



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 29, 2012

Mr. Andrew Martin
General Counsel
Central Texas Regional Mobility Authority
301 Congress Avenue Suite 650
Austin, Texas 78701

OR2012-03154

Dear Mr. Martin:

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# 447103.

The Central Texas Regional Mobility Authority (the "authority") received a request for information from a specified time period regarding "State Highway 45 Southwest," the "Manchaca Expressway," or any proposed road that would connect South Mopac to FM 1626 and/or IH-35.¹ You state some of the requested information is being released. You claim the submitted information is excepted from disclosure under sections 552.111 and 552.137

¹You inform us, and have provided documentation confirming, the authority sought and received clarification of the request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *City of Dallas v. Abbott*, 304 S.W.3d 380, 384 (Tex. 2010) (when governmental entity, acting in good faith, requests clarification or narrowing of unclear or over-broad request for public information, ten-day period to request attorney general ruling is measured from date request is clarified or narrowed).

of the Government Code and privileged under Texas Rule of Evidence 503.² We have considered your arguments and reviewed the information you submitted.³

We note, and you acknowledge, the information submitted as Attachment C consists of an attorney fee bill. Section 552.022 of the Government Code provides for required public disclosure of “information that is in a bill for attorney’s fees and that is not privileged under the attorney-client privilege,” unless the information is confidential under the Act or other law.⁴ Gov’t Code § 552.022(a)(16). The Texas Supreme Court has held the Texas Rules of Evidence are “other law” that makes information confidential for purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will address your claim under Texas Rule of Evidence 503 for the information at issue in the attorney fee bill.

Rule 503 enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

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;

²Although you also appear to claim the attorney-client privilege under section 552.101 of the Government Code, we note this exception does not encompass discovery privileges. *See* Open Records Decision No. 676 at 1-3 (2002). We note you also raise section 552.022 of the Government Code, which is not an exception to disclosure under subchapter C of the Act. Instead, section 552.022 provides for required public disclosure of eighteen categories of information, unless the information is confidential under the Act or other law or subject to section 552.022(a)(1) but excepted from disclosure under section 552.108 of the Government Code. *See* Gov’t Code § 552.022(a)(1)-(18).

³To the extent the submitted information consists of representative samples of information, this letter ruling assumes the submitted representative samples are truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the authority to withhold any information that is substantially different from the submitted information. *See* Gov’t Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

⁴As you correctly note, section 552.107(1) of the Government Code encompasses the attorney-client privilege but is a discretionary exception to disclosure that does not make information confidential under the Act.

(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 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). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You have marked the information you contend is protected by the attorney-client privilege under rule 503. You explain the submitted attorney fee bill documents communications between representatives of the authority and attorneys in the private law firm that serves as the authority’s outside counsel. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the authority. You also state the communications were intended to be and remain confidential. You have generally identified the parties to the communications. Based on your representations and our review of the information at issue, we conclude the authority may withhold the information we have marked under Texas Rule of Evidence 503. We conclude the authority has not demonstrated any of the remaining information at issue documents an attorney-client communication. Therefore, the remaining information is not privileged under rule 503 and may not be withheld on that basis.

We note some of the remaining information in Attachment C falls within the scope of section 552.136 of the Government Code.⁵ Section 552.136(b) states that “[n]otwithstanding any other provision of [the Act], 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(b); *see id.* § 552.136(a) (defining “access device”). This exception makes information confidential for purposes of section 552.022(a)(16) of the

⁵Unlike other exceptions to disclosure under the Act, this office will raise section 552.136 on behalf of a governmental body, as this section is a mandatory exception to disclosure. *See* Gov’t Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

Government Code. We have marked bank account and bank routing numbers the authority must withhold under section 552.136 of the Government Code.

Next, we address your arguments under section 552.111 of the Government Code for the information at issue in Attachments A and B. Section 552.111 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.” *Id.* § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of this privilege is to protect advice, opinion, and recommendation in the decisional process and 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 section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, and opinions 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 has concluded a preliminary draft of a document 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.

We also have concluded section 552.111 can encompass communications between a governmental body and a third party. *See* Open Records Decision Nos. 631 at 2 (1995) (Gov’t Code § 552.111 encompasses information created for governmental body by outside consultant acting at governmental body’s request and performing task that is within

governmental body's authority), 561 at 9 (1990) (Gov't Code § 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (Gov't Code § 552.111 applies to memoranda prepared by governmental body's consultants). In order for section 552.111 to protect communications with a third party, the governmental body must identify the third party and explain the nature of the party's relationship with the governmental body. Section 552.111 is not applicable to a governmental body's communications with a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See* ORD 561 at 9.

You claim the deliberative process privilege under section 552.111 for all the information in Attachment A and the information you have indicated or marked in Attachment B. You explain the information in Attachment A consists of draft documents that were created during an environmental review process and that will eventually be incorporated into a final environmental review document, which will be subject to public inspection on completion. You state the information you have indicated or marked in Attachment B consists of e-mail communications involving policy-related advice, opinion, and recommendations; draft documents pertaining to proposed authority policy; and summaries and minutes of meetings at which policy-related matters pertaining to the Manchaca Expressway were deliberated and discussed. You state that the persons involved in creating this information, whom you have identified, are representatives of the authority and of public or private entities with which the authority shares a privity of interest. Based on your representations and our review of the information at issue, we conclude the authority may withhold Attachment A and the information we have marked in Attachment B under section 552.111 of the Government Code. We conclude the authority has not sufficiently demonstrated any of the remaining information at issue, much of which is factual, constitutes policy-related advice, opinion, or recommendations. Therefore, none of the remaining information at issue may be withheld under section 552.111.

Lastly, section 552.137 of the Government Code provides that "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 [the Act]," unless the owner of the e-mail address has affirmatively consented to its public disclosure or the e-mail address falls within the scope of section 552.137(c). Gov't Code § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. The authority must withhold the e-mail address we have marked under section 552.137 of the Government Code unless the owner has affirmatively consented to its public disclosure.⁶

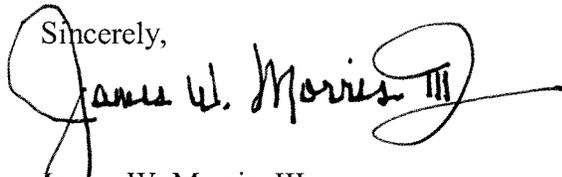
⁶We note Open Records Decision No. 684 (2009) is a previous determination issued by this office authorizing all governmental bodies to withhold ten categories of information without the necessity of requesting an attorney general decision, including an e-mail address of a member of the public under section 552.137 of the Government Code.

In summary, the authority (1) may withhold the information we have marked in Attachment C under Texas Rule of Evidence 503; (2) must withhold the bank account and bank routing numbers we have marked in Attachment C under section 552.136 of the Government Code; (3) may withhold Attachment A and the information we have marked in Attachment B under section 552.111 of the Government Code; and (4) must withhold the e-mail address we have marked in Attachment B under section 552.137 of the Government Code unless the owner has consented to its disclosure. The rest of the submitted 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, 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 that reads "James W. Morris, III". The signature is written in a cursive style with a large, looping initial "J" and a long horizontal flourish extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/em

Ref: ID# 447103

Enc: Submitted documents

c: Requestor
(w/o enclosures)