



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

May 23, 2011

Mr. Anthony S. Corbett  
Counsel for Brushy Creek Municipal Utility District  
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8500 Bluffstone Cove, Suite B-104  
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OR2011-07268

Dear Mr. Corbett:

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# 418372 (PIR X-11-016).

The Bushy Creek Municipal Utility District (the "district"), which you represent, received a request for three categories of information, including (1) all opinions from legal counsel paid by the district regarding the Open Meetings Act; (2) the calendars, or other records of activities or meetings, of all current members of the district's board of directors (the "board") for calendar years 2010 and 2011 during non-posted meetings; and (3) all e-mail exchanged between or among board members and the district's general manager relating to the hiring of two specified employees, whether through the use of official or personal e-mail. You state the district will release most of the requested information in its possession. You claim some of the information requested in categories two and three is not subject to the Act. You also claim the submitted information is excepted from disclosure under section 552.107 of the Government Code. We have considered your arguments and reviewed the submitted information.

Initially, we address the district's contention that some of the information requested in categories two and three is not subject to the Act. The Act is applicable to "public information," as defined by section 552.002 of the Government Code. Section 552.002(a) provides that "public information" consists of

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body; or

(2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov't Code § 552.002(a). Thus, virtually all of the information in a governmental body's physical possession constitutes public information and thus is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body, and the governmental body owns the information or has a right of access to it. *See* Gov't Code § 552.002(a)(2); *see* Open Records Decision No. 462 at 4 (1987). We note the characterization of information as "public information" under the Act is not dependent on whether the requested records are in the possession of an individual or whether a governmental body has a particular policy or procedure that establishes a governmental body's access to the information. *See* Open Records Decision No. 635 at 3-4 (1995) (finding that information does not fall outside definition of "public information" in Act merely because individual member of governmental body possesses information rather than governmental body as whole); *see also* Open Records Decision No. 425 (1985) (concluding, among other things, that information sent to individual school trustees' homes was public information because it related to official business of governmental body) (overruled on other grounds by Open Records Decision No. 439 (1986)). Information is within the scope of the Act if it relates to the official business of a governmental body and is maintained by a public official or employee of the governmental body. *See* Gov't Code § 552.002(a).

You argue the personal and family appointment calendars of board members requested in category two are not subject to the Act. You inform us the calendars at issue are located on the board members' refrigerators, in their personal computers, or in their personal electronic devices. You also inform us the calendars are created and maintained with the board members' own private funds. You state the district does not own or have a right of access to the calendars. Although you acknowledge the calendars reference certain district meetings, you also state the calendars are used primarily for the personal appointments of board members and their families. In Open Records Decision No. 635, this office concluded that an appointment calendar purchased by an employee of a governmental body with personal funds, which is solely maintained and used by that employee, and that primarily contains personal appointments, is not public information subject to the Act. *See* Open Records Decision No. 635 at 9. Based on your representations, we find the calendars are not collected, assembled, or maintained in connection with the transaction of the district's official business. Accordingly, the calendars are not subject to the Act.

You also argue the information in the personal e-mail accounts of board members and the district's general manager requested in category three is not subject to the Act. You state the district furnishes e-mail addresses and accounts to each board member for conducting district business, and records of communications to and from these accounts are maintained

on the district's server. You state the e-mail messages sent to a board member's district e-mail account may be forwarded to a personal e-mail account. You inform us board members may respond to a forwarded e-mail from his or her personal computer or personal electronic device. You further inform us that when this is the case, the district does not have access to the board member's replies and thus cannot keep a record of these communications. Thus, you acknowledge board members and the general manager may be conducting official district business using their personal e-mail accounts. A governmental body may not circumvent the applicability of the Act by conducting official public business in a private medium. *See* ORDs 635 at 12, 425 at 2. Moreover, the fact the board members and district manager have sole possession of e-mails related to district business does not alter the public nature of this information. *See id.* Accordingly, to the extent e-mails related to district business are maintained on the board members' and general manager's personal computers and personal electronic devices, they are subject to the Act. As you raise no exceptions to the disclosure of this information, it must be released.

The district raises section 552.107(1) of the Government Code for the submitted information. 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 in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate 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 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 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)(A)-(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 pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain 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 state the submitted information is a communication between the district's representatives and its legal counsel that was made for the purpose of facilitating professional legal services to the district. You state this communication was not intended for disclosure to third persons and we understand that its confidentiality has been maintained. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the submitted information. Thus, the district may withhold the submitted information under section 552.107 of the Government Code.

In summary, the requested personal and family appointment calendars of board members are not subject to the Act and need not be released. To the extent the e-mails maintained on the board members' and general manager's personal computers and personal electronic devices relate to the official business of the district, they are subject to the Act and must be released. The district may withhold the submitted information under section 552.107 of the Government Code.

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](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, toll free at (888) 672-6787.

Sincerely,



Kenneth Leland Conyer  
Assistant Attorney General  
Open Records Division

KLC/eb

Ref: ID# 418372

Enc. Submitted documents

c: Requestor  
(w/o enclosures)