and must be withheld under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Prior decisions of this office have held that section 6103(a) of title 26 of the United States Code renders tax return information confidential. *See* Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Tax return information is defined as data furnished to or collected by the IRS with respect to the determination of possible existence of liability of any person under title 26 of the United States Code for any tax. *See* 26 U.S.C. § 6103(b). The business tax identification numbers submitted to the department do not fall under the definition of tax return information. *See id.* We conclude, therefore, that you may not withhold the tax identification numbers under section 552.101 of the Government Code as information deemed confidential by federal statute.

Section 552.136 of the Government Code 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." Gov't

Code § 552.136. The department must, therefore, withhold the marked bank account and credit card numbers under section 552.136.

Lastly, section 552.137 provides:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. The department must, therefore, withhold the e-mail addresses of members of the public, which you have marked, under section 552.137. We note that section 552.137 does not apply to a business' general e-mail address or to a government employee's work e-mail address.

To summarize, we conclude that: (1) the department may withhold the documents we have marked pursuant to section 552.107(1) of the Government Code; (2) the department may withhold the information we have marked under section 552.111 of the Government Code; (3) the department must withhold the marked account numbers under section 552.136 of the Government Code; and (4) the department must withhold the marked e-mail addresses under section 552.137 of the Government Code. The remaining submitted 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 Dep't of Pub. 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,



Sarah I. Swanson
Assistant Attorney General
Open Records Division

SIS/lmt

Ref: ID# 183602

Enc. Submitted documents

c: Mr. Colin Clark
Communications Director
Save Our Springs Alliance
P. O. Box 684881
Austin, Texas 78768
(w/o enclosures)