



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

March 24, 2003

Mr. Anthony S. Corbett
Freeman & Corbett, L.L.P.
2304 Hancock, Suite 6
Austin, Texas 78756

OR2003-1988

Dear Mr. Corbett:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 178255.

The Brushy Creek Municipal Utility District (the "district"), which you represent, received a request for "all E-Mail originated or received by District Engineer Jimmy Griffith and General Manager Mike Taylor since 1 July 2002." You state that you are releasing some of the requested information. You claim that the remaining requested information is excepted from disclosure under sections 552.105, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered the requestor's arguments pursuant to section 552.304 of the Government Code.¹

Section 552.105 excepts from disclosure information relating to:

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or

¹We note that, in this correspondence to this office, the requestor complains of the district's alleged failure adequately to respond to several previous public information requests submitted to the district by the same requestor. We have referred these complaints to the Open Records Hotline staff.

(2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Section 552.105 was designed to protect a governmental body's planning and negotiating position with respect to particular transactions. Open Records Decision No. 564 at 2 (1990). This exception protects information relating to the location, appraisals, and purchase price of property only until the transaction is either completed or aborted. Open Records Decision Nos. 357 at 3 (1982), 310 at 2 (1982). You state that some of the submitted information, which you have marked, relates to the location of real property that the district is currently considering acquiring for a waterline project. You further explain that the district has not yet secured the parcels of property or easement interests related to the project, and that the district has not announced to the public the specific location of the proposed pipeline route or water treatment plant. Finally, you state that release of this information "would harm the [d]istrict in its negotiations for purchase of the real property interests from the landowners in question, and from other landowners." Based upon your representations and our review of the information in question, we find that you may withhold some of the information, which we have marked, pursuant to section 552.105 of the Government Code. However, some of the information you have marked does not contain information related to the location, appraisals, and purchase price of property, and thus, may not be withheld under section 552.105.

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, 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). You state that the information that you have marked consists of confidential e-mail communications between the district’s representatives and the district’s legal counsel prepared at the request of the district’s general manager or engineer to answer legal questions and/or to explain why certain revisions to a contract were made. Based upon your representations and our review of the information that you have marked, we agree that some of the information, which we have marked, may be withheld under section 552.107 as confidential communications made between privileged parties for the purpose of the rendition of professional legal services. However, we find that some of the information that you wish to withhold under section 552.107 may not be withheld under that section because some of the communications in question were not made between privileged parties.

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.” This exception applies not only to internal memoranda, but also to memoranda prepared by consultants of a governmental body. Open Records Decision Nos. 462 at 14 (1987), 298 at 2 (1981). In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). An agency’s policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. 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.*, 37 S.W.3d at 160; ORD 615 at 4-5. You state that some of the submitted information, which you have marked, relates to deliberations between the district’s staff and consultants, or between different staff members, regarding policy making issues “primarily relate[d] to the [d]istrict’s long-term water project, and specifically address considerations related to the location of the project and acquisition of right of way for the project.” Based upon your representations and our review of the submitted information, we find that you may withhold the information that we have marked pursuant to section 552.111.

However, some of the information that you wish to withhold under section 552.111 consists of purely factual information that is severable from the opinion portions of the internal memoranda. Furthermore, you have not adequately demonstrated how other portions of the information that you wish to withhold under section 552.111 relate to policymaking matters of the district. Finally, some of the information that you wish to withhold under section 552.111 shows on its face that it has been seen by a third party other than a district consultant. Therefore, you may not withhold this information under section 552.111.

We further find that some of the submitted information may be subject to section 552.117 of the Government Code. Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. 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). Therefore, the district may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. For those employees who timely elected to keep their personal information confidential, the district must withhold the employees' home addresses and telephone numbers, social security numbers, and any information that reveals whether these employees have family members. The district may not withhold this information under section 552.117 for those employees who did not make a timely election to keep the information confidential. The submitted information contains the home address of a district employee. Accordingly, the district must withhold this information, which we have marked, if the employee in question timely requested that this information remain confidential.

Finally, the submitted information also contains e-mail addresses obtained from the public. Section 552.137 makes certain e-mail addresses confidential.² Section 552.137 provides:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code §552.137. You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. The

²House Bill 2589 also makes certain e-mail addresses confidential. *See* Act of May 22, 2001, 77th Leg., R.S., H.B. 2589, § 5 (codified at Gov't Code § 552.136). The language of section 552.136, as added by House Bill 2589, is identical to that of section 552.137.

district must, therefore, withhold e-mail addresses of members of the public, which we have marked, under section 552.137.

In summary, the district may withhold the information that we have marked under sections 552.105 and 552.111. The district must withhold the home address of a district employee that we have marked under section 552.117 if the employee in question timely requested that this information remain confidential. The district must withhold e-mail addresses of members of the public that we have marked pursuant to section 552.137. The district must release the remainder of the submitted information.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

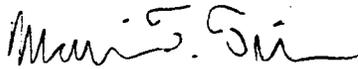
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Maverick F. Fisher
Assistant Attorney General
Open Records Division

MFF/seg

Ref: ID# 178255

Enc: Submitted documents

c: Mr. John C. McLemore
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(w/o enclosures)