



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 9, 2008

Ms. Paula J. Alexander  
General Counsel  
Metropolitan Transit Authority of Harris County  
P.O. Box 61429  
Houston, Texas 77208

OR2008-04767

Dear Ms. Alexander:

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# 306895.

The Metropolitan Transit Authority of Harris County (the "authority") received a request for (1) a specified contract, (2) specified engineering drawings, e-mail communications, invoices, and correspondence to the Federal Transit Authority, and (3) drawings depicting specified property takings. You state you have no responsive information for the requested drawings of property takings or for some of the requested e-mails and invoices.<sup>1</sup> You claim that the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information, some of which is a representative sample.<sup>2</sup>

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<sup>1</sup> The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990).

<sup>2</sup> We 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.

Initially, you inform us that the some of the requested invoices were the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2008-00891 (2008). In that ruling, we concluded that the authority must withhold some of the submitted information under sections 552.130 and 552.136 of the Government Code. As we have no indication that the law, facts, and circumstances on which the prior ruling was based have changed, the authority must continue to rely on that ruling as a previous determination and withhold or release the requested invoice information in accordance with Open Records Letter No. 2008-00891. *See Open Records Decision No. 673 (2001)* (so long as law, facts, and 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).

Next, we note that part of the submitted information is subject to section 552.022(a) of the Government Code, which provides in part:

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:

(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). Exhibit 8 contains a contract, which must be released under section 552.022 unless it is confidential under other law. You claim the contract is protected under section 552.103 of the Government Code. We note, however, that section 552.103 is a discretionary exception to disclosure that a governmental body may waive. *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 Gov't Code § 552.103 ); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the authority may not withhold the contract in Exhibit 8 under section 552.103 of the Government Code. As you have claimed no other exceptions for the contract, it must be released.

We will now address your arguments under section 552.103 for the information that is not subject to section 552.022. Section 552.103 of the Government Code provides:

(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 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 was pending or reasonably anticipated on the date the governmental body received the request for information, 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state, and provide documentation showing, that the authority received the request for information after a lawsuit styled *Scarborough v. The Metropolitan Transit Authority of Harris County*, Cause No. 2007-31651 was filed in the District Court of Harris County, Texas, 333rd Judicial District. Based upon your representation and our review, we conclude that litigation was pending when the authority received the request. You also state that the scope of work, e-mails, and correspondence to the Federal Transit Authority, submitted in Exhibits 8, 10, and 11, respectively, are related to the pending litigation because these documents form part of the basis for the lawsuit. Based on your representations and our review, we find that the remaining information in Exhibit 8 and the information in Exhibits 10 and 11 is related to the pending litigation for the purposes of section 552.103. We therefore conclude that the authority may withhold the remaining information in Exhibit 8, as well as Exhibits 10 and 11, under section 552.103 of the Government Code.<sup>3</sup>

We note, however, that once the information at issue has been obtained by all parties to the pending litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. See Open Records Decision Nos. 349 (1982), 320 (1982). Thus, any information at issue that has either been obtained from or provided to all opposing parties in the pending litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation

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<sup>3</sup> As our ruling is dispositive, we need not address your remaining arguments against disclosure for this information.

has concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

You assert that the information in Exhibit 9 is excepted from disclosure under the deliberative process privilege encompassed by section 552.111 of the Government Code, 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." Gov't Code § 552.111; *see also* Open Records Decision No. 615 (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 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 that 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).

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 that the requested engineering drawings submitted as Exhibit 9 are draft documents pertaining to policy decisions regarding a comprehensive transit plan. Based on your representations and our review, we find that you have established that the deliberative process privilege is applicable to the draft documents. Accordingly, the authority may withhold the draft documents in Exhibit 9 in their entirety under section 552.111.

In summary, with the exception of the contract in Exhibit 8, the authority may withhold Exhibits 8, 10, and 11 under section 552.103 of the Government Code, and Exhibit 9 under section 552.111 of the Government Code. The remaining invoice information and contract must be released.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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).

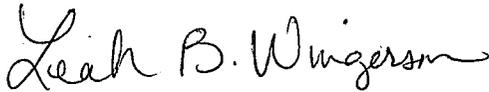
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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 Office of the Attorney General 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. 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,



Leah B. Wingerson  
Assistant Attorney General  
Open Records Division

LBW/ma

Ref: ID# 306895

Enc. Submitted documents

c: Mr. Paul Magaziner  
3773 Richmond Ave.  
Houston, Texas 77046  
(w/o enclosures)