



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

July 23, 2003

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

OR2003-5082

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# 184693.

The Brushy Creek Municipal Utility District (the "district"), which you represent, received a request for (1) documents sent or received by the district engineer relating to district business since January 1, 2003; (2) documents relating to the status of the Long-Term Water Treatment, Storage, and Transmission Improvement Project dated after July 1, 2002; and (3) documents that the district general manager sent to or received from the district counsel, district engineer, and members of the board of directors since January, 2003, with the exception of representative samples that the district submitted to this office in connection with its request for Open Records Letter No. 2003-3006 (2003). You state that some of the information that is responsive to the present request is encompassed by Open Records Letter Nos. 2003-2539 (2003) and 2003-3006 (2003). You claim that other responsive information is excepted from disclosure under sections 552.105, 552.107, 552.111, and 552.137 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.¹ We assume that the district has released any other information that is responsive to this request, to the extent that the district held or had access to such information when it received the request. If not, then the district must do so at this time. *See Gov't Code §§ 552.301, .302; Open Records Decision No. 664 (2000).* We note that

¹This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the district to withhold any information that is substantially different from the submitted information. *See Gov't Code § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).*

chapter 552 of the Government Code does not require the district to release information that did not exist when it received this request or to create responsive information. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

We first address your representations with regard to Open Records Letter Nos. 2003-2539 (2003) and 2003-3006 (2003). You inform us that some of the information to which the requestor seeks access is addressed in the prior rulings. You do not inform us that there has been any change in the relevant law, facts, and circumstances on which the prior rulings are based. Accordingly, the district may continue to rely on Open Records Letter Nos. 2003-2539 (2003) and 2003-3006 (2003) with regard to the requested information that is encompassed by the prior rulings. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 6-7 (2001) (attorney general decision constitutes first type of previous determination under Gov't Code § 552.301(a) where (1) precisely the same records or information previously were submitted under Gov't Code § 552.301(e)(1)(D), (2) same governmental body previously requested and received ruling, (3) prior ruling concluded that same records or information are or are not excepted from disclosure, and (4) law, facts, and circumstances on which prior ruling was based have not changed).

Next, we address your claims with regard to the submitted information. You claim that some of the information at issue is excepted from disclosure under section 552.105 of the Government Code. Section 552.105 protects information that relates to:

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Gov't Code § 552.105. Section 552.105 is designed to protect a governmental body's planning and negotiating position with regard to particular transactions. *See* Open Records Decision Nos. 564 (1990), 357 (1982), 310 (1982). Information that pertains to such negotiations may be withheld under section 552.105 for so long as the transaction relating to the negotiations is not complete. *See* Open Records Decision No. 310 (1982). Under section 552.105, a governmental body may withhold information "which, if released, would impair or tend to impair [its] 'planning and negotiating position in regard to particular transactions.'" Open Records Decision No. 357 at 3 (1982) (quoting Open Records Decision No. 222 (1979)). The question of whether specific information, if publicly released, would impair a governmental body's planning and negotiating position in regard to a particular transaction is a question of fact. *See* Open Records Decision No. 564 at 2 (1990). Accordingly, this office will accept a governmental body's good faith determination in this regard, unless the contrary is clearly shown as a matter of law. *Id.*

You state that the documents submitted as Category 2 relate to the location of real property for the district's water line project. You inform us that the district has not yet announced the specific location of either the pipeline route or the water treatment plant and related facilities to the public. You also inform us that the district has not yet secured the parcels of property or easement interests that are related to the project. You state that the documents marked as Category 2 reference the names of landowners or otherwise refer to the proposed location of property to be acquired for the project. You assert that the release of this information would harm the district in connection with its negotiations for the purchase of property from landowners. Based on your representations and our review of the documents in question, we conclude that the district may withhold the Category 2 documents under section 552.105. We have marked that information accordingly.

You contend that the documents submitted as Category 3 are excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) protects information that comes 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. *See* 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. *See* 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. *See 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 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. *See* 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. *See 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 inform us that the documents submitted as Category 3 contain communications between client representatives of the district and its legal counsel. You state that these communications were made in connection with the rendition of professional legal services to the district. You also state that these communications were not intended to be disclosed, and in fact were not disclosed, to persons other than those to whom disclosure was made in furtherance of the rendition of professional legal services to the district. Based on your representations and our review of the Category 3 information, we conclude that you have demonstrated that most of that information is excepted from disclosure under section 552.107(1) of the Government Code. We have marked the information that the district may withhold under section 552.107.

Next, we address your claim under section 552.111 with regard to the remaining documents submitted as Category 1.² Section 552.111 excepts from required public 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). In Open Records Decision No. 615 (1993), 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, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* Open Records Decision No. 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. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (personnel-related communications not involving policymaking not excepted from public disclosure under section 552.111). 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* Open Records Decision No. 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

²We note that you have included some of the Category 1 documents in Category 2 or Category 3. As we have concluded that the district may withhold the Category 2 documents under section 552.105 and the attorney-client communications in the Category 3 documents under section 552.107, we need not consider whether any of that information is excepted from disclosure under section 552.111.

data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

This office also has concluded that 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.

You contend that the submitted Category 1 documents are excepted from disclosure under section 552.111. You state that these documents contain communications between members of the district's staff and its consultants, or between staff members, regarding policy issues.³ You inform us that these communications relate primarily to the district's long-term water project and address considerations relating to the location and design of the project and acquisition of right-of-way. You assert that these communications pertain to policy issues concerning water-supply planning and development. You also inform us that the submitted Category 1 information includes drafts of documents that relate to policy matters. We assume that the final versions of such draft documents either have been or will be released to the public. Based on this assumption, your arguments, and our review of the remaining Category 1 information, we conclude that you have demonstrated that section 552.111 is applicable to portions of that information. We have marked the information that the district may withhold under section 552.111.

Lastly, we address your claim under section 552.137 of the Government Code. This exception is applicable to certain e-mail addresses and provides as follows:

- (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.

³We note that section 552.111 encompasses policy-related communications between a governmental body and its consultants. *See* Open Records Decision Nos. 631 at 2 (1995) (Gov't Code § 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), 563 at 5-6 (1990) (private entity engaged in joint project with governmental body may be regarded as its consultant), 561 at 9 (1990) (Gov't Code § 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (Gov't Code § 552.111 applies to memoranda prepared by governmental body's consultants).

(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. Section 552.137 is applicable only to personal e-mail addresses. This exception is not applicable to institutional e-mail addresses, internet website addresses, or e-mail addresses that governmental entities maintain for their officials and employees. We have marked the e-mail addresses contained in the rest of the submitted information that are confidential under section 552.137. You inform us that the persons to whom these e-mail addresses belong have not consented to their public disclosure. Accordingly, the district must withhold the marked e-mail addresses under section 552.137.

In summary, the district may continue to rely on Open Records Letter Nos. 2003-2539 (2003) and 2003-3006 (2003) with regard to the requested information that is encompassed by those rulings. The district may withhold the information that we have marked as being excepted from disclosure under sections 552.105, 552.107, and 552.111. The district must withhold the e-mail addresses that we have marked under section 552.137.⁴ The district must release the rest 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

⁴You also ask that we issue a previous determination that would permit the district to withhold e-mail addresses in connection with future requests for information. We decline to do so at this time.

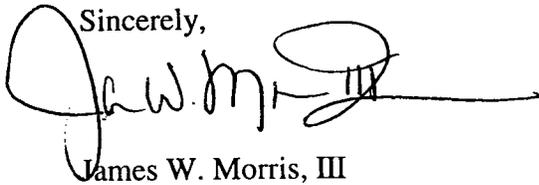
governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The 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,

A handwritten signature in black ink, appearing to read "J.W. Morris III", with a long horizontal flourish extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 184693

Enc: Submitted documents

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