



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 4, 2009

Ms. Pauline E. Higgins  
Senior Vice President & General Counsel  
Metropolitan Transit Authority of Harris County  
P.O. Box 61429  
Houston, Texas 77208-1429

OR2009-05922

Dear Ms. Higgins:

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# 341703.

The Metropolitan Transit Authority of Harris County ("METRO") received a request for: (1) a list of METRORail accidents up to and including January 31, 2008, (2) three different categories of revenue for January 2008, (3) bus and METRORail boardings for January 2008, (4) documents related to "stray current," (5) documents related to METRO corrosion committee meetings, and (6) METRO communications to and from the Federal Transit Administration concerning commuter and urban rail. You state you have released the information responsive to categories one through three of the request. You state you do not possess any information responsive to category five of the request.<sup>1</sup> You claim that the submitted information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code and privileged under Texas Rule of Civil Procedure 192.5. We have considered your arguments and reviewed the submitted information. We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information).

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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).

We note that a portion of the information submitted as responsive to item four of the request is subject to section 552.022 of the Government Code, which provides in relevant 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:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The information at issue consists of a completed report made for METRO and is therefore subject to section 552.022(a)(1). Accordingly, METRO may withhold this information only if it is confidential under "other law" or excepted from disclosure under section 552.108 of the Government Code. You do not raise section 552.108 for any of the requested information. Sections 552.103 and 552.111 are discretionary exceptions to public disclosure that protect the governmental body's interests and may be waived. *See* Gov't Code § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 470 at 7 (1987) (statutory predecessor to section 552.111 may be waived), 663 (1999) (governmental body may waive section 552.103); *see also* Open Records Decision No. 665 at 2 n.5 (discretionary exceptions generally). As such, sections 552.103 and 552.111 are not "other law" that makes information confidential for the purposes of section 552.022. Therefore, METRO may not withhold any of the submitted information subject to section 552.022 under sections 552.103 and 552.111 of the Government Code. However, 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). Therefore, we will consider your argument that the information subject to section 552.022 is privileged under Rule 192.5 of the Texas Rules of Civil Procedure. We also will consider your other arguments against the disclosure of the remaining information.

Information subject to section 552.022 is "expressly confidential" for purposes of that section under Rule 192.5 only to the extent the information implicates the core work product aspect of the privilege. *See* Open Records Decision No. 677 at 9-10 (2002). Core work product is defined as the work product of an attorney or an attorney's representative developed in anticipation of litigation or for trial that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. TEX. R. CIV. P. 192.5(a), (b)(1).

In order to withhold attorney work product from disclosure under Rule 192.5, a governmental body must demonstrate that the material was (1) created for trial or in anticipation of litigation and (2) consists of an attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. ORD 677 at 6-7. 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 that (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 prong of the work product test requires the governmental body to show that the documents at issue contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. TEX. R. CIV. P. 192.5(b)(1). A document containing work product information that meets both prongs of the work product test is confidential under Rule 192.5 provided the information does not fall within the purview of the exceptions to the privilege enumerated in Rule 192.5(c). *Pittsburgh Corning Corp. v. Caldwell*, 861S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state the information subject to section 552.022 was prepared and developed by METRO's expert consultant in anticipation of trial. Upon review, we find that the information responsive to item four of the request is attorney work product that is protected by rule 192.5. Accordingly, METRO may withhold this information, which we have marked, on the basis of core work product for purposes of Texas Rule of Civil Procedure 192.5.

You claim that the remaining information not subject to section 552.022 is excepted from disclosure under section 552.111 of the Government Code, which provides that "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." This exception 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, 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).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. See ORD 615 at 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).

When determining if an interagency memorandum is excepted from disclosure under section 552.111, we must consider whether the agencies between which the memorandum is passed share a privity of interest or common deliberative process with regard to the policy matter at issue. See Open Records Decision No. 561 at 9 (1990).

You assert that the information responsive to item six contains the advice, opinions, and recommendations concerning future METRO projects. You state that the document outlines problems and possible alternatives as well as the approach METRO will take in analyzing the alternatives. You further state that as a condition of federal funding, you are required to correspond with the Federal Transit Administration regarding these plans. Based on your representations and our review, we determine that METRO may withhold portions of the information under section 552.111 of the Government Code. However, we find the remaining information consists of purely factual information and not advice, opinions, or recommendations. Accordingly, you may only withhold the marked portions of the submitted information under section 552.111 of the Government Code.

In summary, METRO may withhold the information we have marked under Texas Rule of Civil Procedure 192.5. METRO may also withhold the information we have marked under section 552.111 of the Government Code. The remaining 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.

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.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,

A handwritten signature in black ink, appearing to read "Greg Henderson", with a long horizontal flourish extending to the right.

Greg Henderson  
Assistant Attorney General  
Open Records Division

GH/rl

Ref: ID#341703

Enc. Submitted documents

c: Requestor  
(w/o enclosures)