



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 9, 2010

Ms. Jacqueline Hojem
Public Information Officer
Metropolitan Transit Authority
P.O. Box 61429
Houston, Texas 77208-1429

OR2010-10158

Dear Ms. Hojem:

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# 386027 (MTA No. 2010-0455).

The Metropolitan Transit Authority of Harris County ("METRO") received a request for the following twelve categories of information: 1) name(s) of the person(s) METRO contacts at AT&T and Centerpoint Energy regarding moving or adjusting utilities in the southeast quadrant for any METRO Solutions project; 2) third party companies which METRO must notify to move private utilities and contact persons in the area of the southeast quadrant; 3) procedures for notifying third parties regarding the moving of private utilities for public transportation projects including request forms, names of METRO employees who made the requests, and method of transmission from 2007 to the present; 4) request forms or documents pertaining to requests for adjustments of utilities for METRO Solutions projects in six specified areas from January 2008 to the present; 5) information pertaining to permits and permit requests/applications which METRO has funded or for which METRO has contracted with agencies pertaining to any event connected to the Texas Commission on Environment Quality ("TCEQ"), Environmental Protection Agency, and City of Houston regarding any projects in the southeast quadrant from January 2008 to the present; 6) names of companies contracted for used oil services by METRO and the length of time these services have been provided since January 1, 2007; 7) number of properties METRO has purchased, acquired, or is in negotiations to purchase or acquire on Scott Street south of the Wheeler Street/Scott Street intersection; 8) number of properties METRO has purchased, acquired, or is in negotiations to purchase or acquire on Griggs Road west of the Martin Luther King, Jr. Boulevard./Griggs Road intersection; 9) purpose and use for the property in a specified area if the land has been acquired by METRO or an agent of

METRO; 10) amount of funds in the budget for the construction of the vehicle storage and maintenance facility in the 2009 budget estimates; 11) explanation of how METRO's southeast corridor vehicle storage and maintenance facility intends on treating and discharging wastewater and any security measures which will be taken for this facility; and 12) names of project managers, managers, or former managers from January 1, 2007 to the present for Houston operational maintenance for the southeast corridor vehicle maintenance and storage facility. You state METRO has no information responsive to items 7, 8, and 9. You state METRO released information related to items 1, 6, 10, 11, and 12. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹ We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note you have not submitted information responsive to items 2, 3, and 4 of the request. To the extent information regarding this portion of the request existed on the date METRO received this request, we assume you have released it. If you have not released any such information, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, we note most of the submitted documents are subject to section 552.022 of the Government Code. Section 552.022(a) provides in part:

(a) Without limiting the amount or kind of information that is public information under this chapter, 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 submitted documents include environmental site assessment reports, a report concerning a ground penetrating radar survey, and a report of limited subsurface investigation, all of which are completed reports made for, or by, METRO and are subject to 552.022(a)(1). METRO must release these reports under section 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law. You claim these reports are excepted under section 552.103 of the Government Code and under the deliberative process

¹We 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.

prong of section 552.111 of the Government Code. However, sections 552.103 and 552.111 are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. See *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. 665 at n.5 (2000) (discretionary exceptions generally), 470 at 7 (1987) (governmental body may waive statutory predecessor to section 552.111 deliberative process). Therefore, METRO may not withhold these reports under sections 552.103 or 552.111 of the Government Code. As you raise no further exceptions to disclosure, these reports must be released.

We next turn to your claim under section 552.103 of the Government Code for the remaining documents pertaining to Parcel 19 (SE 49). Section 552.103 provides in pertinent 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 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 is 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). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). See ORD 551 at 4.

You state, and provide documentation showing, METRO received the request for information after an eminent domain proceeding styled *METRO v. U.S. Petroleum, et al.*, cause number 957262, was filed in the County Civil Court at Law No. 2 of Harris County. Based on your representation and our review, we conclude litigation involving METRO was pending when METRO received the request. You also indicate the remaining documents pertaining to Parcel 19 (SE 49) are related to the litigation because they pertain to the property at issue in the eminent domain proceeding. Based on your representations and our

review, we find the remaining documents pertaining to Parcel 19 (SE 49) are related to the pending litigation for the purposes of section 552.103. We, therefore, conclude METRO may withhold these documents, which we marked, under section 552.103.²

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

You also assert the remaining documents pertaining to Parcel 283 (NR 283) are excepted from disclosure under 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. 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). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5.

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

²As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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 id.* at 9.

Although you assert the remaining documents pertaining to Parcel 283 are subject to section 552.111, most of the remaining documents contain purely factual information and thus may not be withheld under section 552.111. A small portion of one letter between METRO and TCEQ, however, contains advice, opinions, or recommendations revealing the policymaking processes of METRO. You state METRO is in negotiations with TCEQ regarding environmental issues pertaining to Parcel 283 and that the information in this letter pertains to these negotiations. We note, however, TCEQ operates in a regulatory posture in relation to the project at issue in this document. In this instance, you have not demonstrated how METRO shares a privity of interest or common deliberative process with TCEQ. Therefore, METRO has failed to establish the applicability of section 552.111 to any portion of this document.

In summary, METRO must release the reports which are subject to section 552.022(a)(1) of the Government Code. METRO may withhold the documents we marked under section 552.103 of the Government Code. The remaining documents 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,



Jessica Eales
Assistant Attorney General
Open Records Division

JCE/eeg

Ref: ID# 386027

Enc. Submitted documents

c: Requestor
(w/o enclosures)