ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 24, 2012

Mr. Michael B. Gary
Legal Counsel
Harris County Appraisal District
P.O. Box 920975
Houston, Texas 77292-0975

OR2012-13510

Dear Mr. Gary:

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# 463275 (HCAD #s 12-2271, 12-2271A, 12-2271B, 12-2594).

The Harris County Appraisal District (the "district") received four requests, three of which are from the same requestor, for (1) the name, salary, and position or summary job description of each employee assigned to work in "Review Appraisal" for a specified time period; (2) summary statistical reports for specified time periods; (3) information pertaining to the resolution of all lawsuits resolved during a specified time period; (4) information pertaining to current active lawsuits awaiting resolution during a specified time period; (5) information indicating whether expert reports were produced to guide district in resolution of lawsuits; (6) copies of communications or reports in which the expert reports were referenced; (7) copies of all reports purporting to show analysis of value losses incurred in lawsuits for those cases in which expert reports had been prepared and had not been prepared; (8) information showing the cost of legal services to the district for a specified time period; (9) documentation showing the current case load assigned to external and internal legal operations; (10) an audit conducted by the district or its representatives showing the effectiveness of a specified law firm for a specified period of time; (11) the detailed out-of-office travel schedule of a named individual during a specified time period; (12) documentation showing reimbursements of travel expenses of the named individual for a specified time period; (13) information pertaining to a specified cause number; (14) information pertaining to the district's appeal of the decision in the specified cause number; (15) documentation pertaining to an appraisal review board protest hearing involving specified property; (16) information pertaining to and documentation prepared by

district consultants to show the methodology used in the valuation of refineries in Harris County; (17) documentation prepared by the district regarding the impact the loss of sales disclosure information would have in the valuation of residential property; (18) documentation regarding payments made to the previously specified law firm during a specified time period for all cases that are still active; (19) copies of all minutes or notes of executive staff meetings from a specified time period; (20) communications from another specified law firm; (21) a specified electronic document providing information on the resolution of property protests during a specified time period; (22) a specified electronic document pertaining to the resolution of lawsuits during a specified time period; and (23) a specified electronic document created by the district in response to a specified public information request.[1] You state the district will release some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.[2] 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).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This section encompasses information protected by other statutes, such as section 22.27 of the Tax Code, which provides in pertinent part:

> (a) Rendition statements, real and personal property reports, attachments to those statements and reports, and other information the owner of property provides to the appraisal office in connection with the appraisal of the property, including income and expense information related to a property filed with an appraisal office and information voluntarily disclosed to an appraisal office or the comptroller about real or personal property sales prices after a promise it will be held confidential, are confidential and not open to public inspection. The statements and reports and the information they contain about specific real or personal property or a specific real or personal property owner and information voluntarily disclosed to an appraisal office about real or personal property sales prices after a promise it will be held confidential may not be disclosed to anyone other than an employee of the

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[1]We note the district received clarification regarding this request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

[2]We assume the "representative sample" of information 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 those submitted to this office.

> appraisal office who appraises property except as authorized by Subsection (b) of this section.

Tax Code § 22.27(a). We understand the district is an appraisal office for purposes of section 22.27. You represent the submitted information in Exhibit 224 was furnished to the district by a property owner in connection with the appraisal of the property at issue and under a promise of confidentiality. You state none of the exceptions in section 22.27(b) apply in this instance. Based on your representations and our review, we find the information in Exhibit 224 is confidential under section 22.27 of the Tax Code and must be withheld under section 552.101 of the Government Code.

Section 552.103 of the Government Code provides in part as follows:

> (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.
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> . . .
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> (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). A 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 showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request, 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). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103.

You inform us, and have provided documentation showing, that a lawsuit, styled *Houston Refining, L.P. v. Harris County Appraisal District*, Cause No. 2011-59136, was pending in the 215th Judicial District Court for Harris County prior to the receipt of the instant requests for information. You state the submitted information in Exhibits 225 through 228 is related to the pending lawsuit. Based on your representations and our review, we agree that litigation to which the district is a party was pending on the date the district received the requests. We further find that the information at issue relates to the pending litigation.

Therefore, the district may withhold the submitted information in Exhibits 225 through 228, under section 552.103 of the Government Code.

We note that once the information has been obtained by all parties to the pending litigation, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note that the applicability of section 552.103(a) ends when the litigation is concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. 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. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was "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). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. 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).

The district states the submitted information in Exhibits 1 through 223 consists of communications between its in-house attorneys, outside counsel, and employees of the district that were made in connection with the rendition of professional legal services to the

district. Furthermore, the district states the communications were intended to be confidential, and the confidentiality of the communications has been maintained. Upon review, we find the district may withhold the submitted information in Exhibits 1 through 223 under section 552.107 of the Government Code.[3]

Section 552.111 of the Government Code 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); *see also* 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 only those internal communications that consist of advice, opinions, recommendations 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. *See id.; see also City of Garland v. The 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).

You contend the remaining information constitutes communications between district employees that contain advice, opinions, and recommendations relating to the district's policymaking processes in connection with executive staff meetings and the potential impact of the loss of sales disclosure information on appraisal operations. Upon review, we agree the district may withhold the information we have marked in Exhibits 229 through 234 under section 552.111 of the Government Code. However, we find the remaining information you seek to withhold consists of general administrative and purely factual information. Therefore, we conclude you have failed to demonstrate how the deliberative process privilege

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

applies to the remaining information you seek to withhold, and the district may not withhold this information pursuant to the deliberative process privilege under section 552.111.

Lastly, we note a portion of the remaining information in Exhibit 230 may be subject to section 552.117 of the Government Code.[4] Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, a governmental body must withhold information under section 552.117 on behalf of a current or former employee only if the individual made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the individual whose information is at issue timely requested confidentiality pursuant to section 552.024, the information we have marked in the remaining information in Exhibit 230 must be withheld under section 552.117(a)(1). However, the district may not withhold the marked information under section 552.117(a)(1) if the individual did not make a timely election to keep the information confidential.

In summary, the district may withhold the submitted information in Exhibit 224 under section 552.101 of the Government Code in conjunction with section 22.27 of the Tax Code. The district may withhold the submitted information in Exhibit 225 through 228 under section 552.103 of the Government Code. The district may withhold the submitted information in Exhibits 1 though 223 under section 552.107 of the Government Code. The district may withhold the information we have marked in Exhibits 229 through 234 under section 552.111 of the Government Code. If the individual whose information is at issue timely requested confidentiality pursuant to section 552.024 of the Government Code, the information we have marked in the remaining information in Exhibit 230 must be withheld under section 552.117(a)(1) of the Government Code. The district 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 http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free,

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[4]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).

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,

Sean Nottingham
Assistant Attorney General
Open Records Division

SN/bhf

Ref: ID# 463275

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)