



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 27, 2004

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

OR2004-1466

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# 196866.

The Brushy Creek Municipal Utility District (the "district"), which you represent, received three requests for specific information relating to Items X(A)(1) through X(A)(5) on the agenda for the November 13, 2003 district's Board of Directors meeting. You state that you will make some of the responsive information available to the requestor. However, you claim that some of the requested information is excepted from disclosure under sections 552.105, 552.107, and 552.111 of the Government Code. We have considered your arguments and reviewed the submitted sample of information.¹

We first note that you indicate that some of the requested information is the subject of other requests for rulings by this office. A review of our records reveals that Open Records Letter Nos. 2004-0315 (2004) and 2004-0819 (2004) may encompass some of the documents referenced in the requests at issue here. To the extent any of the information at issue here was the subject of Open Records Letter Nos. 2004-0315 or 2004-0819, you must withhold or release those documents in accordance with those rulings. *See* Open Records Decision No. 673 (2001) (describing criteria of two types of previous determinations).

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

¹ We assume that the "representative 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.

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).

You represent that the submitted Category 3 information was communicated between the district and its attorneys and that the information was not intended for disclosure to third parties. Based on your representations and arguments and our review of this information, we find that you have demonstrated that some of the information that you have marked as Category 3 is protected by the attorney-client privilege and is therefore excepted from disclosure under section 552.107. You may withhold the information we have marked under section 552.107.

We now turn to your argument under section 552.105 for the information you have marked as Category 2 that is not otherwise protected by section 552.107. 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

- (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 is designed to protect a governmental body's planning and negotiating position with regard to particular transactions. Open Records Decision Nos. 564 (1990), 357 (1982), 310 (1982). Information excepted under section 552.105 that pertains to such negotiations may be excepted so long as the transaction is not complete. Open Records Decision No. 310 (1982). 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 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. Open Records Decision No. 564 (1990).

You state that the submitted documents marked as Category 2 that have not been withheld under section 552.107 "relate to the location of real property for the District's water project" and that the district "has not yet announced to the public the specific location of the pipeline route that connects to the treatment plant and related facilities." You further state that the Category 2 information references "the name of landowners, or otherwise refer[s] to the proposed location of property to be acquired for the project" and that release of this information "would harm the District in connection with its negotiations for purchase of the real property interests from the landowners." Based on your representations and our review of the submitted information, we conclude that you have demonstrated the applicability of section 552.105 to the Category 2 documents that have not been withheld under section 552.107. Thus, you may withhold these documents, which we have marked, under section 552.105 of the Government Code.

Finally, we turn to the remainder of the submitted information, which you have marked as Category 1. Section 552.111 of the Government Code 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." 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. The preliminary draft of a policymaking document that has been released or is intended for release in final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document. Open Records Decision No. 559 at 2 (1990).

Upon review of the remaining documents, we agree that some may be withheld in their entirety because, as draft documents, they necessarily reflect the advice, recommendations, or opinions of the drafter as to the form and content of the final document and they relate to the policymaking process of the district. We have marked these documents for your convenience. Furthermore, we have marked portions of some of the documents that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the district. You may withhold the information we have marked under section 552.111. The remaining information may not be withheld under section 552.111 as advice, recommendations, opinions, and other material reflecting the policymaking processes of the district.

To summarize, to the extent any of the information at issue here was the subject of Open Records Letter Nos. 2004-0315 or 2004-0819, you must withhold or release those documents in accordance with those rulings. You may withhold (1) the information that we have marked under section 552.107 of the Government Code, (2) the information that we have marked under section 552.105 of the Government Code, and (3) the information that we have marked under section 552.111 of the Government Code. You must release the remaining submitted information to the requestor.

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,



Jennifer E. Berry
Assistant Attorney General
Open Records Division

JEB/sdk

Ref: ID# 196866

Enc: Submitted documents

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