



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 19, 2003

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

OR2003-8302

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# 191308.

The Brushy Creek Municipal District (the "district") received four requests from the same requestor for documents sent by and received from the district engineer and general manager within a certain time period, documents relating to "the status of the Long-Term Water Treatment, Storage, and Transmission improvement Project," certain invoices for services from Freeman and Corbett and from Dietz and Associates, "a copy of the complete Microsoft ACCESS file containing the record of the receipt, processing, and completion of all Open Records requests received by the District since 1 June 2002 on floppy disk," and information relating to security system improvements. The requestor also asks that copies of the requests "be provided with the results . . . to enable correlation of requests with the results provided." The requestor later clarified the portion of the request seeking the Microsoft ACCESS file stating, "I did not ask for your entire Microsoft ACCESS database. I have ACCESS and only want a file from your database that will import to my database." You indicate that you will provide some information to the requestor but claim that other requested information is excepted from disclosure under sections 552.101, 552.105, 552.107, and 552.111 of the Government Code. We have considered the exception you claim and reviewed the submitted information.¹

¹We assume that the sample of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

We begin by addressing the portion of the requests asking that a copy of each request be provided with the responsive information. It is implicit in several provisions of the Public Information Act (the "Act") that the Act applies only to information that a governmental body maintains or to which it has a right of access at the time a request for information is received. See Gov't Code §§ 552.002, .021, .227, .351. A governmental body need not release information that did not exist when it received a request or create new information in response to a request. See *Economic Opportunities Dev. Corp. of San Antonio v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed). Because the district did not maintain or have a right of access to these requests at the time it received them, the Act does not require the district to provide copies of them.

We turn now to your arguments regarding the Microsoft ACCESS database file. You do not contend that information in the database is excepted from disclosure. Instead, you state that "[t]he District is willing to provide any public information within the database that is available" and that "the District has offered to put all information in its database into the medium requested by Mr. McLemore-- a floppy disk." You further inform us that "[t]he District can put the information in the database in a spreadsheet format, and copy the spreadsheet onto a disk. This would provide all information in the database to Mr. McLemore." You state, however, that "this [format] is not acceptable to Mr. McLemore [because] he desires that the District provide to him a disk that would allow him to utilize and manipulate the database in the same way as District staff."

Section 552.228 of the Government Code requires "[i]f public information exists in an electronic or magnetic medium, the requestor may request a copy either on paper or in an electronic medium, such as on diskette or on magnetic tape[, and a] governmental body shall provide a copy in *the requested medium*" if certain conditions are met. Gov't Code § 552.228(b) (emphasis added). We also note that the Act does not generally require a governmental body to produce information in the particular format requested. See *A&T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 676 (Tex. 1995); *Fish v. Dallas Indep. Sch. Dist.*, 31 S.W.3d 678, 681 (Tex. App.—Eastland, pet. denied); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3, 342 at 3 (1982), 87 (1975).

In this instance, you state that you are willing to provide the requested information in the requested medium, i.e. a diskette. We find that the district complies with its duties under the Act if it provides the requestor with a diskette containing a spreadsheet that includes the responsive information. We further find that the district need not provide the information in the particular format the requestor seeks.

We turn now to the exceptions to disclosure that you claim under the Act. We note that the submitted information includes attorney fee bills and a contract relating to the expenditure of public funds. Section 552.022 lists certain categories of information that are "public information and not excepted from required disclosure . . . unless they are expressly confidential under other law" and includes "(3) information in an account, voucher, or

contract relating to the receipt or expenditure of public or other funds by a governmental body” and “(16) information that is in a bill for attorney’s fees and that is not privileged under the attorney-client privilege[.]” Gov’t Code § 552.022(a)(3), (a)(16). You contend that the fee bills are excepted from disclosure under sections 552.105 and 552.107 of the Government Code. However, these sections are discretionary exceptions under the Act and do not constitute other law for purposes of section 552.022. *See* Open Records Decision Nos. 676 at 6 (2002) (section 552.107 is not other law for purposes of section 552.022), 665 at 2 n.5 (2000) (discretionary exceptions in general). Thus, the fee bills may not be withheld pursuant to section 552.105 or 552.107.

However, we will consider whether Texas Rule of Evidence 503 applies to any of the information in the fee bills. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001) (“[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are ‘other law’ within the meaning of section 552.022”); *see also* ORD 676 at 5-6 (when attorney-client privilege is claimed for information that is subject to release under section 552.022, proper analysis is whether information at issue is excepted under Texas Rule of Evidence 503). Rule 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client’s lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer’s representative;
- (C) by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or
- (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503. A communication is “confidential” if 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).

Accordingly, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must 1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; 2) identify the parties involved in the communication; and 3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. On a demonstration of all three factors, the document containing privileged information is confidential under Rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 4527 (Tex. App.–Houston [14th Dist.] 1998, no pet.) (privilege attaches to complete communication, including factual information).

You assert that the fee bills are communications “between the client’s representatives and the client’s legal counsel.” However, you have failed to identify any of the individuals who were involved in the communications that are reflected in the fee bills. The submitted records reflect that Tom Brown, Tom Caponi, Jimmy Griffith, Bert Holmstrom, and Mike Taylor are representatives or agents of the district. However, the submitted documents give no indication as to the identity or capacity of any of the other individuals whose names appear in the fee bills. Therefore, we are unable to conclude that any communications reflected in the fee bills that involve any other individual come within the scope of Rule 503(b)(1). We have marked the information in the fee bills that may be withheld pursuant to Rule 503. The remainder of the fee bills must be released in accordance with section 552.022.

We turn now to the contract, which you contend is confidential by law. Section 552.101 excepts from disclosure “information deemed confidential by law, either constitutional, statutory, or by judicial decision” and encompasses information protected by other statutes. The Seventy-eighth Legislature passed House Bill 9, which added sections 418.176 through 418.182 to chapter 418 of the Government Code. These provisions make certain information related to terrorism confidential. You contend that the contract is confidential pursuant to sections 418.181 and 418.182, which provide:

Sec. 418.181. CONFIDENTIALITY OF CERTAIN INFORMATION RELATING TO CRITICAL INFRASTRUCTURE.

Those documents or portions of documents in the possession of a governmental entity are confidential if they identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism.

Sec. 418.182. CONFIDENTIALITY OF CERTAIN INFORMATION RELATING TO SECURITY SYSTEMS.

(a) Except as provided by Subsections (b) and (c), information, including access codes and passwords, in the possession of a governmental entity that relates to the specifications, operating procedures, or location of a security system used to protect public or private property from an act of terrorism or related criminal activity is confidential.

(b) Financial information in the possession of a governmental entity that relates to the expenditure of funds by a governmental entity for a security system is public information that is not excepted from required disclosure under Chapter 552.

(c) Information in the possession of a governmental entity that relates to the location of a security camera in a private office at a state agency, including an institution of higher education, as defined by Section 61.003, Education Code, is public information and is not excepted from required disclosure under Chapter 552 unless the security camera:

(1) is located in an individual personal residence for which the state provides security; or

(2) is in use for surveillance in an active criminal investigation.

Act of June 2, 2003, 78th Leg., R.S., ch. 1312, § 3, 2003 Tex. Sess. Law Serv. 4814-15 (to be codified at Gov't Code §§ 418.181, .182).

The fact that information may relate to a governmental body's security measures does not make the information *per se* confidential under House Bill 9. See Open Records Decision Nos. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). The mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions enacted by House Bill 9 must adequately explain how the responsive records fall within the scope of the claimed provision. See Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

The contract at issue pertains to "security and video surveillance systems at the District's community and indoor recreation center, and at certain District tennis and swimming pool facilities." You have failed to explain how recreation centers or tennis and swimming pool facilities constitute "critical infrastructure" for purposes of section 418.181. See Act of June 2, 2003, 78th Leg., R.S., ch. 1312, § 1, 2003 Tex. Sess. Laws Serv. 4809 (to be codified at Gov't Code § 421.001) (defining "critical infrastructure" to "include[] all public or private assets, systems, and functions *vital to* the security, governance, public health and safety, economy, or morale of the state or the nation") (emphasis added). Because you have failed

to establish that release of security measures at these recreational facilities will “identify the technical details of particular vulnerabilities of critical infrastructure,” we conclude that none of the information in the contract is confidential under section 418.181, and none of it may be withheld on that basis.

You also assert that the contract is confidential under section 481.182. As noted above, the contract at issue pertains to the security systems at recreation centers and tennis and swimming pool facilities. We also note that section 481.182 is intended to protect information concerning a “security system used to protect public or private property from *an act of terrorism* or related criminal activity.” (Emphasis added.) This provision is not intended to protect information pertaining to security systems that are used to protect property from criminal activity that is unrelated to terrorism.

You do not allege that these recreation centers or tennis and swimming pool facilities are potential targets of terrorism or terrorism-related criminal activity, nor do you inform us that the security systems at issue are intended to protect these recreational facilities from acts of terrorism or from criminal acts related to terrorism. Thus, we find that the district has failed to establish that any information in the contract is confidential under section 418.182, and none of it may be withheld on that basis. Because you have claimed no other exception for the information in the contract and it is not otherwise confidential by law, you must release it.

We turn now to your arguments for the remaining information, which is not subject to section 552.022. We begin by addressing your arguments under section 552.107 of the Government Code, which 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 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). Having considered your representations and reviewed the communication at issue, we find that you have established that this information constitutes a privileged attorney-client communication that may be withheld pursuant to section 552.107.

We turn next to your arguments regarding section 552.111 of the Government Code. This section excepts from 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 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, 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) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body’s policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body’s policy mission. *See* Open Records Decision No. 631 at 3 (1995). Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* Open Records Decision No. 615 at 5. If, however, the 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 also be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

When determining if an interagency memorandum is excepted from disclosure under section 552.111, we must consider whether the agencies between which the memorandum is passed share a privity of interest or common deliberative process with regard to the policy matter at issue. *See* Open Records Decision No. 561 at 9 (1990). Section 552.111 applies not only to a governmental body's internal memoranda but also to memoranda prepared for a governmental body by its outside consultant. *Open Records Decision Nos. 462 at 14 (1987), 298 at 2 (1981).*

You assert that the information you have marked as Category 1 "relates to deliberations between the District's staff and consultants, or between different staff members, regarding policy-making issues." You assert that these communications "reflect the policy-making and deliberative process . . . in that they relate to internal policy issues concerning the District's water supply planning and development." We agree that some of the information in the submitted documents is excepted from disclosure under section 552.111 and have marked this information accordingly. However, the remaining information is purely factual in nature and is therefore not excepted from disclosure under section 552.111.

You also contend that portions of the submitted information are excepted from disclosure under section 552.105 of the Government Code. This section provides:

- (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. This provision 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) (construing predecessor statute). Information excepted under section 552.105 that pertains to such negotiations may be excepted so long as the transaction is not complete. *See* ORD 310. 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.'" ORD 357 at 3 (quoting Open Records Decision No. 222 (1979)). The question of whether specific information, if publicly released, would impair a governmental body's planning and negotiation position in regard to particular transactions is a question of fact. 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. *See* ORD 564.

In this instance, you state that the submitted information labeled Category 2 relates to the location of real property for the District's water line and treatment plant project. You inform us that the District "has not yet announced to the public the specific location of the pipeline route or water treatment plant and related facilities." Further, you explain that the "District

has not yet secured the parcels of property or easement interests related to the project.” You advise us that disclosure of information related to the proposed location of property for the project would harm the District’s negotiating position. Based on your representations and our review of the submitted information, we conclude the District may withhold the information we have marked under section 552.105 of the Government Code.

Finally, we address section 552.137 of the Government Code, which provides:

(a) Except as otherwise provided by this section, 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.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor’s agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor’s agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Act of June 2, 2003, 78th Leg., R.S., ch. 909, § 1, 2003 Tex. Sess. Law Serv. 3124 (to be codified as amendment to Gov’t Code § 552.137). We note that section 552.137 does not apply to a government employee’s work e-mail address because such address is not that of the employee as a “member of the public” but is instead the address of the individual as a

government employee. We also note that section 552.137 does not apply to a business's general e-mail address or website address. We have marked the e-mail addresses that may be confidential under section 552.137. We note, however, that these addresses belong to consultants and attorneys who work for or with the district. Therefore, if these individuals have "a contractual relationship with the governmental body" or are a "contractor's agent," their e-mail addresses are specifically excluded from the protection of section 552.137 and must be released. *See* Gov't Code § 552.137(c)(1).

In summary, we have marked information that the district may withhold pursuant to sections 552.105, 552.107, and 552.111 of the Government Code and under Texas Rule of Evidence 503. We have also marked e-mail addresses that must be withheld pursuant to section 552.137 unless 1) they pertain to individuals who have a contractual relationship with the district or are a contractor's agent or 2) the individuals at issue have consented to release of the addresses. The remaining submitted information must be released.

Although you request a previous determination with respect to e-mail addresses, we decline to issue at this time. Accordingly, 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).

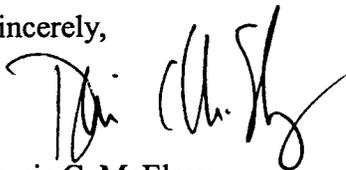
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 191308

Enc. Submitted documents

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