

1. On May 10, 2013, Save Our Springs Alliance, Inc. by and through its Executive Director, William G. Bunch, submitted a request for records to Travis County Commissioner Gerald Daugherty regarding the proposed SH 45 SW, the Manchaca Expressway, or other name for a proposed road or toll road along the SH 45 SW alignment or any part of such alignment.
2. On May 24, 2013, the Defendant, by and through an assistant county attorney, requested a letter ruling from the Texas Attorney General on the information requested by Save Our Springs Alliance, Inc.
3. On May 28, 2013, the Defendant provided Save Our Springs Alliance, Inc. with a minimal amount of documentation the Defendant deemed to be responsive and not excepted from disclosure. The letter also advised Save Our Springs Alliance, Inc., of Defendant's ruling request to the attorney general with respect to additional information that was withheld. Save Our Springs Alliance, Inc., respectfully submits that

Commissioner Daugherty is withholding and, on information and belief, has failed to produce documents required to be produced as public information under the Texas Public Information Act. Since time is of the essence in the public knowing about the County and the Commissioner's efforts to build this major highway, Plaintiff brings this action for mandamus to produce all of the public information requested on May 10, 2013.

#### **DISCOVERY**

4. Subject to an agreed order, a motion by either party to this suit or the Court's own initiative, discovery in this case should be conducted under Level 2 pursuant to Rule 190.3 of the Texas Rules of Civil Procedure.

#### **PARTIES**

5. Plaintiff is Save Our Springs Alliance (SOS or Plaintiff), a non-profit, charitable organization dedicated to the preservation of the Edwards Aquifer ecosystem and the natural and cultural heritage of the Texas Hill Country region. It can be served in this case through its attorneys of record at the address listed below.

6. Defendant is Gerald Daugherty, in his official capacity as Travis County Commissioner for Precinct 3. The Travis County Commissioners Court is a "governmental body" pursuant to the Texas Public Information Act, Tex. Govt. Code § 552.003(1)(A)(i). The Defendant is an officer for public information and the custodian pursuant to Tex. Govt. Code § 552.201. The Defendant can be served by delivering a copy of citation and this Original Petition to Commissioner Gerald Daugherty at 700 Lavaca, Suite 2.400, Austin, TX 78701.

## **JURISDICTION AND VENUE**

7. This Court has jurisdiction to issue the mandamus relief requested under the Texas Public Information Act (TPIA or Act). Tex. Gov't. Code § 552.321. Venue is proper and mandatory in the District Court of Travis County, Texas. Tex. Gov't Code § 552.321 (b).

## **FACTS**

8. On May 10, 2013, SOS by and through its Executive Director, William G. Bunch submitted a request for records to Commissioner Gerald Daugherty regarding the proposed SH 45 SW, the Manchaca Expressway, or other name for a proposed road or toll road along the SH 45 SW alignment or any part of such alignment. The entire request provides:

All correspondence from or to [Commissioner Daugherty] or [his] identified executive assistants since [he] took office in January 2012 to the present, that references the proposed SH 45 SW, the Manchaca Expressway, or other name for a proposed road or toll road along the SH 45 SW alignment or any part of such alignment.

**The instructions make clear that the request for correspondence included:**

all exchanges of information of any kind, or records thereof, including, but not limited to, telephone conference notes, meeting notes, emails, text messages, letters, notices, applications, memoranda, attachments to any of these, or other communications whether or not such information was received on, generated from, or stored on devices or data bases paid for privately or by entities other than your office or Travis County. It also includes any such correspondence where you were not the primary recipient but were "cc'ed" or "bcc'ed."

*A copy of the request is Attached as Exhibit A.*

9. On May 24, 2013, the Defendant, by and through an assistant county attorney, requested a letter ruling from the attorney general on the information request.

10. On May 28, 2013, the Defendant provided SOS with a minimal amount of documentation the Defendant deemed to be responsive. The letter also advised SOS of the Defendant's submission of a ruling request to the attorney general with respect to additional information that was withheld from SOS.

11. On May 30, 2013, the Defendant, by and through counsel, submitted a supplemental letter brief to the attorney general regarding the Defendant's May 24, 2013, request for a letter ruling on information the Defendant withheld from SOS. (*Attached as Exhibit "B"*). The letter vaguely asserts that the remaining information requested by SOS, and withheld by the Defendant, is excepted from disclosure because of attorney-client privilege; because it contains information that is internal communications that consists of advice, recommendations, opinions and other material reflecting the policymaking processes of the governmental body; and finally that the information is properly being withheld pursuant to a doctrine of common law privacy because the requested information contains highly intimate or embarrassing facts that are not of public concern. (*See Exhibit "B"*)

12. Attorney-client privilege only applies when a communication included a lawyer "for the purpose of facilitating the rendition of professional legal services." Tex. R. Evid. 503(b)(1). Simply because a communication involves or includes an attorney for the County does not mean the privilege applies.

13. The agency memorandum exception is applied narrowly and only applies to communications that relate to new agency policymaking. Information related to existing policy or that which is purely factual must be disclosed and may be severed from other exempted information in order to make the public information available.

14. Finally, the requested correspondence is not of the nature intended to be exempt from disclosure under the common-law privacy. The courts and the attorney general's



office have repeatedly made clear that this doctrine was adopted to protect only extremely private information that may be embarrassing if made public, such as that relating to sexual assault, intimate family relationships, pregnancy, psychiatric treatment, abuse, some medical information, personal financial information not related to a government body, and other similar information. Since the proposed SH 45 SW highway (or toll road) is a public project of great public interest, there can be nothing both "private" and "embarrassing" that would allow the withholding of documents under the personal privacy privilege.

15. On July 30, 2013 the Office of the Attorney General issued letter ruling OR2013-13139 . (*Attached as “Exhibit C”*). The letter ruling held in part that Defendant had failed to show that certain documents were subject to being withheld from public disclosure under the attorney client privilege or the draft policy making exception. The ruling was inconclusive on some other documents that were submitted for review because there was insufficient context provided by Defendant to support the privilege or exception claims. Finally, the letter ruling stated that some of the claims for withholding requested documents were justified. Among these, the ruling stated, at page 5, that “the information we have marked is highly intimate or embarrassing and of no legitimate public interest.”

16. Among the information provided by the Defendant was an email acknowledging that the Defendant had been emailing individuals about the SH 45 SW project through his personal email address. (*Attached as Exhibit “D”*) The County did not disclose these messages and made no reference to them or any others in its supplemental letter brief to the attorney general. (*See Exhibit “B”*).

17. Commissioner Daugherty has been very active since his election in pushing the development of the SH 45 SW roadway. As some of the documents provided establish,

Commissioner Daugherty serves as Chair of a subcommittee of the Capital Area Metropolitan Planning Organization concerning SH 45 SW. However, no minutes of this subcommittee or notices of its meetings were provided in response to the request.

18. SOS contends that the Defendant provided the attorney general with only a sample of the requested documentation, and that the Defendant has not produced relevant emails and text messages from his personal email and cell phone accounts and may not have provided correspondence to or from his executive assistants that reference SH 45 SW and were specifically requested by SOS. To the extent such information concerns the public business of planning for and seeking to build SH 45 SW, such information is public information regardless of whether it is stored, sent, or received on accounts or devices owned privately by Commissioner Daugherty or one or more of his Executive Assistants, and is within the scope of Plaintiff's May 10 request for public information.

### **CAUSES OF ACTION**

#### **Mandamus to Provide Public Records**

19. Defendant violated SOS's right under the TPIA by failing to provide full disclosure of the information requested in SOS's record request dated May 10, 2013. Under the TPIA, the requested records are "public information" and subject to public disclosure.

20. SOS asks the Court to issue a writ of mandamus requiring the Defendant to "promptly" provide all copies of those records to SOS pursuant to the terms of the TPIA.

21. In the event that the Defendant asserts that the requested documents should be withheld, SOS requests that those documents be made available to Plaintiff under restrictive order pursuant to discovery request, and also made available for *in camera* review so the Court can make an informed determination on which documents and

portions of documents contain public information properly requested by Plaintiff in its May 10 request..

#### CLAIM ONE

**22.** Defendant violated SOS's right under the TPIA by redacting email addresses that were not personal email addresses, but rather were business and/or government agency email addresses not excepted by Government Code Section 552.137. Under the TPIA, the requested records are "public information" and subject to public disclosure.

#### CLAIM TWO

**23.** Defendant violated SOS's rights under the TPIA by justifying the withholding of information on the grounds that "documents containing highly intimate or embarrassing facts" and "not of legitimate concern to the public," and that ".to preserve the subject's common-law right of privacy, the information should be withheld in its entirety". (See Exhibit "A"). This exception to disclosure does not warrant withholding information as it relates to a public construction project or any other public undertaking affecting public's use of public property. While such information may be embarrassing, information concerning the proposed SH 45 SW cannot be "highly intimate" nor can it be considered not of "a legitimate concern to the public." In short, the Attorney General's ruling is wrong on this point, and the "common law privacy" doctrine cannot apply to information concerning a major public capital improvement project.

#### CLAIM THREE

**24.** Defendant violated SOS's right under the TPIA by failing to produce documents that were maintained, delivered, or received, on or from Defendant's private email and text accounts or privately owned devices. On information and belief, Defendant also failed to produce correspondence concerning SH 45 SW to or from his Executive Assistants, regardless of whether such correspondence was delivered or received on

privately owned devices or accounts. Such documents are public information and warrant disclosure when the context of the communication relates to the official business of a governmental body.

### **ATTORNEY FEES**

**25.** Plaintiff asks the Court to order the Defendant to pay reasonable and necessary attorney fees and costs to Plaintiff, pursuant to Tex. Gov't Code § 552.323.

### **PRAYER**

For these reasons, Plaintiff, Save Our Springs Alliance, requests that the Defendant be cited to appear and answer and that the Court:

- a.** order a writ of mandamus requiring the Defendant to:
    - i.** promptly provide to Plaintiff, Save Our Springs Alliance, copies of the records requested May 10, 2013 at a reasonable cost, save and except those documents demonstrated to the Court, following discovery and a hearing, to be properly withheld under the Texas Public Information Act; and
- order the Defendant to pay reasonable and necessary attorney fees and costs to Save Our Springs Alliance and grant such other and further relief, at law and in equity, to which Plaintiff may show itself to be justly entitled.

Respectfully Submitted,

**SAVE OUR SPRINGS ALLIANCE, INC.**

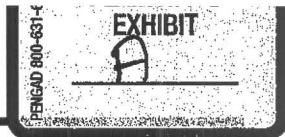
//S// William G. Bunch

William G. Bunch  
State Bar No. 03342450  
bill@sosalliance.org

//S//Adam R. Abrams

Adam R. Abrams  
State Bar No. 24053064  
adam@sosalliance.org  
905 W. Oltorf, Suite A  
Austin, Texas 78704  
512.477.2320  
512. 477.6410 fax

**Adam Abrams**



**From:** Bill Bunch <bill@sosalliance.org>  
**Sent:** Friday, May 31, 2013 1:37 PM  
**To:** Adam Abrams; Lauren Ice  
**Subject:** Fwd: May 10 Public Information Request

----- Original Message -----

**Subject:** May 10 Public Information Request  
**Date:** Fri, 10 May 2013 16:13:01 -0500  
**From:** Bill Bunch <bill@sosalliance.org>  
**Organization:** Save Our Springs Alliance  
**To:** geerald.daugherty@co.travis.tx.us  
**CC:** barbara.smith@co.travis.tx.us, David Escamilla <David.Escamilla@co.travis.tx.us>

\_Via E-mail\_

Re: REQUEST FOR PUBLIC INFORMATION

Dear Commissioner Daugherty:

This is a request for public information under Chapter 552 of the Texas Government Code. I request that you make available for inspection and/or copying all information received, delivered, collected, assembled or maintained by you or your office that is described below.

1. All correspondence from or to you or your identified executive assistants since you took office in January 2012 to the present, that references the proposed SH 45 SW, the Manchaca Expressway, or other name for a proposed road or toll road along the SH 45 SW alignment or any part of such alignment.

\_INSTRUCTIONS:\_

You must promptly produce the requested information for inspection and/or duplication. Tex. Gov't Code, § 552.221(a). If you wish to withhold any information, you must identify all reasons and request a decision from the Attorney General, with written notice to me asserting any exceptions to the Public Information Act, within 10 business days. Tex. Gov't Code, § 552.301 - .302. "Correspondence" includes all exchanges of information of any kind, or records thereof, including, but not limited to, telephone conference notes, meeting notes, emails, text messages, letters, notices, applications, memoranda, attachments to any of these, or other communications whether or not such information was received on, generated from, or stored on devices or data bases paid for privately or by entities other than your office or Travis County. It also includes any such correspondence where you were not the primary recipient but were "cc'ed" or "bcc'ed."

The Save Our Springs Alliance is a non-profit, charitable organization dedicated to the preservation of the Edwards Aquifer ecosystem, to conservation of park and natural heritage lands, and to open, responsive government. The Alliance will use the requested information to inform and educate the general public as to the County's activities. Release of the information we have requested will primarily benefit the general public by increasing public awareness and knowledge of these matters. The Alliance therefore requests a waiver or reduction of charges associated with the release of this information, pursuant to Tex. Gov't Code § 552.267.

Thank you for your cooperation. If you have any questions about these requests and/or desire clarification or assistance, please do not hesitate to call me at 477-2320.

Sincerely,

Bill Bunch

Executive Director  
Save Our Springs Alliance

**DAVID A. ESCAMILLA**  
COUNTY ATTORNEY

STEPHEN H. CAPELLE  
FIRST ASSISTANT

JAMES W. COLLINS  
EXECUTIVE ASSISTANT

314 W. 11<sup>TH</sup> STREET  
GRANGER BLDG., SUITE 420  
AUSTIN, TEXAS 78701

P. O. BOX 1748  
AUSTIN, TEXAS 78767

(512) 854-9513  
FAX: (512) 854-4808



**TRANSACTIONS DIVISION**

JOHN C. HILLE, JR., DIRECTOR †

BARBARA J. WILSON

MARY ETTA GERHARDT

TENLEY A. ALDREDGE

JAMES M. CONNOLLY

DANIEL BRADFORD

ELIZABETH H. WINN

† Member of the College  
of the State Bar of Texas

May 30, 2013

**Hand Delivered**

Ms. Amanda Crawford, Division Chief  
Office of the Attorney General of Texas—Open Records Division  
P.O. Box 12548  
Austin, Texas 78711-2548

Re: Request from **Bill Bunch** on **05/10/2013**—Request for Ruling and  
Supplemental Brief

Dear Ms. Crawford:

On May 24, 2013, on behalf of the Travis County Commissioner for Precinct 3, Gerald Daugherty, we submitted a letter to your office asking for a ruling on this request. This is our supplemental brief for the ruling request. It explains the specific exceptions in Government Code chapter 552 that we believe control over the responsibility of Travis County Commissioner Gerald Daugherty to release the requested information.

**Some of the requested information is excepted from disclosure under Government Code section 552.107 and Section 552.101 with Texas Rule of Evidence 503.**

Government Code section 552.107(1) 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 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. 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 your 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, no writ). 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).

In this case, some of the requested information constitutes or documents communications between lawyers of the Travis County Attorney's Office and client and client's representatives, as well as constituting or documenting communications between representatives of the client. These communications were made for the purpose of facilitating the rendition of professional legal services and were intended to be confidential. In addition, the confidentiality of these communications has been maintained. Accordingly, we assert that all responsive information that constitutes or documents attorney-client communications as well as those that constitutes or documents client representative communications are protected from disclosure under Government Code section 552.107(1) and Rule 503 of the Rules of Evidence with Government Code section 552.101.

**Some of the responsive information is excepted from disclosure under Government Code section 552.111.**

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 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). 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 may be withheld under 552.111. *See* Open Records Decision No. 313 at 3 (1982). In addition, a preliminary draft of a document that is intended for public release in its final form that necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document may be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor of section 552.111). 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.

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." 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). Thus, section 552.111 encompasses the deliberative process privilege. *See* ORD 615 at 2.

In this case, we have marked responsive information that comprises intraagency documents that include advice, opinion, and recommendations about Travis County's role in relation to future road along the SH 45 SW alignment. The information was created by client and client representatives to demonstrate possible scenarios of construction and funding strategies. The information is directly related to policy matters regarding the possible construction and funding scenarios and documents the advice, opinions and recommendations of Commissioner Daugherty and his staff. To release this information would discourage frank deliberations of this matter among Commissioner Daugherty and his staff.

**Some of the requested information must be withheld under Government Code section 552.101.**

This request implicates Government Code section 552.101, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 incorporates the doctrine of common law privacy.

The doctrine of common law privacy protects from public disclosure information that (1) contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and (2) is of no legitimate concern to the public. *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The documents include statements that could be considered highly intimate or embarrassing. To preserve the subject's common-law right of privacy, the information should be withheld in its entirety.

In conclusion, we ask that you rule on whether the enclosed information must be released to the requestor. If you have any questions, please contact me at (512) 854-4168, or by e-mail at [elizabeth.winn@co.travis.tx.us](mailto:elizabeth.winn@co.travis.tx.us).

Sincerely,



Elizabeth Hanshaw Winn  
Assistant County Attorney

Enclosures: request letter, requested information.

c:

Gerald Daugherty  
Commissioner, Precinct 3  
P.O. Box 1748  
Austin, TX 78767  
(emailed, without enclosures)

Bill Bunch  
Executive Director  
Save Our Springs Alliance  
(emailed [bill@sosalliance.org](mailto:bill@sosalliance.org), without enclosures)



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT



July 30, 2013

Ms. Elizabeth Hanshaw Winn  
Assistant County Attorney  
Travis County  
P.O. Box 1748  
Austin, Texas 78767-1748

OR2013-13139

Dear Ms. Winn:

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# 494791.

The Office of the Travis County Commissioner, Precinct 3 (the "commissioner's office") received a request for all correspondence to or from the commissioner and/or his executive assistants referencing proposed named roads and toll roads from January 2012 to the date of the request. You state the commissioner's office is releasing some of the responsive information to the requestor, but claim the remaining requested information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from 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 a portion of the submitted information, which we have marked, is not responsive to the instant request because it was created after the date the request was received. This ruling does not address the public availability of non-responsive information, and the commissioner's office is not required to release non-responsive information in response to this request.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *Id.* § 552.107(1). 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 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, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. See TEX. R. EVID. 503(b)(1). 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.*, 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, no pet.). Section 552.107(1) generally excepts an entire communication 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).

You state the submitted e-mail communications you have marked were made by lawyers of the Travis County Attorney's Office and the commissioner's office staff for the purpose of providing legal services to the commissioner's office. You state these e-mails were intended to be confidential and have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information we have marked. Thus, the commissioner's office may generally withhold the information we have marked under section 552.107(1) of the Government Code. We note, however, some of these otherwise privileged e-mail strings include e-mails received from or sent to non-privileged parties. Furthermore, if the e-mails received from or sent to non-privileged parties are removed from the otherwise privileged e-mail strings in which they appear and stand alone, they are responsive to the requests for information. Therefore, if these non-privileged e-mails, which we have marked, are maintained by the commissioner's office separate and apart from the otherwise privileged e-mail strings in which they appear, then the commissioner's office may not withhold these non-privileged e-mails under section 552.107(1). Further, some of the submitted e-mails were sent to or received by individuals you have not demonstrated are privileged parties. Thus, we find you have not demonstrated the remaining information reveals privileged attorney-client communications for the purposes of section 552.107(1). Thus, the remaining information may not be withheld on that basis.

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. Section 552.111 encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of this exception 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, orig. proceeding); 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, orig. proceeding). We determined section 552.111 excepts from disclosure 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. *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). Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *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 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.

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 Nos. 631 at 2 (section 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) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body's consultants). 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 at 9.

You state the information you have marked consists of advice, opinions, and recommendations regarding policy issues concerning the State Highway 45 Southwest toll road ("SH 45"). The submitted information reflects the commissioner serves as a member of the Capital Area Metropolitan Planning Organization ("CAMPO") SH 45 Committee. Upon review, we find the commissioner's office and CAMPO share a privity of interest. We understand the information you have marked pertains to CAMPO policy or reflects the deliberative and policymaking process of the CAMPO SH 45 Committee. We note some of the information you marked contains draft documents. You do not state whether the draft documents will be released to the public in final form. Thus, to the extent the draft documents will be released to the public in their final form, the commissioner's office may withhold them in their entirety under section 552.111. If the draft documents will not be released to the public in their final form, then the commissioner's office may not withhold them in their entirety under section 552.111. Further, we find the information we have marked, including information within some of the draft documents if they will not be released in final form, consists of advice, opinions, and recommendations pertaining to a policymaking matter. Accordingly, the commissioner's office may withhold the information we have marked under section 552.111. 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 how the remaining information at issue is excepted under section 552.111. Accordingly, the remaining information at issue may not be withheld under section 552.111 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses the doctrine of common-law privacy, which protects information (1) containing highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. 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. 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. Upon review, we find the information we have marked is highly intimate or embarrassing and of no legitimate public interest. Therefore, the commissioner's office must withhold the marked information under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find none of the remaining information is highly intimate or embarrassing and not of legitimate public interest. Accordingly, none of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy.

Section 552.117 of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code.<sup>1</sup> Gov't Code § 552.117(a). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5* (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request under section 552.024 the information be kept confidential. Therefore, to the extent the individual at issue timely requested confidentiality under section 552.024, the commissioner's office must withhold the information we have marked in the remaining information under section 552.117(a)(1) of the Government Code. Conversely, to the extent the individual at issue did not timely request confidentiality under section 552.024, the commissioner's office may not withhold the information under section 552.117(a)(1).

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)-(c)*. The e-mail addresses at issue are not excluded by subsection (c). Therefore, the commissioner's office must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

In summary, the commissioner's office may generally withhold the information we have marked under section 552.107(1) of the Government Code. However, if the non-privileged

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<sup>1</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body but ordinarily will not raise other exceptions. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).*



e-mails we have marked are maintained by the commissioner's office separate and apart from the otherwise privileged e-mail strings in which they appear, then the commissioner's office may not withhold the non-privileged e-mails under section 552.107(1) of the Government Code. To the extent the marked draft documents will be released to the public in their final form, the commissioner's office may withhold them in their entireties under section 552.111. The commissioner's office may also withhold the advice, opinions, and recommendations we have marked, including information within some of the draft documents if they will not be released in final form, under section 552.111. The commissioner's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the individual at issue timely requested confidentiality under section 552.024 of the Government Code, the commissioner's office must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The commissioner's office must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. The remaining 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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Britni Fabian  
Assistant Attorney General  
Open Records Division

BF/dls

Ref: ID# 494791

Enc. Submitted documents

c: Requestor  
(w/o enclosures)



**Barbara A. Smith**

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**From:** Susan Narvaiz  
**Sent:** Wednesday, March 20, 2013 4:55 PM  
**To:** Barbara Smith  
**Subject:** RE: SH 45 SW meeting  
**Attachments:** Susan Narvaiz.vcf

Barbara:

I will make that change. Thank you for all the support and "handling" as we go along. Gerald speaks so highly of his team and I can see why!

Susan

Confidentiality Notice: This e-mail message, including any attachments, is for the sole use of the intended recipient(s) and may contain confidential and privileged information. Any unauthorized review, use, disclosure, or distribution is prohibited. If you are not the intended recipient, please contact the sender by reply email and destroy all copies of the original message.

-----Original Message-----

**From:** Barbara Smith [<mailto:Barbara.Smith@co.travis.tx.us>]  
**Sent:** Wednesday, March 20, 2013 4:52 PM  
**To:** Susan Narvaiz  
**Subject:** RE: SH 45 SW meeting

Susan -

Gerald has not been here this afternoon. Also, I believe you are sending emails to his personal address. Please change it to his County address:

[Gerald.daugherty@co.travis.tx.us](mailto:Gerald.daugherty@co.travis.tx.us) Not sure how often he is checking personal emails these days. Bob forwarded today's email with media release and progress report to me so I do have it. I will make sure Gerald sees it. Not sure about the one on Saturday.

Thanks,  
Barbara

-----Original Message-----

**From:** Susan Narvaiz  
**Sent:** Wednesday, March 20, 2013 4:47 PM  
**To:** Barbara Smith  
**Subject:** FW: SH 45 SW meeting

Barbara:

I followed up with Deena and she has updated the calendar. Please make sure Gerald knows I responded.