

IN THE SUPREME COURT OF TEXAS

No. 00-0453

IN RE THE CITY OF GEORGETOWN AND GEORGE RUSSELL, IN HIS OFFICIAL
CAPACITY AS ACTING CITY MANAGER AND OFFICER FOR PUBLIC INFORMATION,
RELATOR

ON PETITION FOR WRIT OF MANDAMUS

Argued on January 3, 2001

JUSTICE ABBOTT, dissenting, joined by CHIEF JUSTICE PHILLIPS and JUSTICE BAKER.

When enacting Chapter 552 of the Public Information Act, the Legislature enunciated a clear and unambiguous policy statement: “[I]t is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees.” TEX. GOV’T CODE § 552.001(a). The Act “forcefully articulates a policy of open government.” *A & T Consults., Inc. v. Sharp*, 904 S.W.2d 668, 675 (Tex. 1995). To effectuate this policy, the Legislature mandated that the Act “shall be liberally construed in favor of granting a request for information.” TEX. GOV’T CODE § 552.001(b).

To further these broad directives, the Legislature expressly identified eighteen categories of information that are “public information” and that must be disclosed upon request. TEX. GOV’T

CODE § 552.022(a). The Legislature attempted to safeguard its policy of open records by adding subsection 552.022(b), which limits courts' encroachment on its legislatively established policy decisions. That section provides:

A court in this state may not order a governmental body or an officer for public information to withhold from public inspection any category of public information described by Subsection (a) or to not produce the category of public information for inspection or duplication, unless the category of information is expressly made confidential under other law.

Id. § 552.022(b). Subsection (b) makes clear that courts may not order any information falling within the subsection (a) categories to be withheld, unless the information is expressly made confidential under other law. *Id.* But if this Court has the power to broaden by judicial rule the categories of information that are “confidential under other law,” then subsection (b) is eviscerated from the statute. By determining what information falls outside subsection (a)'s scope, this Court may evade the mandates of subsection (b) and order information withheld whenever it sees fit. This not only contradicts the spirit and language of subsection (b), it guts it. For these reasons and for those that follow, I dissent.

The eighteen categories of public information listed in subsection (a) are “not excepted from required disclosure under [Chapter 552].” *Id.* § 552.022(a). This language plainly means that the exceptions to disclosure contained in Subchapter C of the Act do not apply to these categories of information. And, information falling within the scope of subsection (a) may not be withheld “unless the category of information is expressly made confidential under other law.” *Id.* § 552.022(b).

The first category of public information listed in subsection (a) is “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108.” Because section 552.108, the exception for certain law-enforcement and prosecutorial records, does not apply, the engineering report at issue falls within this category. The report may also fall within the litigation exception to disclosure (Section 552.103) or one of the other Subchapter C exceptions, but, as noted, those exceptions do not apply. Accordingly, under the plain language of section 552.022, the report can be withheld only if it is expressly made confidential under other law.

In construing the Act to determine whether the report is within a category of information that “is expressly made confidential under other law” and therefore can be withheld, the Court should be guided by the legislative policy underlying the Act. That policy instructs us to strictly construe the language “expressly made confidential under other law” to ensure disclosure to the full extent envisioned by the Legislature. The more broadly the Court construes this language, the more information may be withheld from disclosure, and the more the legislative policy of public access to information is thwarted.

The City contends that the report is privileged under the work-product and consulting-expert privileges embodied in Texas Rules of Civil Procedure 192.5 and 192.3(e) and is therefore “confidential under other law” within the meaning of section 552.022. But “privileged” is not the same as “confidential.” These discovery privileges do not except the report from disclosure under section 552.022(a). They simply protect documents from discovery if the privilege is properly asserted. Privileges are voluntary and may be waived. That is why discovery privileges are

recognized and included within the *permissive* exceptions of sections 552.103 (litigation exception), 552.107(1) (certain legal matters), and 552.111 (agency memoranda) of the Act. But those exceptions do not apply to “public information” under section 552.022(a).

The Court concludes that the Texas Rules of Civil Procedure and the Texas Rules of Evidence constitute “other law” within the meaning of section 552.022. But there is no indication that the Legislature considered our rules to be “other law.” To the contrary, our State Constitution makes clear that it is the Legislature that promulgates laws and “the power conferred upon the legislature to make the laws cannot be delegated by that department to any other body or authority.” TEX. CONST. art. III, § 1 interp. commentary (Vernon 1997); *FM Properties Operating Co. v. City of Austin*, 22 S.W.3d 868, 873 (Tex. 2000) (the Texas Constitution vests legislative power in the Legislature). Although the Legislature may have delegated to the Court rule-making authority, it did not grant us law-making authority. In fact, the Legislature provided that “[t]he supreme court may make and enforce all necessary rules of practice and procedure, *not inconsistent with the law*, for the government of the supreme court and all other courts of the state.” TEX. GOV’T CODE § 22.003(b) (emphasis added). If the Legislature considered our rules to be law, it would have used the words “other law” rather than “the law.”

Moreover, even if this Court’s rules can be considered “other law,” they do not expressly make confidential those documents that are protected by the work-product and consulting-expert privileges.¹ The rules do not use the term “confidential” in connection with these privileges.

¹ Although the Court includes a discussion of the attorney-client privilege and the Texas Rules of Evidence, they are not at issue here. The City has asserted only the work-product and consulting-expert privileges in the Texas Rules of Civil Procedure.

Nevertheless, the Court contends, “the rules do not have to use the word ‘confidential’ to make information confidential.” ___ S.W.3d at ___. But the rules do have to use the word “confidential” to *expressly* make information confidential. The Court simply ignores the statute’s unambiguous requirement that the information be “expressly” made confidential. How can it be said that the rules *expressly* make documents confidential if the rules never even use the word “confidential”? The Court rewrites the statute so that “expressly made confidential under other law” means only that information “do[es] not have to be disclosed.” ___ S.W.3d at ___. Section 552.022(a) is unambiguous and should not be construed to mean something other than what the plain words say. *See Fleming Foods v. Rylander*, 6 S.W.3d 278, 284 (Tex. 1999). “It is the duty of a court to give to language used in a statute the meaning with which it was used by the legislature . . . [and] the only safe rule is to apply to [the words used] their ordinary meaning” *Boudreaux v. Tex. & N.O.R. Co.*, 78 S.W.2d 641, 644 (Tex. Civ. App.—Beaumont 1935, writ ref’d). The court-made rules do not *expressly* make confidential information that is subject to the work-product and consulting-expert privileges; nor does any other law.

In contrast to information subject to the work-product and consulting-expert privileges, which is not expressly made confidential by any law, numerous types of information are “expressly made confidential under other law.” For example, Texas Transportation Code section 681.003(d) provides that “[i]nformation concerning the name or address of a person to whom a disabled parking placard is issued or in whose behalf a disabled parking placard is issued is confidential” TEX. TRANSP. CODE § 681.003(d). Section 21.355 of the Texas Education Code provides that “[a] document evaluating the performance of a teacher or administrator is confidential.” TEX. EDUC.

CODE § 21.355. Section 28.058 provides: “All information regarding an individual student received by the commissioner under this subchapter from a school district or student is confidential.” *Id.* § 28.058. And, Family Code section 58.106 makes confidential information contained in the juvenile justice information system and precludes its disclosure. TEX. FAM. CODE § 58.106. This is just a small sample of the many examples — too numerous to list — in which the Legislature has made information expressly confidential. These confidentiality provisions generally protect third parties’ privacy, not that of party litigants. And, in contrast to privileges, governmental compliance with confidentiality laws is mandatory, and their protections may not be waived by governmental entities.

In addition to expressly making certain information confidential, the Legislature also often expressly excepts information from the operation of the Public Information Act. For example, Texas Health and Safety Code section 82.009, which concerns data obtained from medical records, makes that data confidential and expressly states that “[i]nformation that may identify an individual whose medical records have been used for obtaining data under this chapter is not available for public inspection under Chapter 552, Government Code.” TEX. HEALTH & SAFETY CODE § 82.009(b). And, Agriculture Code section 201.006 provides that, “[e]xcept as provided by this section, information collected by the state board or a conservation district is not subject to Chapter 552, Government Code.” TEX. AGRIC. CODE § 201.006(a).

I include these citations to emphasize a simple point: “When the Legislature has intended to make information confidential, it has not hesitated to so provide in express terms.” *Birnbaum v. Alliance of Amer. Insurers*, 994 S.W.2d 766, 776 (Tex. App.—Austin 1999, pet. denied). Similarly, when it desired certain information to be exempt from public disclosure under Chapter 552, it

unambiguously noted that exception. But the Legislature has not expressly made privileged information confidential or exempted it from Chapter 552. Nor has the Legislature excepted privileged information from section 552.022(a)(1). If the Legislature had intended to exclude from mandatory disclosure information related to litigation, it could easily have included the litigation exception in the language of section 552.022(a)(1), the same way it included section 552.108, the exception for law-enforcement and prosecutorial records.

That the Legislature does not consider the terms “privileged” and “confidential” synonymous is further evidenced by the terms’ use within the Act. For example, in section 552.110, the exception for trade secrets, the Legislature made an express distinction between “privileged” and “confidential”: “A trade secret obtained from a person and privileged or confidential by statute or judicial decision is excepted” TEX. GOV’T CODE § 552.110. And in section 552.131, the Legislature again used privileged and confidential in the disjunctive: “This section does not affect whether information is considered confidential or privileged under Section 508.313.” *Id.* § 552.131(c).

More notably, section 552.022(a)(16) defines as public “information that is in a bill for attorney’s fees and that is not privileged under the attorney-client privilege.” *Id.* § 552.022(a)(16). Certainly, it would be unnecessary for the Legislature to have included the language “that is not privileged under the attorney-client privilege” if the term “confidential” includes privileged information. When it amended section (a)(16), which formerly excluded information in a legal-fee bill that was “privileged by the attorney client privilege or confidential under other law,” the Legislature deleted “or confidential under other law.” With the amendment, the deleted language

became duplicative of the “unless they are expressly confidential under other law” language added to the introductory section of 552.022(a). If the Legislature had deemed privileged information to be within the scope of “confidential under other law,” it would have also deleted the language referring to the attorney-client privilege. Because it did not, we must assume that it means something different. *See Spradlin v. Jim Walter Homes, Inc.*, ___ S.W.3d ___, ___ (Tex. 2000) (we must give effect to all words of a statute and avoid constructions that would treat statutory language as surplusage). Moreover, the Legislature’s express exclusion of privileged matter in subsection (a)(16) demonstrates that the Legislature considered privileged information when it wrote section 552.022 and expressly allowed only certain documents cloaked with the attorney-client privilege to be withheld. The Legislature could have shielded from disclosure other documents protected by privilege, but it chose not to.

Section 552.022 provides:

(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:

.....

(b) *A court in this state may not order a governmental body or an officer for public information to withhold from public inspection any category of public information described by Subsection (a) or to not produce the category of public information for inspection or duplication, unless the category of information is expressly made confidential under other law.*

TEX. GOV’T CODE § 552.022 (emphasis added).

In an attempt to skirt the strictures of section 552.022(b), the Court contends that: (1) subsection (a) and subsection (b) are “largely, if not entirely” duplicative; (2) it was unnecessary to include subsection (b), but the Legislature did so; (3) the Legislature did not need to include the language that information in an attorney fee bill that is “privileged under the attorney-client privilege” is excepted from disclosure since the Legislature already said twice that information “expressly confidential under other law” does not have to be disclosed; and (4) “the only reasonable explanations for the redundancies in section 552.022 about exceptions from disclosure when information is ‘expressly confidential under other law’ is that the Legislature repeated itself out of an abundance of caution, for emphasis, or both.” ___ S.W.3d at ___.

First, subsections (a) and (b) are far from duplicative. In fact, of the fifty-six words in subsection (b), only twelve could be called duplicative of subsection (a). The italicized language in subsection (b) is unique to that provision and is obviously not duplicative of words in subsection (a). Moreover, the two subsections have very different purposes. Subsection (a)’s purpose is to create a set of “super public” categories of information to which the exceptions to disclosure contained in Subchapter C of the Act do not apply. Subsection (b)’s purpose is to prevent courts from ordering information withheld unless the information is expressly made confidential under some other law. Thus, far from being duplicative, the two provisions use different language and serve different purposes.

Second, the Court’s conclusion that the redundancy of the “expressly confidential under other law” language was the result of caution or emphasis begs the question of why the Legislature left in the express exception for information in a fee bill that is “privileged under the attorney-client

privilege.” Even if subsections (a) and (b) were redundant, under the Court’s reasoning, the presence of redundancy anywhere in the statute should lead us to entirely abandon the rule of statutory construction that no language shall be treated as surplusage.

The Court further questions: “If the Legislature had intended for article 552.022 to sweep so broadly that it reached all attorney-client and work-product information contained in final reports or evaluations, why would it have taken pains to except from disclosure *brief descriptions* of that same information in attorney’s bills under 552.022(a)(16)?” ___ S.W.3d at ___. First, subsection (a)(16) only excepts from disclosure information protected by the attorney-client privilege, not work product or any other privilege. Second, and more importantly, subsection (a)(16) is a general provision requiring disclosure of information in attorney-fee bills, and its exception for attorney-client privileged information will still apply to many categories of information. For example, brief descriptions of conversations, communications, and the like are protected by the attorney-client privilege exception in (a)(16). Accordingly, it is inaccurate to say that the Legislature has “taken pains to except from disclosure” brief descriptions of information contained in final reports and evaluations even though those reports and evaluations are nevertheless made public under other subsections. Rather, the Legislature has taken pains to except all attorney-client privileged information in fee bills, even though some portion of the underlying information — completed reports and evaluations — is otherwise made public under subsection (a).

Last, when the Legislature has intended to except information made privileged or confidential by judicial decision, it has expressly said so. As noted, section 552.110 excepts from disclosure “[a] trade secret obtained from a person and privileged or confidential by statute or

judicial decision.” TEX. GOV’T CODE § 552.110. And, in section 552.101, the Legislature excepted “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. But in section 552.022, the Legislature chose not to expressly except information made confidential by judicial decision or judicial rule. When the Legislature has used a term in one section of a statute and excluded it in another, the Court should not imply the term where it has been excluded. *See Smith v. Baldwin*, 611 S.W.2d 611, 616 (Tex. 1980) (“When the Legislature has carefully employed a term in one section of a statute, and has excluded it in another, it should not be implied where excluded.”). “A court may not judicially amend a statute and add words that are not implicitly contained in the language of the statute.” *Lee v. City of Houston*, 807 S.W.2d 290, 294-95 (Tex. 1991) (quoting *Jones v. Liberty Mut. Ins. Co.*, 745 S.W.2d 901, 902 (Tex. 1988)).

Contrary to the City’s outcry, interpreting the act to require disclosure here does not open to the public all litigation-related information. The litigation exception in section 552.103 may be asserted with regard to all types of information except those that fall within the scope of 552.022(a). Whether privileges may be asserted to withhold information will depend on the type of information being sought and whether it is within the eighteen categories of information that the Legislature has deemed “public information.” Here, section 552.022(a)(1) requires the City to release only one type of litigation-related information — the engineering report. But section 552.103, which specifically excepts from disclosure information relating to litigation involving the state or a political subdivision, still allows the government to withhold a wide range of information not subject to section 552.022(a) under a standard — “related to litigation” — much broader than that actually

used in litigation. TEX. GOV'T CODE § 552.103; *see also Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 482-83 (Tex. App.—Austin 1997, no writ). The Legislature was aware of governmental entities' concerns regarding privileged information and provided appropriate protections by enacting section 552.103. But, as noted, the Legislature clearly intended that exception not to apply to any of the information listed in section 552.022(a).

The Court and the City are fair in concluding that this interpretation of section 552.022 places an extra burden on governmental entities because it requires them to disclose in a litigation context certain documents that private parties would not be required to produce. But it is within the Legislature's province to make that call. We are bound to apply the statute's words as written:

and if, so applying them, the legislation in which they are found seems to be harsh, . . . the courts . . . are not authorized to place on them a forced construction for the purpose of mitigating a seeming hardship, imposed by a statute, or conferring a right which the legislature had not thought proper to give. It is the duty of a court to administer the law as it is written, and not to make the law; and however harsh a statute may seem to be, or whatever may seem to be its omission, courts cannot, on such considerations, by construction sustain its operation, or make it apply to cases to which it does not apply, without assuming functions that pertain solely to the legislative department of the government.

Boudreaux, 78 S.W.2d at 644.

While the Court's interpretation may have common sense behind it, a strict construction of the statute does not support it. Subsection (b)'s mandate that public information cannot be withheld unless expressly made confidential under other law is clear. Today, the Court abandons strict construction and rewrites the statute to eliminate subsection (b)'s restrictions. Accordingly, I dissent.

GREG ABBOTT
JUSTICE

OPINION DELIVERED: February 15, 2001