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ATTORNEY GENERAL OF TEXAS

August 20, 2020

Ms. Tammye Curtis-Jones
Office of General Counsel
Houston Housing Authority
2640 Fountain View Drive
Houston, Texas 77057

OR2020-20905

Dear Ms. Curtis-Jones:

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# 840769 (Ref. No. Dolcefino 15).

The Houston Housing Authority (the "authority") received a request for telephone records and e-mails sent or received by a named authority official during a stated period of time.¹ You state the authority has released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.103, 552.105, 552.107, 552.111, and 552.143 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence.² We have considered your arguments and reviewed the submitted representative sample of information.³

¹ We note the authority sought and received clarification of the information requested. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

² Although you also raise section 552.101 of the Government Code, you make no arguments to support this exception. Therefore, we assume you have withdrawn your claim that this exception applies to the submitted information. *See* Gov't Code §§ 552.301, .302.

³ We assume 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 those records contain substantially different types of information than that submitted to this office.

Initially, we note the information submitted as Exhibits M and N is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

[T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or 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; [and]

...

(16) information that is in a bill for attorney's fees and is not privileged under the attorney-client privilege[.]

Gov't Code § 552.022(a)(3), (16). Portions of Exhibits M and N consist of information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body. Further, the remainder of Exhibits M and N consists of attorney fee bills that are subject to section 552.022(a)(16). The authority must release this information pursuant to subsections 552.022(a)(3) and 552.022(a)(16) unless it is made confidential under the Act or other law. *See id.* Although you raise section 552.107 of the Government Code for the information at issue, this section is a discretionary exception to disclosure and does not make information confidential under the Act. *See Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions).* Therefore, no portion of the information at issue may be withheld under section 552.107 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Thus, we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503 for the information subject to 552.022 of the Government Code. We will also address your arguments for the information not subject to 552.022.

Texas Rule of Evidence 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

(A) between the client or the client's representative and the client's lawyer or the lawyer's representative;

(B) between the client's lawyer and the lawyer's representative;

(C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;

(D) between the client's representatives or between the client and the client's representative; 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 to further the rendition of professional legal services to the client or reasonably necessary to transmit 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). *See 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, orig. proceeding) (privilege attaches to complete communication, including factual information).

You indicate the information at issue was communicated between and among attorneys for the authority, authority employees and officials, and consultants hired by the authority for the purpose of the rendition of legal services to the authority. You also indicate the communications at issue were not disclosed to third parties and confidentiality has not been waived. Upon review, we find you have demonstrated the applicability of the attorney-client privilege to some of the information at issue, which we marked. Accordingly, the authority may withhold the information we marked under rule 503 of the Texas Rules of Evidence. However, the remainder of Exhibits M and N, which are subject to section 552.022, does not consist of communications. We note an entry stating a memorandum or an e-mail was prepared or drafted does not demonstrate the document was communicated to the client. Thus, we find you have failed to demonstrate the remaining information at issue consists of privileged communications for purposes of rule 503 of the Texas Rules of Evidence. Therefore, the authority may not withhold any portion of the remainder of Exhibits M and N under rule 503 of the Texas Rules of Evidence.

Next, we address your assertion of the attorney-client privilege under section 552.107 of the Government Code for the remaining information 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(1) are the same as those discussed above for rule 503. 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. *See* ORD 676 at 6-7. 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*, 922 S.W.2d at 923. You state the information submitted as Exhibits H, I, J, K, and L consists of communications involving attorneys for the authority and authority employees and officials in their capacities as clients. You state these communications were made in furtherance of the rendition of professional legal services to the authority. You state these communications were intended to be, and have remained, confidential. Upon review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the authority may withhold Exhibits H, I, J, K, and L under section 552.107(1) of the Government Code.⁴

Section 552.103 of the Government Code provides, in relevant part:

(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). The governmental body claiming section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information, and (2) the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

⁴ As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

You state, and provide documentation demonstrating, prior to the authority's receipt of the present request for information, a lawsuit styled *Atkinson v. Houston Housing Authority*, Cause No. 2019-83384, was filed and is currently pending against the authority in the 61st Civil District Court of Harris County, Texas. Thus, we agree litigation was pending on the date the authority received the present request for information. You also state the information submitted as Exhibits O, P, Q, R, S, T, U, and GG pertains to the substance of the lawsuit claims. Based on these representations and our review, we find the information at issue is related to the pending litigation. Accordingly, the authority may withhold Exhibits O, P, Q, R, S, T, U, and GG under section 552.103 of the Government Code.⁵

Generally, however, once information has been obtained by all parties to the litigation though discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to 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 has been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

Section 552.105 of the Government Code excepts from disclosure information relating to "(1) the location of real or personal property for a public purpose prior to public announcement of the project; or (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property." Gov't Code § 552.105(1), (2). Section 552.105 is designed to protect a governmental body's planning and negotiating position with respect to particular transactions. Open Records Decision Nos. 564 at 2 (1990), 357 (1982), 310 (1982). Information that is excepted from disclosure under section 552.105 that pertains to such negotiations may be excepted from disclosure so long as the transaction relating to that information is not complete. *See* ORD 310. But the protection offered by section 552.105 is not limited solely to transactions not yet finalized. This office has concluded that information about specific parcels of land obtained in advance of other parcels to be acquired for the same project could be withheld where release of the information would harm the governmental body's negotiating position with respect to the remaining parcels. *See* ORD 564 at 2. A governmental body may withhold information "which, if released, would impair or tend to impair [its] 'planning and negotiating position in regard to particular transactions.'" ORD 357 at 3 (quoting Open Records Decision No. 222 (1979)). The question of whether specific information, if publicly released, would impair a governmental body's planning and negotiating position with regard to particular transactions is a question of fact. Accordingly, this office will accept a governmental body's good-faith determination in this regard, unless the contrary is clearly shown as a matter of law. *See* ORD 564.

You state the information submitted as Exhibits Y, Z, and AA relates to the location of real properties the authority intends to acquire for a public purpose. You assert release of this

⁵ As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

information would damage the authority's planning and negotiating positions with respect to the acquisition of properties needed for the project. Based on your representations and our review, we conclude the authority may withhold Exhibits Y, Z, and AA under section 552.105 of the Government Code.⁶

Section 552.111 of the Government Code excepts from disclosure “[a]n 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. 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, writ ref’d n.r.e.); 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 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 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).

This office has also concluded 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.

⁶ As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

Section 552.111 can also encompass communications between a governmental body and a third party, including a consultant or other party with a privity of interest. *See* Open Records Decision No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and 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.

You state the information submitted as Exhibits BB, CC, DD, EE, and FF consists of advice, opinions, and recommendations of authority employees and consultants for the authority regarding policymaking matters. Additionally, you state some of the information consists of drafts of documents pertaining to the authority's policymaking. You state one of the drafts at issue, which we marked, has been or will be released to the public in its final form. Accordingly, the authority may withhold the draft document we marked in its entirety under section 552.111 of the Government Code. However, you do not explain whether the remaining draft document was intended to be released in its final form. Thus, with respect to this information, we must rule conditionally. To the extent the remaining draft document, which we marked, will be released to the public in its final form, the authority may withhold this draft document in its entirety under section 552.111 of the Government Code. Conversely, to the extent the remaining draft document will not be released to the public in its final form, the authority may not withhold it in its entirety under section 552.111. Nevertheless, in that instance, we find portions of the information at issue consist of advice, opinions, or recommendations on the policymaking matters of the authority. Further, upon review, we find we find you have demonstrated some of the remaining information at issue, which we marked, consists of advice, opinions, or recommendations on the policymaking matters of the authority. Accordingly, the authority may withhold the information we marked under section 552.111 of the Government Code. However, we find the remaining information at issue consists of either general administrative information that does not relate to policymaking or information that is purely factual in nature. Thus, we find you have failed to demonstrate the remaining information at issue constitutes internal communications containing advice, recommendations, or opinions reflecting the policymaking processes of the authority. Therefore, the authority may not withhold any portion of the remaining information at issue under section 552.111 of the Government Code on the basis of the deliberative process privilege.

In summary, the authority may withhold the information we marked under rule 503 of the Texas Rules of Evidence. The authority may withhold Exhibits H, I, J, K, and L under section 552.107(1) of the Government Code. The authority may withhold Exhibits O, P, Q, R, S, T, U, and GG under section 552.103 of the Government Code. The authority may withhold Exhibits Y, Z, and AA under section 552.105 of the Government Code. The authority may withhold the draft document we marked in its entirety under section 552.111 of the Government Code. To the extent the remaining draft document we marked will be released to the public in its final form, the authority may withhold this draft document in its entirety under section 552.111 of the Government Code. Additionally, the authority

may withhold the information we marked under section 552.111 of the Government Code. The authority must release the remaining information.

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Blake Brennan
Assistant Attorney General
Open Records Division

BBX/mo

Ref: ID# 840769

Enc. Submitted documents

c: Requestor
(w/o enclosures)