ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 30, 2009

Mr. Mike Willatt
Willatt & Flickinger
Counsel to Lakeway Municipal Utility District
2001 North Lamar
Austin, Texas 78705

OR2009-09005

Dear Mr. Willatt:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 347851.

The Lakeway Municipal Utility District (the "district"), which you represent, received a request for the following five categories of information related to the district's *ad hoc* committee and its efforts "to oppose the City of Lakeway's decision to seek legislation related to amending state annexation law, or other state law applicable to municipal utility districts located within the city limits[:]"

1. meeting notices, agendas, and minutes;
2. documents produced by or given to committee members;
3. documents regarding the City of Lakeway or any legislation filed or pending that affects the district;
4. contracts executed by the district with professional consultants hired to assist the district; and
5. invoices for fees paid to professional consultants hired to assist the district.

You claim that the requested information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code.[1] We have considered the exceptions you claim and reviewed the submitted representative sample of the requested information.[2]

Initially, we note that a portion of the submitted information, which we have marked, is not responsive to the instant request because it was created after the date the district received this request. The district need not release non-responsive information in response to this request, and this ruling will not address such information.

We next note that you have not submitted any information responsive to request items 1, 4, or 5. Therefore, to the extent the district maintained any information responsive to these items on the date the district received the request, we assume the district has already released such information. If the district has not released any such information, it must do so at this time. *See* Gov't Code § 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply, it must release information as soon as possible).

You assert that the responsive information is excepted from disclosure under section 552.103 of the Government Code, which provides in relevant part:

> (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.
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> . . .
>
> (c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

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[1]Although your brief cites section 552.071 of the Government Code, no such section exists. Based on the substance of your arguments, we understand you to raise sections 552.107 (attorney-client privilege) and 552.111 (attorney work product privilege) for all of the information at issue.

[2]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.

Gov't Code § 552.103(a), (c). The governmental body claiming this exception bears the burden of providing relevant facts and documents to demonstrate the applicability of the exception. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). You state that the responsive information relates to a pending lawsuit, styled *City of Lakeway, Texas, v. Lakeway Municipal Utility District, et. al.*, No. D-1-GN-09-001330 (345th Dist. Ct., Travis County, Tex.). However, we note that the district received the request for information on April 14, 2009, and the City of Lakeway did not file this lawsuit until April 24, 2009. Thus, you have failed to establish that litigation was pending on the date the district received the request for information. You have also failed to establish that the district anticipated litigation on the date it received this request. Accordingly, the district may not withhold any of the responsive information under section 552.103 of the Government Code.

Section 552.107(1) of the Government Code 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. 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 Tex. 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). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1). 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, 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).

Although you claim section 552.107 for all of the responsive information, you have not identified any of the parties to the submitted communications. You have also failed to explain how these communications were made in furtherance of the rendition of legal services to the district. Furthermore, you have not established that these communications were intended to be and have remained confidential. Thus, we conclude that the district may not withhold any of the responsive information under the attorney-client privilege of section 552.107 of the Government Code.

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." Gov't Code § 552.111. This exception encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as:

> (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
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> (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX.R.CIV.P. 192.5. A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *See id.*; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that:

> a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7.

You inform us that the district is a defendant in pending litigation and that the responsive information relates to this litigation. However, you have not submitted any arguments to meet your burden of demonstrating that the responsive information was created or developed for trial or in anticipation of litigation by or for the district or a representative of the district. Accordingly, we conclude that the district may not withhold any of the responsive information under the attorney work product exception of section 552.111 of the Government Code.

We note that section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c).[3] *See* Gov't Code § 552.137(a)-(c). Subsection 552.137(c)(1) states that the confidentiality provision of subsection (a) does not apply to an e-mail address "provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent" and subsection 552.137(c)(2) states that subsection (a) does not apply to an e-mail address "provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent[.]" *Id.* § 552.137(c)(1), (2). Therefore, unless the district receives consent from the owners of the marked e-mail addresses to release this information, the district must withhold these e-mail addresses, but only to the extent these e-mail addresses do not belong to employees of vendors who either have or are seeking a contractual relationship with the district.

Finally, we note that section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that the information be kept confidential under section 552.024 of the Government Code. Section 552.117 also encompasses a personal cellular telephone number, provided that a governmental body does not pay for the cell phone service. *See* Open Records Decision No. 506 at 5-6 (1988) (Gov't Code § 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former official or employee who made a request for confidentiality

[3]The Office of the Attorney General will raise a mandatory exception, such as section 552.137, on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Therefore, the district must withhold the information we have marked under section 552.117(a)(1) to the extent the employees concerned timely elected under section 552.024 to keep their information confidential.

In summary: (1) unless the district receives consent from the owners of the marked e-mail addresses to release this information, the district must withhold these e-mail addresses under section 552.137, but only to the extent these e-mail addresses do not belong to employees of vendors who either have or are seeking a contractual relationship with the district; (2) the district must withhold the information we have marked under section 552.117(a)(1) to the extent the employees concerned timely elected under section 552.024 to keep their information confidential; and (3) the district must release the remainder of the responsive information.

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,

Ryan T. Mitchell
Assistant Attorney General
Open Records Division

RTM/rl

Ref: ID# 347851

Enc. Submitted documents

cc: Requestor
(w/o enclosures)