



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 11, 2010

Mr. David M. Swope  
Assistant County Attorney  
Harris County  
1019 Congress, 15<sup>th</sup> Floor  
Houston, Texas 77002

OR2010-00484

Dear Mr. Swope:

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# 367030.

The Harris County Attorney and the Harris County Judge (collectively, the "county") each received a request from the same requestor for several categories of information concerning the redevelopment of the Astrodome or Reliant Park. You state you are releasing some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.107, 552.111, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that Exhibit B-1 contains information subject to section 552.022 of the Government Code, which provides in relevant part:

[T]he 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 B-1 contains contracts relating to the expenditure or receipt of public funds. Accordingly, the county may withhold the information we have marked that is subject to section 552.022(a)(3) only if such information is expressly confidential under "other law." You assert that this information is excepted from disclosure under section 552.107. However, section 552.107 is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. *See* Open Records Decision No. 676 at 6 (2002) (section 552.107 is not other law for purposes of section 552.022); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). Therefore, the county may not withhold the information subject to section 552.022, which we have marked in Exhibit B-1, under section 552.107 of the Government Code. However, the attorney-client privilege is also found in rule 503 of the Texas Rules of Evidence. The Texas Supreme Court has held that the Texas Rules of Evidence are "other law" that makes information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider your arguments under Texas Rule of Evidence 503 for the information that is subject to section 552.022.

Rule 503 of the Texas Rules of Evidence encompasses the attorney-client privilege and 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 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). 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. Upon a demonstration of all three factors, the information 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). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

The information at issue consists of contracts relating to leases between the county and other third parties. You have not explained how this information constitutes a communication between an attorney or an attorney's representative and a client in furtherance of the rendition of legal services to the client. Further, you have not explained that the information at issue was intended to be and has remained confidential. Therefore, we find you have failed to demonstrate that the information that is subject to 552.022 constitutes communications between privileged parties or that it reveals confidential communications. Accordingly, the information subject to section 552.022 may not be withheld under rule 503. Because you have made no further arguments against the disclosure of the information that is subject to section 552.022, it must be released.

Turning to your exceptions to disclosure of the remaining information, we address your claim under section 552.107 of the Government Code for the remaining information in Exhibit B-1 that is not subject to section 552.022. Section 552.107(1) protects information coming within the attorney-client privilege. The elements of the privilege under section 552.107 are the same as those discussed for Rule 503. 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 communications with third party consultants with which a governmental body shares a privity of interest are protected. Open Records Decision Nos. 464 (1987), 429 (1985).

You contend that the remaining information in Exhibit B-1 consists of privileged communications between attorneys for and employees of the county. You have identified some of the parties to the communications. You state that the communications were made in furtherance of the rendition of professional legal services to the county. You also state that the communications were not intended to be disclosed to third parties. Based on your

representations and our review of the information at issue, we conclude that the county may generally withhold the information we have marked in Exhibit B-1 under section 552.107(1). We note, however, that some of the e-mail strings we have marked include communications with parties that you have not identified. If the communications with these non-privileged parties, which we also have marked, exist separate and apart from the e-mail strings in which they appear, then the county may not withhold the communications with the non-privileged parties under section 552.107(1). We also find that you have not demonstrated that any of the remaining information in Exhibit B-1 constitutes or documents a privileged attorney-client communication. We therefore conclude that the county may not withhold any of the remaining information in Exhibit B-1 under section 552.107(1).

Next, you raise section 552.111 of the Government Code for Exhibit B-2. This section 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. Section 552.111 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 (1993), 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. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (Gov't Code § 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). Moreover, 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).

This office also has 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 seek to withhold Exhibit B-2 under section 552.111. You contend that the information at issue contains advice, opinion, and recommendation relating to redevelopment of the Astrodome and includes draft documents that are subject to release in their final form. Based on your representations and our review of the information at issue, we conclude that the county may withhold the draft documents we have marked under section 552.111. With respect to the remaining information in Exhibit B-2, we conclude that some of the information at issue is factual. We also conclude that you have not demonstrated that the remaining information at issue consists of advice, opinion, or recommendations relating to the policymaking processes of the county. We note that much of the remaining information in Exhibit B-2 consists of communications between representatives of the county and those of other entities. Section 552.111 can encompass policy-related information that a governmental body obtains from or provides to other entities with which the governmental body shares a privity of interest or common deliberative process. *See* Open Records Decision No. 561 at 9 (1990). Likewise, section 552.111 can encompass information shared with a consultant that is acting at the governmental body's request and performing a task that is within the governmental body's authority. *See* ORD 631 at 2; *see also* ORD 462 at 14 (statutory predecessor encompassed memoranda prepared by governmental body's consultants). The governmental body must demonstrate, however, that section 552.111 is applicable to such information by identifying the party with which the information was shared and explaining the nature of the party's relationship with the governmental body. In this instance, you have neither identified the persons with which the information in Exhibit B-2 was shared nor explained the nature of any relationship those persons may have with the county. We therefore conclude that the county has not demonstrated that section 552.111 is applicable to any of the remaining information in Exhibit B-2 and may not withhold any of the information at issue on that basis.

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). *See* Gov't Code § 552.137(a), (b). We note that section 552.137 is not applicable to an e-mail address that a governmental entity maintains for one of its officials or employees. We have marked e-mail addresses that are not of a type specifically excluded by section 552.137(c). *See id.* § 552.137(c). Therefore, the county must withhold the e-mail addresses we have marked

under section 552.137 of the Government Code, unless the owners of the e-mail addresses consent to their release.<sup>1</sup>

Next, we note some of the remaining information is excepted from disclosure under section 552.101 of the Government Code.<sup>2</sup> Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and is not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). The type of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. In addition, this office has found that some kinds of medical information or information indicating disabilities or specific illnesses is protected by common-law privacy. *See Open Records Decision Nos. 470* (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we find some of the submitted information is highly intimate or embarrassing and of no legitimate public interest. Therefore, the county must withhold the information we have marked in Exhibit C under section 552.101 of the Government Code in conjunction with common-law privacy.

In summary, the county may generally withhold the attorney-client communications we have marked in Exhibit B-1 under section 552.107(1) of the Government Code, but may not withhold the marked communications with the non-privileged parties to the extent that those communications exist separate and apart from the e-mail string in which they appear. The county may withhold the information we have marked pursuant to section 552.111 of the Government Code. The county must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses consent to their release. The county must withhold the information we have marked in Exhibit C pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. The remaining information must be released to the requestor.

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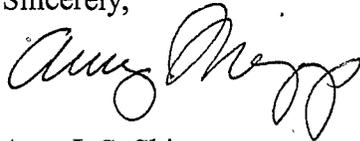
<sup>1</sup>We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

<sup>2</sup>The 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).

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, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Amy Shipp", written in a cursive style.

Amy L.S. Shipp  
Assistant Attorney General  
Open Records Division

ALS/rl

Ref: ID# 367030

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)