



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

May 23, 2007

Mr. Vic Ramirez
Associate General Counsel
Lower Colorado River Authority
P.O. Box 220
Austin, Texas 78767-0220

OR2007-06452

Dear Mr. Ramirez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 279192.

The Lower Colorado River Authority (the "LCRA") received a request for various documents including all documents that include or refer to a legal opinion or analysis of certain matters, documents that include or refer to the LCRA's ability to place conditions on water contracts, documents pertaining to efforts to clarify the LCRA's authority with the Texas Legislature, documents pertaining to the LCRA's commitment to Envision Central Texas, the Regional Water Quality Protection Plan and CAMPO's Regional Growth Concept, and a recording and a written copy of the presentation Joe Beal made to the board on February 21st concerning item 14 of the meeting agenda. You indicate that the LCRA will release portions of the requested information. You claim that portions of the requested information are excepted from disclosure under sections 552.101, 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information, which you say is a representative sample of the information at issue.¹

¹We 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.

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).

After review of the submitted information, we conclude that all of the information except one document, exhibit D-22, constitutes attorney-client communications. Thus, the LCRA may withhold all of the information except exhibit D-22 based on section 552.107(1).

With regard to exhibit D-22, we consider your other claims. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information protected by other statutes. You argue that the information “should be considered statutorily confidential by law.” You bring your section 552.101 claim in conjunction with rule 503 of the Texas Rules of Evidence and rule 1.05(b)(1) of the Texas Disciplinary Rules of

Professional Conduct. However, rule 503 and rule 1.05 are not confidentiality provisions for the purposes of section 552.101. *See* Open Records Decision Nos. 676 at 1-3, 575 at 2 (1990), 416 at 6-7 (1984). Therefore, the LCRA may not withhold exhibit D-22 under section 552.101 on the basis of either of these rules.

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.” 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 explain that exhibit D-22 is an email and attached draft talking points for LCRA General Manager Joe Beal from Ms. Bondy, LCRA Manager, River Services, dated February 14, 2007, to multiple LCRA internal clients. You state that Ms. Dean, Associate General Counsel, received a courtesy copy of the email. You state that Mr. Beal’s “talking points are related to the LCRA Board Policies concerning LCRA’s obligation to sell water and conditions on water sales and includes or incorporated advice from LCRA attorney’s, including the advice of Ms. Dean.” You state that “the email and attached talking points contain written work that contains legal advice, opinion, or recommendation on policymaking matters.”

After review of the information, we find that neither the email nor the talking points contains advice, recommendations or opinions. The list of policy issues in the email reflects the decision to include those issues rather than the recommendation or advice to include them. *See* Open Records Decision Nos. 624 at 6 (1994), 137 at 3 (1976)(adopting federal court distinction between pre-decisional and post-decisional documents, applying federal Freedom of Information Act intra-agency memorandum exception to the former, but not the latter). Moreover, we note that Mr. Beal’s presentation was apparently made in a public board meeting and so it cannot be said that protection of the talking points serves the purpose of section of 552.111 “to promote a frank discussion of legal or policy matters within government agencies.” *See* ORD 615 at 4 (citing *Environmental Protection Agency v. Mink*,

410 U.S. 73 (1973) interpretation of exemption 5 of Freedom of Information Act, 5 U.S.C. §552(b)(5)). Accordingly, we conclude that section 552.111 does not apply to exhibit D-22.

In conclusion, the LCRA must release exhibit D-22 to the requestor. The LCRA may withhold the other information based on section 552.107(1).

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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 "Kay Hastings", written in a cursive style.

Kay Hastings
Assistant Attorney General
Open Records Division

KH/sdk

Ref: ID# 279192

Enc: Submitted documents

c: Ms. Christy Muse
Executive Director
Hill Country Alliance
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Austin, Texas 78738
(w/o enclosures)